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Balaji Srinivasan,

Advocate on Record,

Supreme Court of India.

22. The High Court has dealt with this contention. It has rightly pointed out that the amplitude of the words "due course of justice" used in Section 13 is wider than the words "due course of any judicial proceeding" or "administration of justice" used in sub-clause (*ii*) or (*iii*) of Section 2(*c*). We have held that the contempt of court committed by the appellant falls both under sub-clause (*i*) and also within the amplitude of sub-clause (*iii*). If the act complained scandalizes the judicial officer in regard to the discharge of his judicial functions, it thereby substantially interferes or tends to interfere with the "due course of justice" which is a facet of the broad concept of the "administration of justice", and as such, is punishable under Section 13.

23. We agree with the High Court that the contempt of court committed by the appellant is serious and gross as he has recklessly imputed mala fides and lack of good faith to the judicial officer who had decided the cases against him. The imputations levelled were per se scandalous and actuated by bad faith. The appellant did not even pretend to give any reason for the alleged malicious attitude on the part of the judicial officer, either in the notice or in the counter-affidavit. Even in this Court he has not relented. He has not adopted, even obliquely, an attitude of contrition or a pretence of remorse.

24. For the foregoing reasons, we dismiss this appeal and maintain the conviction and sentence of the appellant.

(1981) 2 Supreme Court Cases 585

(Before S. Murtaza Fazal Ali, A. Varadarajan and V. B. Eradi, JJ.)

Km. SONIA BHATIA .. Appellant;

Versus

STATE OF U. P. AND OTHERS .. Respondents.

Civil Appeal No. 775 of 1981, decided on March 17, 1981

Ceiling on Land — U. P. Imposition of Ceiling on Land Holdings Act, 1960 (U. P. Act 1 of 1961) — Section 5(6) proviso (b) (as introduced by U. P. Act 18 of 1973) — Gift of land, even though bona fide, held, does not amount to 'transfer . . . for adequate consideration' within proviso (b) and therefore, not expressly or impliedly excluded from operation of sub-section (6) of Section 5 — Hardship suffered by some persons would not change the legal position — 'Adequate consideration' — Meaning of — Words take colour from the identical words used in Section 16(3)(b) of Income Tax Act, 1961

Transfer of Property Act, 1882 (4 of 1882) — Section 122 — Gift — Concept of — Element of 'consideration' is absent in gift and therefore, it is different from grant

Contract Act 1872 (9 of 1872) — Section 2(b) — Adequate consideration — Meaning of — Held, does not include love, affection or spiritual benefit as involved in a gift

Words and Phrases — 'Adequate consideration', 'gift' and 'consideration' — Meaning of

Held:

Proviso (*b*) of Section 5(6) of the Ceiling Act was enacted to protect genuine and bona fide transfers for consideration. The words 'transfer' and 'consideration' have been used in proviso (*b*) in general sense of the terms as defined in the T. P. Act and the Contract Act respectively. Having regard to Section 122 of the T. P. Act and Section 2(*b*) of the Contract Act as also definitions contained in dictionaries and books it must be held that the words 'transfer . . . for adequate consideration' used in that proviso clearly and expressly exclude a transaction which is in the nature of a gift and which is without consideration. Even if the words 'relinquishment, admission or declaration' are used in Explanation I, the use of such words do not absolve the party concerned from proving the essential ingredients laid down in clause (*b*) of the proviso, namely, that the transfer should be executed in good faith and should be for adequate consideration. Whatever be the nature of the declaration, acknowledgment, relinquishment, adequacy of consideration has to be proved in any case. (Paras 9, 21, 25 and 27)

'Consideration' means a reasonable equivalent or other valuable benefit passed on by the promisor to the promisee or by the transferor to the transferee. Similarly, when the word 'consideration' is qualified by the word 'adequate', it makes consideration stronger so as to make it sufficient and valuable having regard to the facts, circumstances and necessities of the case. The words 'adequate consideration' clearly postulate that consideration must be capable of being measured in terms of money value having regard to the market price of the property, the value that it may fetch if sold, the value of similar lands situated in the vicinity, so on and so forth. (Paras 20 and 21)

BLACK'S LAW DICTIONARY, 4th Edn.; WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (Unabridged); HALSBURY'S LAWS OF ENGLAND, 3rd Edn., Vol. 18; CORPUS JURIS SECUNDUM, Vols. 17 & 38 and WORDS AND PHRASES (Permanent Edition), Vol. 2, pp. 2 & 545, *referred to*

The Ceiling Act and the Income Tax Act have both used the words 'adequate consideration' which being terms of well known legal significance having a well recognised popular sense would convey the same meaning and import whenever used in other statutes unless a contrary intention appears from the language employed by the legislature in the statute. Moreover, the object of the Income Tax Act as also the Ceiling Act seems to be more or less identical. Therefore, it cannot be said that the words 'adequate consideration' appearing in sub-section (6) of Section 5 of the Act do not take their colour from the context. (Para 26)

A gift, though a transfer, is a gratuity and an act of generosity and does not contain any element of consideration in any shape or form. Complete absence of monetary consideration is the main hallmark which distinguishes a gift from a grant or for that matter other transactions which may be for valuable or adequate consideration. Where there is any equivalent or benefit measured in terms of money in respect of a gift the transaction ceases to be a gift and assumes a different colour. The legislature by using the word 'adequate' to qualify the word 'consideration' has completely ruled out and excluded gift from the ambit of clause (*b*) of the proviso. The motive or the purpose of making a gift should not be confused with the consideration which is the subject-matter of the gift. Love, affection, spiritual benefit and many other factors may enter in the intention of the donor to make a gift but these filial considerations cannot be called or held to be legal considerations as understood by law. (Paras 20, 21 and 22)

The Act is a valuable piece of social legislation with the avowed object of ensuring equitable distribution of the land by taking away land from large tenure holders and distributing the same among landless tenants or using the same for public utility schemes which is in the larger interest of the community at large and seeks to implement one of the most important constitutional directives contained in Part IV of the Constitution. If in this process a few individuals suffer severe hardship that cannot be helped, for individual interests must yield to the larger interests of the community or the country. (Paras 4 and 29)

Although there is no dispute in this case that the gift in question was bona fide and had been executed in good faith but as the gift did not fulfil the other ingredients of proviso (*b*) viz. that it was not for adequate monetary consideration, the gift has to fail however laudable the object of the donor might have been. (Para 29)

Fateh Mohammad v. *District Judge*, Civil Writ Petition No. 915 of 1975, decided on July 10, 1978; *Debi Saran Koiri* v. *Nandalal Chaubey*, AIR 1929 Pat 591 and *Kulasekaraperumal* v. *Pathakutty Thalevanar*, AIR 1961 Mad 405 : 74 Mad LW 16, *approved*

Tulsidas Kilachand v. *C. I. T.*, (1961) 3 SCR 351 : AIR 1961 SC 1023, *followed*

Fateh Singh v. *State of U. P.*, (1977) 3 All LR 690 (DB), *overruled*

Interpretation of Statutes — Legislative intent — Can be conveyed by express as well as implied terms

Every legislature has its own technical or legal device to express its intendment. Legislative intent can be conveyed not only by enactment of express provisions but also by using such expressions which would convey the intent expressly or by necessary intendment. (Para 21)

Interpretation of Statutes — Plain meaning — Where language is clear and explicit, courts must not interpol or legislate (Paras 11 and 22)

Union of India v. *Sankalchand Himatlal Sheth*, (1977) 4 SCC 193 : 1977 SCC (L & S) 435 : (1978) 1 SCR 423, *followed*

Westminster Bank Ltd. v. *Zang*, 1966 AC 182 and *S. Narayanaswami* v. *G. Pannerselyam*, (1972) 3 SCC 717, 726 : AIR 1972 SC 2284, 2290, *cited*

Interpretation of Statutes — Mischief rule — Applied where provision in a land ceiling legislation aims at remedying the evil of evading ceiling law (Para 10)

Keates v. *Lewis Merthyr Consolidated Collieries Ltd.*, 1911 AC 641 : (1911-13) All ER Rep 921 : 105 LT 450, *applied*

Interpretation of Statutes — Subordinate rules — Legislature does not waste words without any intention and every word used by it must be given its due import and significance (Para 22)

Interpretation of Statutes — Internal aids — Explanation — Use of

An Explanation merely widens the scope of the main section and is not meant to carve out a particular exception to the contents of the main section. (Para 24)

Interpretation of Statutes — External aids — Other statutes — When can be used in construction

Where the two statutes have a common and identical object then the legal terms used in one statute must be given the same meaning in the other. (Para 26)

Interpretation of Statutes — Hardship or inconvenience — Hardship suffered by a few persons cannot be a ground for distorting the language and giving a different interpretation especially to a social legislation seeking implementation of directive principles (Paras 4 and 30)

Interpretation of Statutes — Words and phrases — To be construed in their popular sense

Whenever the legislature uses certain terms or expressions of well known legal significance or connotation the courts must interpret them as used or understood in the popular sense. (Para 10)

C. I. T. v. *Taj Mahal Hotel, Secunderabad,* (1971) 3 SCC 550 : (1972) 1 SCR 168, *relied on*

R-M/5290/C

The Judgment of the Court was delivered by

Fazal Ali, J.—This appeal by special leave is directed against a judgment dated December 21, 1978 of the Allahabad High Court allowing the writ petition filed by the State of U. P. before the court.

2. The case arose out of an order passed by the Prescribed Authority under the U. P. Imposition of Ceiling on Land Holdings Act, 1960 (hereinafter referred to as the 'Act'), as amended up-to-date, by which the said Authority rejected the claim of the petitioners on the basis of a gift which had been executed by her grandfather by a registered document dated January 28, 1972. The Act was passed as far back as 1960 but by virtue of an amendment, being U. P. Act 18 of 1973, Section 5 was introduced which placed a ceiling on any tenure holder to hold land in excess of the ceiling area fixed under the Act. Section 5 contained various sub-sections but in the instant case we are concerned only with sub-section (6) as also clause (*b*) of the proviso to the said sub-section. By another amendment, being U. P. Act 2 of 1975, which was given retrospective operation with effect from June 8, 1973 Explanation I, along with its sub-clauses, was added to sub-section (6) of Section 5.

3. The decision in the present case turns upon the interpretation of sub-section (6) of Section 5 and the proviso therein in order to determine the validity of the Deed of Gift said to have been executed by Chunni Lal Bhatia, the grandfather of the petitioner Sonia and respondent 4 before the District Judge.

4. To begin with, we might like to state here that the facts of the case undoubtedly reveal that if the provisions of the said sub-section (6) were to apply it would work serious hardship to the petitioner but as we are concerned with interpretation of an important statute the mere fact that a correct interpretation may lead to hardship would not be a valid consideration for distorting the language of the statutory provisions.

5. Before we proceed to examine the relevant provisions, it may be necessary to give a resume of the facts of the case. Chunni Lal Bhatia had two sons, Sudesh and Mahesh and a daughter Smt. Sarla. On September 14, 1969 Chunni Lal executed a registered deed of gift in respect of 110 bighas in favour of his son, Sudesh. A month later, another deed of gift was executed in favour of his son, Sudhir. So far as these two gifts are concerned, as they were made before the amendment of the Ceiling Act, their validity was beyond question and they are not the subject-matter of any dispute in the present case. On January 28, 1972 Chunni Lal executed a gift in respect of 80 bighas in favour of his granddaughter, Sonia (daughter of Mahesh). It appears that a serious misfortune had befallen Chunni Lal in that he lost his two sons, Sudesh and Mahesh, who were serving in the Air Force and died in two different air crashes. As Chunni Lal wanted to make sufficient provision for his grandsons and granddaughter, he executed the three gifts.

6. The gift executed in favour of Sonia is the subject-matter of the dispute in the instant case. The prescribed authority held that as the gift was made after the due date, i. e. January 24, 1971, as prescribed by sub-section (6) of Section 5, the transfer would have to be ignored. Against the decision of the prescribed authority, the appellant filed an appeal before the District Judge, being the Appellate Authority, and assailed the finding of the prescribed authority. The District Judge, after hearing the parties, came to a clear finding that the gift was a bona fide one having regard to the circumstances in which the transfer was made and merely because it was executed after the due date (January 24, 1971) it could not be held to be invalid. Thereafter, the State of U. P. filed a writ petition in the High Court which was allowed following a Division Bench decision of its court in *Fateh Mohammad* v. *District Judge*[1] which had held that a deed of gift not being a transfer for consideration had to be ignored under the provisions of the Act. Hence, this appeal before us.

7. The finding of the District Judge that the gift was a bona fide one has not been challenged by Mr. Rana, appearing for the respondent, who however argued that the said gift itself was not covered by the Explanations laid down in the proviso to the said sub-section (6) of Section 5 of the Act. Thus, the only question for determination in the instant case is the legal effect of the prohibition contained in sub-section (6) and clause (*b*) of its proviso. In order to understand the scope and ambit of sub-section (6) and its proviso, it may be necessary to extract the relevant portions of sub-section (6) and Explanations concerned :

1. Civil Writ Petition No. 915 of 1975, decided on July 10, 1978

(6) In determining the ceiling area applicable to a tenure holder, any transfer of land made after the twenty-fourth day of January, 1971, which but for the transfer would have been declared surplus land under this Act, shall be ignored and not taken into account:

Provided that nothing in this sub-section shall apply to—

* * *

(*b*) a transfer proved to the satisfaction of the prescribed authority to be in good faith and for adequate consideration and under an irrevocable instrument not being a *benami* transaction or for immediate or deferred benefit of the tenure holder or other members of his family.

Explanation I.—For the purposes of this sub-section, the expression 'transfer of land made after the twenty-fourth day of January, 1971', includes—

(*a*) a declaration of a person as a co-tenure holder made after the twenty-fourth day of January, 1971 in a suit or proceeding irrespective of whether such suit or proceeding was pending on or was instituted after the twenty-fourth day of January, 1971;

(*b*) any admission, acknowledgment, relinquishment or declaration in favour of a person to the like effect, made in any other deed or instrument or in any other manner.

Explanation II.—The burden of proving that a case falls within clause (*b*) of the proviso shall rest with the party claiming its benefit.

8. The substantive provision which is contained in sub-section (6) clearly provides that any transfer after January 24, 1971 would have to be ignored and not taken into account in determining the surplus area. Clause (*b*) of the proviso to sub-section (6) [hereinafter referred to as 'clause (*b*) of the proviso'] however, carves out an exception to the general rule contained in sub-section (6) and Explanation II places the burden of proving the fact, that the case falls within the protection of clause (*b*) of the proviso, on the party relying on the transfer and claiming its benefit. A careful analysis of clause (*b*) of the proviso would reveal that it requires the following conditions to be fulfilled before a transfer can seek its protection—

(*1*) that the transfer must be in good faith,

(*2*) that it must be proved to be in good faith to the satisfaction of the prescribed authority,

(*3*) that it should be for adequate consideration and under an irrevocable instrument, and

(*4*) that it should not be in the nature of a *benami* transaction for immediate or deferred benefit of the tenure holder or other members of his family.

9. It is manifest that if these conditions are satisfied and proved to the satisfaction of the Prescribed Authority then the burden which lies on the claimant under Explanation II would have been discharged and the transfer would not be ignored but would fall under the protective umbrella contained in clause (*b*) of the proviso. It may be noticed that the legislature in its wisdom has neither defined the word 'transfer' in any of the definitions of the Act nor has clarified it. The primary object of the Act is to prevent the tenure holders from evading the Law of Ceiling by making fictitious transfers even by registered documents either before or after the due date so as to evade the provisions of the Act and thus frustrate the very object and the social purpose for which the Act had been passed. In these circumstances, therefore, the word 'transfer' has obviously been used by the legislature in the general sense of the term as defined in the Transfer of Property Act, which is the statute that governs all transfers of moveable or immovable properties. In other words, the word 'transfer' being a term of well known legal significance having well ascertained incidents, the legislature did not think it necessary to define the term 'transfer' separately. Similarly, the word 'consideration' also being a term commonly used to denote contracts, sales and transactions, has been used in the same sense, that is to say, as defined by Section 2(*d*) of the Contract Act.

10. It is well settled that whenever the legislature uses certain terms or expressions of well known legal significance or connotation the courts must interpret them as used or understood in the popular sense. In the case of *C. I. T.*, v. *Taj Mahal Hotel, Secunderabad*[2] this Court while laying down guide-lines for holding how a particular expression has been defined, observed as follows: (SCC p. 552, para 6)

> Now it is well settled, that where the definition of a word has not been given, it must be construed in its popular sense if it is a word of every day use. Popular sense means "that sense which people conversant with the subject-matter with which the statute is dealing, would attribute to it".

Lord Atkinson in *Keates* v. *Lewis*[3] observed as follows:

> In the construction of a statute it is, of course, at all times and under all circumstances, permissible to have regard to the state of things existing at the time when the statute was passed, and to the evils which, as appears from its provisions, it was designed to remedy. If the words are capable of one meaning alone; then it must be adopted, but if they are susceptible of wider import, we have to pay regard to what the statute or the particular piece of legislation had in view.

11. These observations are fully applicable to the present Act which has for its object remedying the evil of evading the ceiling law by the large landholders by executing sale deeds or other instruments so as to escape the consequences of the law. In *Union of India* v. *Sankalchand Himatlal Sheth*[4] Chandrachud, J., as he then was, observed as follows: [SCC pp. 214 & 215: SCC (L & S) pp. 456 & 457, para 11]

> The normal rule of interpretation is that the words used by the legislature are generally a safe guide to its intention. Lord Reid in *Westminster Bank Ltd.* v. *Zang*[5] observed that "no principle of interpre-

2. (1971) 3 SCC 550: (1972) 1 SCR 168
3. *Keates v. Lewis Merthyr Consolidated Collieries Ltd.*, 1911 AC 641: (1911-13) All ER Rep 921: 105 LT 450
4. (1977) 4 SCC 193: 1977 SCC (L & S) 435: (1978) 1 SCR 423
5. 1966 AC 182

tation of statutes is more firmly settled than the rule that the court must deduce the intention of Parliament from the words used in the Act." Applying such a rule, this Court observed in *S. Narayanaswami* v. *G. Pannerselvam*[6] that where the statute's meaning is clear and explicit, words cannot be interpolated. . . . But, if the provision is clear and explicit, it cannot be reduced to a nullity by reading into it a meaning which it does not carry. . . .

12. Against this background we have now to consider the real intention of the words "transfer for adequate consideration" as used in clause (*b*) of the proviso. The High Court has held that although the deed of gift is a transfer but as it is a transfer without any consideration, therefore such a transfer does not fulfil one of the essential ingredients mentioned in clause (*b*) of the proviso, namely, that it should be for consideration. The High Court has further held that its view is reinforced by the word 'adequate' which qualifies the word 'consideration' which completely rules out a transfer in the nature of a gift. The High Court was of the view that a transfer of property by way of a gift being a purely gratuitous transfer made out of love and affection or for the spiritual benefit of the donor, falls completely beyond the ambit of clause (*b*) of the proviso and, therefore, has to be ignored under the provisions of the said sub-section (6) of Section 5 of the Act.

13. Mr. Kacker, appearing for the appellant, assailed the view taken by the High Court on the ground that the High Court has given a very restricted meaning to the term 'transfer for adequate consideration' by limiting the import of the word 'consideration'. He argued in the first place that a gift cannot be said to be a transfer without consideration because even love and affection, spiritual benefit or other factors of similar nature may provide sufficient consideration for the gift. Secondly, it was argued that even if a gift was a transfer without consideration and was intended to be excluded by clause (*b*) of the proviso, then there should have been an express indication of the same in the provisions of clause (*b*) of the proviso by expressly excluding gifts. Another facet of this argument advanced before us by Mr. Kacker was that as gift has not been expressly excluded by clause (*b*) of the proviso, we should be persuaded to hold that the condition regarding adequate consideration would not apply to a gift, as a gift was a transfer without consideration and if other conditions were satisfied a gift would also fall within the purview of clause (*b*) of the proviso. We have given our anxious consideration to the arguments put forward by Mr. Kacker and although the arguments are extremely attractive yet we find ourselves unable to agree with the same.

14. To begin with, it may be necessary to dwell on the concept of gift as contemplated by the Transfer of Property Act and as defined in various legal dictionaries and books. To start with, BLACK'S LAW DICTIONARY (Fourth Edition) defines gift thus:

6. (1972) 3 SCC 717, 726 : AIR 1972 SC 2284, 2290

> A voluntary transfer of personal property without consideration. A parting by owner with property without pecuniary consideration. A voluntary conveyance of land, or transfer of goods, from one person to another, made gratuitously, and not upon any consideration of blood or money.

A similar definition has been given in WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (Unabridged) where the author defines gift thus:

> Something that is voluntarily transferred by one person to another ***without compensation***; a voluntary transfer of real or personal property ***without any consideration*** or without a valuable consideration — distinguished from sale. (emphasis supplied)

Volume 18 of WORDS AND PHRASES (Permanent Edition) defines gift thus:

> A 'gift' is a voluntary transfer of property ***without compensation or any consideration***. A 'gift' means a voluntary transfer of property from one person to another without consideration or compensation. (emphasis supplied)

In HALSBURY'S LAWS OF ENGLAND (Third Edition, Volume 18) while detailing the nature and kinds of gift, the following statement is made:

> A gift inter vivos (*a*) may be defined shortly as the transfer of any property from one person to another gratuitously. Gifts then, or grants, which are the eighth method of transferring personal property, are thus to be distinguished from each other, that gifts are always gratuitous, grants are upon some consideration or equivalent.

15. Thus, according to Lord Halsbury's statement the essential distinction between a gift and a grant is that whereas a gift is absolutely gratuitous, grant is based on some consideration or equivalent. Similarly in Volume 38 of CORPUS JURIS SECUNDUM, it has been clearly stated that a gift is a transfer without consideration and in this connection while defining the nature and character of a gift the author states as follows:

> A gift is commonly defined as a voluntary transfer of property by one to another, without any consideration or compensation therefor. Any piece of property which is voluntarily transferred by one person to another without compensation or consideration. A gift is a gratuity, and an act of generosity, and not only does not require a consideration, but there can be none; if there is a consideration for the transaction it is not a gift.

16. It is, therefore, clear from the statement made in this book that the concept of gift is diametrically opposed to the presence of any consideration or compensation. A gift has aptly been described as a gratuity and an act of generosity and stress has been laid on the fact that if there is any consideration then the transaction ceases to be a gift. Before closing this aspect of the matter we might also refer to the definition of consideration given in various books. BLACK'S LAW DICTIONARY defines 'consideration' thus:

> Consideration is not to be confounded with motive. Consideration means something which is of value in the eye of the law, moving from the plaintiff, either of benefit to the plaintiff or of detriment to the defendant.

This is the view expressed in 2 QB 851. Similarly, at page 61 in the same volume, the words 'adequate consideration' have been defined thus:

> *One which is equal, or reasonably proportioned, to the value of that for which it is given.* Fair and reasonable under circumstances.
> (emphasis supplied)

17. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (Unabridged) defines 'consideration' thus:

> Something that is legally regarded as the equivalent or return given or suffered by one for the act or promise of another.

And the word 'adequate' has been defined in the same volume at page 25 thus:

> Legally sufficient: such as is lawfully and reasonably sufficient.

Similarly, in WORDS AND PHRASES (Permanent Edition—Volume 2) the word 'adequate' has been defined at page 545 thus:

> 'Adequate' means fully equal to requirements or occasions, commensurate . . . but in its primary and more popular significance nothing can be said to be 'adequate' which is not equal to what is required, suitable to the case or occasion, fully sufficient, proportionate, and satisfactory.

And when used to qualify consideration, it has been defined thus; in the same volume at page 545:

> "Fair consideration in money or money's worth" is consideration which under all circumstances is *honest, reasonable, and free from suspicion,* whether or not strictly 'adequate' or 'full'. (emphasis supplied)

'Adequate consideration' has been further defined as follows in the same volume at page 553:

> 'Adequate consideration' generally is one *which is a fair equivalent in value for benefit obtained.* . . .
>
> 'Adequate consideration' required in action for specific performance merely means that *contract price must be substantially just and fair valuation* under all circumstances. (emphasis supplied)

18. In Volume 17 of CORPUS JURIS SECUNDUM (pp. 420-421 and 425) the import of 'consideration' has been described thus:

> Various definitions of consideration are to be found in the textbooks and judicial opinions. A sufficient one, as stated in CORPUS JURIS and which has been quoted and cited with approval is, "a benefit to the party promising, or a loss or detriment to the party to whom the promise is made. . .".
>
> At common law every contract not under seal requires a consideration to support it, that is, as shown in the definition above, some benefit to the promisor, or some loss or detriment to the promisee. . .
>
> There is a sufficient consideration for a promise if there is any benefit to the promisor or any detriment to the promisee. . . . It may be laid down as a general rule, in accordance with the definition given above, that there is a sufficient consideration for a promise if there is any benefit to the promisor or any loss or detriment to the promisee.

19. The gist of the term 'consideration' and its legal significance has been clearly summed up in Section 2(*d*) of the Contract Act which defines 'consideration' thus:

> When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.

20. From a conspectus, therefore, of the definitions contained in the dictionaries and the books regarding a gift or an adequate consideration, the inescapable conclusion that follows is that 'consideration' means a reasonable equivalent or other valuable benefit passed on by the promisor to the promisee or by the transferor to the transferee. Similarly, when the word 'consideration' is qualified by the word 'adequate', it makes consideration stronger so as to make it sufficient and valuable having regard to the facts, circumstances and necessities of the case. It has also been seen from the discussions of the various authorities mentioned above that a gift is undoubtedly a transfer which does not contain any element of consideration in any shape or form. In fact, where there is any equivalent or benefit measured in terms of money in respect of a gift the transaction ceases to be a gift and assumes a different colour. It has been rightly pointed out in one of the books referred to above that we should not try to confuse the motive or the purpose of making a gift with the consideration which is the subject-matter of the gift. Love, affection, spiritual benefit and many other factors may enter in the intention of the donor to make a gift but these filial considerations cannot be called or held to be legal considerations as understood by law. It is manifest, therefore, that the passing of monetary consideration is completely foreign to the concept of a gift having regard to the nature, character and the circumstances under which such a transfer takes place. Furthermore, when the legislature has used the word 'transfer' it at once invokes the provisions of the Transfer of Property Act. Under Section 122 of the Transfer of Property Act, gift is defined thus:

> 'Gift' is the transfer of certain existing moveable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.
>
> Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.
>
> If the donee dies before acceptance, the gift is void.

21. Thus, Section 122 of the Transfer of Property Act clearly postulates that a gift must have two essential characteristics— (1) that it must be made voluntarily, and (2) that it should be without consideration. This is apart from the other ingredients like acceptance, etc. Against the background of these facts and the undisputed position of law, the words, 'transfer for adequate consideration' used in clause (*b*) of the proviso clearly and expressly exclude a transaction which is in the nature of a gift and which is without consideration. Love and affection, etc., may be motive for making a gift but is not a consideration in the legal sense of the term. As regards the argument of Mr. Kacker that if the legislature intended to exclude gifts, clause (*b*) of the proviso should have expressly said so; the answer is very simple. Every legislature has its own technical or legal device to express its intendment. Some legislatures may have chosen to expressly exclude gift as Mr. Kacker says but that is not the only method of conveying the legislative intent. There may be other methods or devices by which the legislative intent can be expressed, namely, by using such expressions which would expressly or by necessary intendment exclude a particular transaction. This method seems to have been adopted by the legislature in enacting clause (*b*) of the proviso. In fact, the legislature has made its intention clear that gift is excluded by qualifying the word 'consideration' by the adjective 'adequate'. Assuming that love and affection, spiritual benefit or similar other factors may amount to a consideration for the gift, the word 'adequate' is wholly inapplicable to and inconsistent with the concept of a gift because it is impossible to measure love and affection, the sentiments or feelings of the donor by any standard yardstick or barometer. The words 'adequate consideration' clearly postulate that consideration must be capable of being measured in terms of money value having regard to the market price of the property, the value that it may fetch if sold, the value of similar lands situated in the vicinity, so on and so forth. In the instant case, therefore, in our opinion, the legislature by using the word 'adequate' to qualify the word 'consideration' has completely ruled out and excluded gift from the ambit of clause (*b*) of the proviso. In these circumstances, therefore, the argument of Mr. Kacker that by not expressly excluding gift, clause (*b*) of the proviso includes gift cannot be accepted particularly in the face of the clear and unambiguous language used by clause (*b*) of the proviso in describing the nature of the transaction as one for adequate consideration.

22. We now deal with the second limb of the argument of Mr. Kacker that as in the case of a gift there is no question of a consideration, we should hold that the 3rd part of clause (*b*) of the proviso which contains the words 'for adequate consideration' is inapplicable and ignore the same. This argument is diametrically opposed to the well known rule of interpretation that courts in interpreting statutes must not interpolate or legislate. It is well settled that a legislature does not waste words without any intention, and every word that is used by the legislature must be given its due import and significance. In the instant case, the words 'adequate consideration' have undoubtedly a well recognised concept and, as indicated above, the intention was to exclude any transaction which is not for adequate consideration. Not to speak of a gift but even if a sale is found to be bona fide but the consideration is inadequate, for instance, where the property has been sold for a nominal price or below the market value, the transaction would fall beyond the protection given by clause (*b*) of the proviso. Our attention has been drawn by Mr. Kacker to a single Bench decision by

Banerji, J. in *Fateh Singh* v. *State of U. P.*[7] where the learned Judge had taken the view that the definition of a transfer given in clause (*b*) of the proviso included a gift because a gift also could not be said to be a transfer without consideration even though consideration may not be weighed in terms of money. The learned Judge in taking this view had obviously fallen into error of confusing what was the motive or the reason for the gift as being a legal consideration of it. It has already been pointed out that in considering the nature of a gift one should not confuse the motive, which may be love and affection, or spiritual benefit, with valuable consideration which has to be either in the shape of a money compensation or equivalent of the same. It is true that in every gift the donor has a particular motive and objective or a reason to part with his property in favour of the donee, the reason being, in some cases, love and affection where the gift is in favour of a relation or friend, or spiritual benefit in other cases but this will be the immediate motive for making the gift and cannot be regarded as a consideration for the gift because the very concept of gift is based on a purely gratuitous consideration. The Division Bench of the Allahabad High Court in the case[1] referred to above has rightly overruled the view of Banerji, J., on this count. In fact the matter has been considered by other High Courts who have consistently taken the view that a gift is a transfer without consideration, love and affection being only the motive for making the transfer. In *Debi Saran Koiri* v. *Nandalal Chaubey*[8] while elucidating the nature and character of a gift Sahay, J. made the following observations:

> Now, Section 122, T. P. Act defines "gift" as a transfer of certain existing moveable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee. . . . To my mind consideration in Section 122, T. P. Act, means valuable consideration and not consideration in the shape of conferring spiritual benefit to the donor. If valuable consideration be not the consideration referred to in Section 122, I fail to understand how any gift can be made without consideration at all. There must be some sort of consideration in every gift, for instance, a consideration of an expectation of spiritual or moral benefit or consideration of love and affection. *Such considerations are not considerations contemplated in Section 122. The consideration there contemplated must be valuable consideration, that is consideration either of money or of money's worth.* (emphasis supplied)

23. In *Kulasekaraperumal* v. *Pathakutty Thalevanar*[9] Jagadisan, J. made the classic observations which may be extracted thus:

> A gift is essentially a gratuitous transfer. Complete absence of consideration marks the transfer as a gift and differentiates it from a grant.

24. The learned Judge has rightly pointed out that complete absence of consideration is the main hallmark which distinguishes a gift from a grant or for that matter other transactions which may be for valuable or

7. (1977) 3 All LR 690 (DB)
8. AIR 1929 Pat 591
9. AIR 1961 Mad 405: 74 Mad LW 16

adequate consideration. We find ourselves in complete agreement with the observations made by Jagadisan, J. in *Kulasekaraperumal* case[6] and Sahay, J. in *Devi Saran* case[8] which correctly represent the character and nature of the gift as contemplated by law. Banerji, J. in *Fateh Singh* case[7] seems to have relied heavily on Explanation I of sub-section (6) of Section 5 of the Act which refers to a declaration of a tenure holder made in a suit or any admission, acknowledgment, relinquishment, etc., made in any other deed or instrument in order to reinforce his conclusion that clause (*b*) of the proviso did not exclude a gift. With due respect, here the learned Judge completely failed to appreciate the scope of clause (*b*) of the proviso and Explanation I. It is well settled that an Explanation merely widens the scope of the main section and is not meant to carve out a particular exception to the contents of the main section. Thus, even if the words 'relinquishment, admission or declaration' are used in Explanation I, the use of such words do not absolve the party concerned from proving the essential ingredients laid down in clause (*b*) of the proviso, namely, that the transfer should be executed in good faith and should be for adequate consideration. Whatever be the nature of the declaration, acknowledgment, relinquishment, adequacy of consideration has to be proved in any case. Thus, in our view, the Division Bench was fully justified in overruling the view of Banerji, J. in regard to the interpretation of the Explanation also.

25. Finally, we would like to mention that the matter is no longer res integra but is fully covered in principle by a decision of this Court in *Tulsidas Kilachand* v. *C. I. T.*[10], where Hidayatullah, J. speaking for the Court observed as follows:

> It remains to consider whether there was adequate consideration for the transfer. Reliance has been placed only upon love and affection. *The words "adequate consideration" denote consideration other than mere love and affection, which, in the case of a wife, may* be presumed. When the law insists that there should be "adequate consideration" and not "good consideration", it excludes mere love and affection. They may be good consideration to support a contract; but adequate consideration to avoid tax is quite a different thing. To insist on the other meaning is really to say that consideration must only be looked for, when love and affection cease to exist. (emphasis supplied)

26. It would thus, appear that this Court clearly held that the words 'adequate consideration' completely exclude the concept of love and affection and this decision appears to be on all fours with the facts of the present case. Realising this predicament Mr. Kacker submitted that the words 'adequate consideration' used in the Income Tax Act denote a different texture. Mr. Kacker argued that it is not permissible to interpret or use an expression in one Act as having the same meaning in another Act which is of a different kind. Of course, there can be no dispute with this proposition but then the Act as also the Income Tax Act have both used the words 'adequate

10. (1961) 3 SCR 351 : AIR 1961 SC 1023

consideration' which, as we have already held, are terms of well known legal significance having a well recognised popular sense and hence they would convey the same meaning and import whenever used in other statutes unless a contrary intention appears from the language employed by the legislature in the statute. Moreover, the object of the Income Tax Act as also the present Act seems to be more or less identical. Whereas the object of the Income Tax Act in enacting Section 16(3)(*b*) which is extracted below, is to circumvent and prevent a growing tendency on the part of the assessees to avoid or reduce tax liability by means of settlements:

> 16. (3)(*b*) So much of the income of any person or association of persons as arises from assets transferred otherwise than for adequate consideration to the person or association by such individual for the benefit of his wife or a minor child or both.

In the instant oase also the avowed object of sub-section (6) of Section 5 of the Act is to prevent the large landholders from evading the ceiling law by executing transfers, instruments or gifts so as to reduce their surplus area. Where the two statutes have a common and identical object then the legal terms used in one statute must be given the same meaning in the other. It cannot be said that the words 'adequate consideration' appearing in sub-section (6) of Section 5 of the Act do not take their colour from the context but are in conformity with the main object of the Act; to prevent evasion of the ceiling law by large tenure holders in anticipation of the passing of the ceiling law. For these reasons, therefore, the argument of Mr. Kacker on this score must be rejected. We, therefore, hold that in view of the interpretation placed by this Court on the words 'adequate consideration' which fully applies to the present case and to the same language employed in sub-section (6) of Section 5 of the Act, a gift is not only impliedly but expressly excluded by the Act.

27. In the Division Bench decision[1] of the Allahabad High Court referred to above, after a consideration of a large number of authorities the following observations were made:

> The legislature while enacting the U. P. Imposition of Ceiling on Land Holdings Act, was alive to the provisions of the Transfer of Property Act dealing with the transfer of immovable property. The terms 'transfer', 'sale', 'mortgage' and 'lease' have not been defined in the Act. Therefore, these terms must have been used only in the sense in which they have been used in the Transfer of Property Act. If the legislature intended to use those terms in a different sense and with a different connotation, it would have defined those terms in the Act. But that has not been done. . . .
>
> The legislature, however, thought that there may be genuine and bona fide transfers for consideration. To protect such tenure holders and other transfers, proviso (*b*) to sub-section (6) of Section 5 of the Act was enacted. It saved transfers for adequate consideration. Gift is a gratuitous transfer and there is no consideration which obviously means valuable consideration. If transfer for love and affection is taken to be a transfer for consideration then the purpose of the Act would

be completely defeated as the tenure holders would transfer their land by gift after January 24, 1971.

28. We fully endorse the observations made by the Division Bench which lay down the correct law on the subject and we overrule the decision of Banerji, J. in *Fateh Singh* case[7].

29. Lastly, it was urged by Mr. Kacker that this is an extremely hard case where the grandfather of the donee wanted to make a beneficial provision for his granddaughter after having lost his two sons in the prime of their life due to air crash accidents while serving in the Air Force. It is true that the District Judge has come to a clear finding that the gift in question is bona fide and has been executed in good faith but as the gift does not fulfil the other ingredients of the section, namely, that it is not for adequate consideration, we are afraid, however laudable the object of the donor may have been, the gift has to fail because the genuine attempt of the donor to benefit his granddaughter seems to have been thwarted by the intervention of sub-section (6) of Section 5 of the Act. This is undoubtedly a serious hardship but it cannot be helped. We must remember that the Act is a valuable piece of social legislation with the avowed object of ensuring equitable distribution of the land by taking away land from large tenure holders and distributing the same among landless tenants or using the same for public utility schemes which is in the larger interest of the community at large. The Act seems to implement one of the most important constitutional directives contained in Part IV of the Constitution of India. If in this process a few individuals suffer severe hardship that cannot be helped, for individual interests must yield to the larger interests of the community or the country as indeed every noble cause claims its martyr.

30. As this was the only point raised before us, we find no merit in the same.

31. For the reasons given above, we hold that the High Court was right in allowing the writ petition in respect of the gift in question. The appeal fails and is accordingly dismissed but without any order as to costs.

(1981) 2 Supreme Court Cases 600

(BEFORE S. MURTAZA FAZAL ALI AND A. D. KOSHAL, JJ.)

M/s. LAXMI KHANDSARI AND OTHERS .. Petitioners/Appellants;

Versus

STATE OF U. P. AND OTHERS .. Respondents.

Writ Petitions 5637-41, 5643-45, 5646-47, 5649-51, 5597-98, 5553-67, 5609-11, 5616-20, 5623-28, 5657, 5673-74, 5702-23, 5668, 5659-67, 5733, 5740-42, 5782-84, 5763-64, 5762, 5747-52, 5779-81, 5745, 5785, 5737-39, 5841-43, 5786, 5797, 5861-62 & 5863-64 of 1980 and Civil Appeal No. 2734 of 1980†, decided on March 9, 1981

†Appeal by special leave from the Judgment and Order dated November 12, 1980 of the Allahabad High Court in W. P. No. 3115 of 1980

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thereafter remitting the matter to the Tribunal (*sic* adjudicating authority). Such a course was not available to be adopted.

9. The Tribunal has highlighted the relevant aspects while rejecting the prayer for dispensation of pre-deposit. The three aspects to be focussed while dealing with such applications are: (*a*) prima facie case, (*b*) balance of convenience, and (*c*) irreparable loss. The Tribunal categorically found that these factors were established by the respondents. Even when the Tribunal decides to grant full or partial stay it has to impose such conditions as may be necessary to safeguard the interest of revenue. This is an imperative requirement under Section 129-E of the Act. Normally, therefore, we would have asked the respondent assessee to comply with the orders of the Tribunal, by setting aside the impugned order. But considering the fact that the Tribunal already passed consequential order on the basis of the High Court's order, on 18-8-2006, we dispose of the appeal with following directions:

(*a*) Impugned order passed by the High Court and the consequential order passed by the Tribunal on 18-8-2006 are set aside.

(*b*) The parties are directed to appear before the Tribunal without any further notice on 3-12-2007.

(*c*) The Tribunal shall take up the appeal by hearing them without insistence on pre-deposit.

(*d*) The appeals shall be heard on day-to-day basis.

(*e*) The respondent shall file an undertaking before the adjudicating authority to liquidate the demands, if any, sustained by the Tribunal subject of course, to the right of appeal, if any, within eight weeks from the date of receipt of the Tribunal's order. This of course would be subject to any order of interim protection, passed in the appeal.

10. The appeal is accordingly disposed of without any order as to costs.

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(2007) 13 Supreme Court Cases 210

(BEFORE S.B. SINHA AND H.S. BEDI, JJ.)

ASOKAN .. Appellant;

Versus

LAKSHMIKUTTY AND OTHERS .. Respondents.

Civil Appeal No. 5942 of 2007†, decided on December 14, 2007

A. **Transfer of Property Act, 1882 — Ss. 122 and 123 — "Gift" — Elements of, restated — Acceptance of by donee — Mode of proof of — Averment of such acceptance in the gift deed, if sufficient — Held, there may be various means to prove the acceptance and it is not necessary to prove any overt act in respect thereof — Father executing a registered deed of gift in favour of son and averring therein that the property gifted had been handed over to, and accepted by, the donee — Donor father aware of**

† Arising out of SLP (C) No. 20754 of 2003. From the Final Judgment and Order dated 9-7-2002 of the High Court of Kerala at Ernakulam in SA No. 606 of 1993 (E)

the terms and nature of the document and donee son also aware of the recitals in the said deed — In such circumstances, held, a presumption of the correctness of the said averment in the deed arose — Hence, onus of proof would lie not on the donee but on the donor and would be a heavy one — Evidence Act, 1872, Ss. 91 and 92 — Gift Tax Act, 1958 — S. 2(xii) — Muslim Law — Gift

B. **Transfer of Property Act, 1882 — Ss. 122, 123 and 127 — Gift deed — Conditions precedent for validity of and grounds for rescission of a completed and valid gift — Irrelevance of subsequent conduct of donee — Held, gift deed should be: (i) without any consideration, (ii) voluntary, and (iii) not induced by undue influence — Father, out of love and affection for his son and also to enable the latter to live a peaceful life, executing a registered deed of gift in favour of son — No proof of undue influence to bring the case within the purview of S. 16, Contract Act — In such circumstances keeping in view the relations of the parties and the fact of long absence of the donee from India, held, possession of the gift deed and payment of tax by the donor or non-mutation of the donee's name in revenue records not by themselves sufficient to show that the execution of the gift deed was involuntary — Hence, gift deed could not be rescinded on the premise that the gift was an onerous gift and that the donee had failed to fulfil the condition for the gift viz. contributing towards the marriage of his (donee's) sister the sum specified — Contract Act, 1872 — S. 16 — Evidence Act, 1872 — S. 114 — Presumptions — Gift deed — Presumption regarding averments in — Gift Tax Act, 1958, S. 2(xii)**

Each of the parents of the appellant herein had, by two separate deeds, gifted two separate pieces of land to the appellant. The reason for the gift as stated in the gift deed by the appellant's father was his love and affection for the appellant and the fact that the appellant was his son and successor. However, on the premise that the said gift was an onerous one and the appellant did not fulfil the conditions therefor viz. to contribute a sum of Rs 1,00,000 at the time of marriage of his sister, they cancelled the said deeds of gift by two documents executed on a subsequent date. The appellant filed a suit for a declaration that he was the absolute owner of the suit properties. He also sought the said two deeds of cancellation to be set aside.

The suit was decreed by the trial court but the decree was reversed by the appellate court, whose decision was later upheld by the High Court. The appellant then filed the present appeal by special leave.

One of the questions that arose before the Supreme Court was whether an averment made in the deed of gift in regard to handing over of possession is sufficient proof of acceptance thereof by the donee. The other question was whether the donor (father) could cancel the said deed on the premise that the gift was an onerous one and the donee (son) had failed to contribute the sum specified, at time of the donee's sister's marriage.

Allowing the appeal, the Supreme Court

Held:

The definition of "gift" contained in Section 122 of the Transfer of Property Act provides that the essential elements thereof are:

(*i*) the absence of consideration;
(*ii*) the donor;
(*iii*) the donee;

(*iv*) the subject-matter;
(*v*) the transfer; and
(*vi*) the acceptance.

Concept of payment of consideration in whatever form is unknown in the case of a gift. It should be a voluntary one. It should not be subjected to any undue influence. (Paras 13 and 15)

Gifts do not contemplate payment of any consideration or compensation. (Para 14)

It is, however, beyond any doubt or dispute that in order to constitute a valid gift acceptance thereof is essential. The Transfer of Property Act does not prescribe any particular mode of acceptance. It is the circumstances attending to the transaction which may be relevant for determining the question. There may be various means to prove acceptance of a gift. The document may be handed over to a donee, which in a given situation may also amount to a valid acceptance. The fact that possession had been given to the donee also raises a presumption of acceptance. (Para 14)

In the present case it is not a case that the appellant was not aware of the recitals contained in deeds of gift which recite the factum of handing over of possession of the properties which were the subject-matter of the gift. The very fact that the defendant donors contend that the donee was to perform certain obligations in lieu of the gift is itself indicative of the fact that the parties were aware thereabout. Even a silence may sometimes indicate acceptance. It is not necessary to prove any overt act in respect thereof as an express acceptance is not necessary for completing the transaction of gift. (Paras 16 and 11)

Sanjukta Ray v. *Bimelendu Mohanty*, AIR 1997 Ori 131; *Kamakshi Ammal* v. *Rajalakshmi*, AIR 1995 Mad 415; *Samrathi Devi* v. *Parasuram Pandey*, AIR 1975 Pat 140; *Narayani Bhanumathi* v. *Karthyayani Lelitha Bhai*, 1973 Kerala LJ 354 : 1973 KLT 961, *approved*

Once a gift is complete, the same cannot be rescinded. For any reason whatsoever, the subsequent conduct of a donee cannot be a ground for rescission of a valid gift. The said deeds of gift were executed out of love and affection as well as on the ground that the donee is the son and successor of the donor and so as to enable him to live a good family life. The donors cannot later turn round and say that he was to fulfil a promise. It is one thing to say that the execution of the deed is based on an aspiration or belief, but it is another thing to say that the same constituted an onerous gift. What, however, was necessary is to prove undue influence so as to bring the case within the purview of Section 16 of the Contract Act. It was not done. (Paras 30, 22 and 23)

It has been submitted by the donors that it would be open to them to prove that in fact no possession had been handed over. This case is concerned with the construction of recitals made in a registered document. When a registered document is executed and the executors are aware of the terms and nature of the document, a presumption arises in regard to the correctness thereof. When such a presumption is raised coupled with the recitals in regard to putting the donee in possession of the property, the onus is on the donor and not on the donee. (Paras 18, 26 and 20)

The deeds of gift categorically state, as an ingredient for a valid transaction, that the property had been handed over to the donee and he had accepted the same. Even assuming that the legal presumption therefor may be raised, the same

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is a rebuttable one but in a case of this nature, a heavy onus would lie on the donors. (Para 23)

a Keeping in view the relationship of the parties and further in view of the fact that admittedly the appellant had not been residing in India for a long time, neither the possession of the document nor the payment of tax nor non-mutation of the name by itself would be sufficient to show that the execution of the deeds of gift by the defendants were not voluntary acts on their part. It can never be the intention of a son to drive away the parents from the house as soon as the deeds of gift are executed. Parents while gifting the property to a successor out of love b and affection as also with a view to enable him to live a peaceful life, would not like to lose both the property as also their son. (Para 24)

Prem Singh v. *Birbal*, (2006) 5 SCC 353; *Nawab Mirza Mohammad Sadiq Ali Khan* v. *Nawab Fakr Jahan Begam*, AIR 1932 PC 13, *relied on*

Gangabai v. *Chhabubai*, (1982) 1 SCC 4; *Tyagaraja Mudaliyar* v. *Vedathanni*, AIR 1936 PC 70, *distinguished*

c *S.V.S. Muhammad Yusuf Rowther* v. *Mohd. Yusuf Rowther*, AIR 1958 Mad 527; *Alavi* v. *Aminakutty*, 1984 KLT 61 (SN); *Jhumman* v. *Husain*, AIR 1931 Oudh 7, *discussed*

H-D-M/37128/S

Advocates who appeared in this case :

M.P. Vinod and Sanjith P. Warrier, Advocates, for the Appellant;

d T.L.V. Iyer, Senior Advocate (Subramonium Prasad, Jai Kishore Singh and Vivek Gupta, Advocates) for the Respondents.

Chronological list of cases cited	***on page(s)***
1. (2006) 5 SCC 353, *Prem Singh* v. *Birbal*	217*d*
2. AIR 1997 Ori 131, *Sanjukta Ray* v. *Bimelendu Mohanty*	216*a-b*
3. AIR 1995 Mad 415, *Kamakshi Ammal* v. *Rajalakshmi*	216*a-b*
4. 1984 KLT 61 (SN), *Alavi* v. *Aminakutty*	217*b*, 217*d-e*
e 5. (1982) 1 SCC 4, *Gangabai* v. *Chhabubai*	219*d*
6. AIR 1975 Pat 140, *Samrathi Devi* v. *Parasuram Pandey*	216*a-b*
7. 1973 Kerala LJ 354 : 1973 KLT 961, *Narayani Bhanumathi* v. *Karthyayani Lelitha Bhai*	216*d*
8. AIR 1958 Mad 527, *S.V.S. Muhammad Yusuf Rowther* v. *Mohd. Yusuf Rowther*	217*b*
f 9. AIR 1936 PC 70, *Tyagaraja Mudaliyar* v. *Vedathanni*	219*e*
10. AIR 1932 PC 13, *Nawab Mirza Mohammad Sadiq Ali Khan* v. *Nawab Fakr Jahan Begam*	218*d-e*, 219*a*
11. AIR 1931 Oudh 7, *Jhumman* v. *Husain*	219*c*

The Judgment of the Court was delivered by

S.B. SINHA, J.— Leave granted.

g **2.** Whether an averment made in the deed of gift in regard to handing over of possession is sufficient proof of acceptance thereof by the donee is the question involved in this appeal which arises out of a judgment and order dated 9-7-2002 passed by the High Court of Kerala at Ernakulam in SA No. 606 of 1993.

3. Defendants 1 and 2 are the parents of the appellant herein. A deed of h gift was executed by Respondent 1 Defendant 2 (mother of the appellant) herein in favour of the appellant on or about 4-1-1984. He was said to have been put in possession of the properties covered by the deed of gift. It was a

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registered document. Defendant 1 (father of the appellant) (since deceased) also executed a registered deed of gift dated 17-3-1984 in his favour which was marked as Exhibit A-2 before the learned trial Judge, relevant averments a wherein were:

> "… The said 28 cents was divided into two equal portions. On the southern extreme side of the southern 14 cents after the said division there existed a kudikidappu (hut) of one Konnothu George. Three cents and the said hut was demarcated and given to the said George. Lakshmikutty, your mother, purchased the rights of George over the said b three cents and the hut thereon vide Registered Document No. 2214 of 1980. The said property was later gifted by her to you vide Document No. 78 of 1984. The 11 cents of land, remaining after demarcating the abovesaid three cents from the 14 cents, namely, the southern one-half portion of the 28 cents that originally belonged to me, is still in my possession and enjoyment with all rights. Out of my love and affection c for you and in view of the fact that you are my son and successor the said property having a value of Rs 5500 is gifted to you for leading a good family life. I am hereby relinquishing all my rights over the property. The possession of the property is handed over to you and you have accepted the same…."

4. The defendants, however, on the premise that the said gift was an d onerous one and the appellant did not fulfil the conditions therefor viz. failure to contribute a sum of Rs 1,00,000 at the time of marriage of his sister, cancelled the said deeds of gift by two documents executed on 15-6-1985.

5. The appellant filed a suit inter alia for a declaration that he was the absolute owner of the suit properties. Prayer for setting aside the said two e deeds of cancellation was also made therein.

6. Contentions of the defendants in their written statements were that:

> (*i*) The appellant had not been rendering any financial help to the family although he was employed in Sultanate of Oman;
>
> (*ii*) The appellant had not accepted the said gifts. f

7. The defendants in their evidence stated that the appellant had promised to pay Rs 1,00,000 to them but after returning to Oman, he changed his mind and was not prepared to send the said sum.

8. The learned trial Judge decreed the said suit opining that the ingredients of Sections 122 and 123 of the Transfer of Property Act had been fulfilled and, thus, the same could not have been rescinded "by the mere fact g that the donors' feeling towards the donee underwent a change".

9. Before the learned trial Judge, an apprehension was expressed that in the event a decree is passed, the appellant may evict his parents which was refused to be gone into on the ground that such a question might arise only in the future. The first appellate court, however, reversed the said findings opining that there had been no overt act of possession on the part of the h appellant as he had not paid any tax nor he got his name mutated in the revenue records. It was noticed that even the deeds of gift were produced by the defendants.

10. The High Court by reason of the impugned judgment affirmed the said view.

11. Mr M.P. Vinod, learned counsel appearing on behalf of the appellant, submitted that the first appellate court as also the High Court committed a serious error in arriving at the aforementioned findings insofar as they failed to take into consideration the fact that the deeds of gift being not onerous ones and the factum of handing over of possession of the properties which were the subject-matter of the gift, having been stated in the deeds of gift themselves, it was not necessary for the appellant to prove that he accepted the same. It was furthermore urged that keeping in view the provisions of Sections 91 and 92 of the Evidence Act, no plea contrary to or inconsistent with the recitals made in the deeds of gift is permissible to be raised.

12. Mr T.L.V. Iyer, learned Senior Counsel appearing on behalf of the respondents, on the other hand, submitted:

(*i*) Acceptance of gift being a condition precedent for a valid gift and the first appellate court and the High Court having arrived at a finding that the same was not accepted, the impugned judgments should not be interfered with.

(*ii*) The recitals made in the deeds of gift are not conclusive and, thus, evidence to show that the same were not correct is admissible in evidence.

(*iii*) Sections 91 and 92 of the Evidence Act control only the terms of a contract and not a recital. Even assuming that Sections 91 and 92 of the Evidence Act would be applicable, by reason thereof, only the onus has shifted on the donor and as they have discharged the same, the impugned judgments are unassailable.

13. We have noticed the terms of the deeds of gift. Ex facie, they are not onerous in nature. The definition of "gift" contained in Section 122 of the Transfer of Property Act provides that the essential elements thereof are:

(*i*) the absence of consideration;

(*ii*) the donor;

(*iii*) the donee;

(*iv*) the subject-matter;

(*v*) the transfer; and

(*vi*) the acceptance.

14. Gifts do not contemplate payment of any consideration or compensation. It is, however, beyond any doubt or dispute that in order to constitute a valid gift acceptance thereof is essential. We must, however, notice that the Transfer of Property Act does not prescribe any particular mode of acceptance. It is the circumstances attending to the transaction

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which may be relevant for determining the question. There may be various means to prove acceptance of a gift. The document may be handed over to a donee, which in a given situation may also amount to a valid acceptance. The fact that possession had been given to the donee also raises a presumption of acceptance. (See *Sanjukta Ray* v. *Bimelendu Mohanty*[1], *Kamakshi Ammal* v. *Rajalakshmi*[2] and *Samrathi Devi* v. *Parasuram Pandey*[3].)

15. Concept of payment of consideration in whatever form is unknown in the case of a gift. It should be a voluntary one. It should not be subjected to any undue influence.

16. While determining the question as to whether delivery of possession would constitute acceptance of a gift or not, the relationship between the parties plays an important role. It is not a case that the appellant was not aware of the recitals contained in deeds of gift. The very fact that the defendants contend that the donee was to perform certain obligations, is itself indicative of the fact that the parties were aware thereabout. Even a silence may sometimes indicate acceptance. It is not necessary to prove any overt act in respect thereof as an express acceptance is not necessary for completing the transaction of gift.

17. In *Narayani Bhanumathi* v. *Karthyayani Lelitha Bhai*[4] a learned Single Judge of the Kerala High Court stated the law thus:

> "If the earlier settlement deed was executed on an assurance that Defendants 2 and 3 will be looked after, that presupposes the knowledge of the gift by the donees and an understanding reached between them at the time of execution of the settlement deed which could be sufficient to support the plea of acceptance especially when there is no question of the donee getting possession of properties since there is reservation of right to enjoy the property in the doners during their lifetime.
>
> The evidence bearing on the question of acceptance of the gift deed will have to be appreciated in the background of the circumstance relating to the execution of such a deed. There may be cases where slightest evidence of such acceptance would be sufficient. There may still be cases where the circumstances themselves eloquently speak to such acceptance. Normally when a person gifts properties to another and it is not an onerous gift, one may expect the other to accept such a gift when once it comes to his knowledge, since normally, any person would be only too willing to promote his own interest. Maybe in particular cases there may be peculiar circumstances which may show that the donee would not have accepted the gift. But these are rather the exceptions than the rule. It is then only normal to assume the rule. It is only normal to assume that the donee would have accepted the gift deed. One would have to look into the circumstances of the case in order to see whether

1 AIR 1997 Ori 131
2 AIR 1995 Mad 415
3 AIR 1975 Pat 140
4 1973 Kerala LJ 354 : 1973 KLT 961

acceptance could be read. Mere silence may sometimes be indicative of acceptance provided it is shown that the donee knew about the gift. Essentially, this is a question of fact to be considered on the background of circumstances of each case."

18. Mr Iyer, however, submitted that it would be open to the donors to prove that in fact no possession had been handed over. Strong reliance in this behalf has been placed on *S.V.S. Muhammad Yusuf Rowther* v. *Mohd. Yusuf Rowther*[5] and *Alavi* v. *Aminakutty*[6].

19. In *S.V.S. Muhammad Yusuf Rowther*[5] the Madras High Court was dealing with a case of gift under the Mohammedan Law. Therein it was opined: (AIR p. 529, para 11)

> "*11.* In my judgment, learned counsel for the appellants is justified in his complaint that the courts below have wrongly thrown the onus of proving that this requirement as to delivery of possession had been complied with on the contesting defendants. It is no doubt true that delivery of possession of gifted properties is an essential condition of the validity of the gift and its operative nature under the Muslim Law and it would be for the donees to establish it."

20. When a registered document is executed and the executors are aware of the terms and nature of the document, a presumption arises in regard to the correctness thereof. (See *Prem Singh* v. *Birbal*[7].) When such a presumption is raised coupled with the recitals in regard to putting the donee in possession of the property, the onus should be on the donor and not on the donee.

21. In *Alavi*[6], Paripoornan, J. (as His Lordship then was) held: (KLT p. 61)

> "It is settled law that where the deed of gift itself recites that the donor has given possession of the properties gifted to the donee, such a recital is binding on the heirs of the donor. It is an admission binding on the donor and those claiming under him. Such a recital raised a rebuttable presumption and *is ordinarily* sufficient to hold that there was delivery of possession. Therefore, the burden lies on those who allege or claim the contrary *to prove affirmatively* that in spite of the recitals in the gift deed to the effect that possession has been delivered over, in fact, the subject-matter of the gift *was not* delivered over to the donees."

(emphasis in original)

22. Section 91 of the Evidence Act covers both contract as also grant and other types of disposal of property. A distinction may exist in relation to a recital and the terms of a contract but such a question does not arise herein inasmuch as the said deeds of gift were executed out of love and affection as well as on the ground that the donee is the son and successor of the donor and so as to enable him to live a good family life.

5 AIR 1958 Mad 527
6 1984 KLT 61 (SN)
7 (2006) 5 SCC 353

23. Could they now turn round and say that he was to fulfil a promise? The answer thereto must be rendered in the negative. It is one thing to say that the execution of the deed is based on an aspiration or belief, but it is another thing to say that the same constituted an onerous gift. What, however, was necessary is to prove undue influence so as to bring the case within the purview of Section 16 of the Contract Act. It was not done. The deeds of gift categorically state, as an ingredient for a valid transaction, that the property had been handed over to the donee and he had accepted the same. In our opinion, even assuming that the legal presumption therefor may be raised, the same is a rebuttable one but in a case of this nature, a heavy onus would lie on the donors.

24. Keeping in view the relationship of the parties and further in view of the fact that admittedly the appellant had not been residing in India for a long time, neither the possession of the document nor the payment of tax nor non-mutation of the name by itself would be sufficient to show that the execution of the deeds of gift by the defendants were not voluntary acts on their part. It can never be the intention of a son to drive away the parents from the house as soon as the deeds of gift are executed. Parents while gifting the property to a successor out of love and affection as also with a view to enable him to live a peaceful life, would not like to lose both the property as also their son.

25. Our attention has been drawn to a decision of the Privy Council in *Nawab Mirza Mohammad Sadiq Ali Khan* v. *Nawab Fakr Jahan Begam*[8] wherein again while dealing with a case of gift governed by Mohammedan Law, it was stated: (AIR p. 18)

> "The first objection being against the tenor of the deed, the burden of proof is clearly upon those who dispute the gift. No possible reason is suggested why Baqar Ali should have desired to put a portion of this property in anyone else's name except, possibly, an inherent propensity for benami or 'ism farzi' transactions. On the other hand, the reason recited in the deed that he desired to provide his favourite wife with an alternative residence at Kairabad is to say the least of it, understandable. The portion assigned to her contained the zenana quarters, where she ordinarily put up when accompanying her husband on his apparently not infrequent visits to the kothi, and it is clear from the evidence of his other gifts to her which are now established, that he had a great desire to provide for her future comfort on a generous scale. Against this all that can be said is that during his lifetime she exercised no individual acts of proprietorship over any portion of the Kairabad establishment; that in her and her husband's absence the serai was occupied by the servants of the estate; that such repairs as were necessary were done at Baqar Ali's expense, and that no mutation of names was made in the government records. In Their Lordships' opinion, these facts are not sufficient to establish that the transaction was merely colourable. The deed was handed over to the donee and remained in her possession, and Their

8 AIR 1932 PC 13

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> Lordships have no doubt that Baqar Ali intended to make a genuine gift of the property to her."

a In regard to handing over of the possession, it was held: (*Nawab Mirza case*[8], AIR p. 19)

> "... In the second place, the deed of gift was handed over to the donee as soon as it was registered. In the case of a gift by a husband to his wife, Their Lordships do not think that Mahomedan Law requires actual vacation by the husband and an actual taking of separate b possession by the wife. In their opinion the declaration made by the husband, followed by the handing over of the deed are amply sufficient to establish a transfer of possession."

26. It will bear repetition to state that we are in this case concerned with the construction of recitals made in a registered document.

c **27.** Mr Iyer also relied upon a decision of the Oudh High Court in *Jhumman* v. *Husain*[9] to show that a declaration that possession had been given is not conclusive. Therein again, the Court was dealing with a case of gift under Mohammedan Law. In that case, the gift was accepted after the death of the donor and it was in that situation that emphasis was laid on handing over of possession as a condition of valid gift.

d **28.** In *Gangabai* v. *Chhabubai*[10] wherein also reliance has been placed by Mr Iyer, it was held that the bar created under Sections 91 and 92 of the Evidence Act would operate unless it comes within the purview of the exceptions specified therein. Therein the question which arose for consideration related to the nature of transaction and not the terms of the grant.

e **29.** Mr Iyer places reliance on *Tyagaraja Mudaliyar* v. *Vedathanni*[11] wherein again correctness or otherwise of the nature of document itself was in question and in that view of the matter adduction of oral evidence was not held to be a bar in terms of Section 91 of the Evidence Act.

30. Once a gift is complete, the same cannot be rescinded. For any reason f whatsoever, the subsequent conduct of a donee cannot be a ground for rescission of a valid gift.

31. For the reasons aforementioned, the impugned judgment cannot be sustained and, thus, judgments of the High Court as also the first appellate court are set aside and that of the trial court restored. The appeal is allowed. No costs.

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h 9 AIR 1931 Oudh 7
10 (1982) 1 SCC 4 : AIR 1982 SC 20
11 AIR 1936 PC 70

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(2014) 9 Supreme Court Cases 445

(BEFORE T.S. THAKUR, V. GOPALA GOWDA AND C. NAGAPPAN, JJ.)

RENIKUNTLA RAJAMMA
(DEAD) BY LEGAL REPRESENTATIVES . . Appellant;

Versus

K. SARWANAMMA . . Respondent.

Civil Appeal No. 4195 of 2008†, decided on July 17, 2014

A. **Property Law — Transfer of Property Act, 1882 — Ss. 123, 122 and 129 (after its amendment in 1929) — Gift of immovable property reserving life interest in property for donor, valid — Delivery of possession to donee not essential condition — Rule of Hindu law making transfer of possession a condition for completion of a valid gift stood superseded by S. 123 after the 1929 amendment to S. 129 — Property gifted by retaining possession and right to receive rents of property by donor during donor's lifetime — Held, gift valid — Family and Personal Laws — Hindu Law — Gift**

B. **Property Law — Transfer of Property Act, 1882 — Ss. 122 and 123 — Gift — Retention of life interest by donor, held, valid**

C. **Property Law — Transfer of Property Act, 1882 — S. 126 — Irrevocability of valid gift — Affirmed**

The appellant, a Hindu woman, executed a registered gift deed in respect of an immovable property in favour of the respondent reserving to herself the right to retain possession and to receive rents of the property during her lifetime. The gift was accepted by the respondent. But subsequently the appellant revoked the gift deed by a revocation deed. The respondent filed a suit assailing the revocation deed and seeking a declaration that the same was invalid and void ab initio. The trial court found that the appellant-defendant had failed to prove that the gift deed set up by the respondent-plaintiff was vitiated by fraud or undue influence or that it was a sham or nominal document. The gift, according to the trial court, had been validly made and accepted by the respondent-plaintiff, hence, was irrevocable in nature. It was also held that since the appellant donor had taken no steps to assail the gift made by her for more than 12 years, the same was voluntary in nature and free from any undue influence, misrepresentation or suspicion. The fact that the appellant donor had reserved the right to enjoy the property during her lifetime did not affect the validity of the deed, opined the trial court. Accordingly, the suit was decreed. The first appellate court and the High Court in second appeal concurred with the findings of the trial court.

An apparent conflict between two earlier decisions of the Supreme Court viz. *Naramadaben Maganlal Thakker*, (1997) 2 SCC 255 and *K. Balakrishnan*, (2004) 1 SCC 581 had led to reference to the present Bench of the Court for an authoritative pronouncement as to the true and correct interpretation of Sections 122 and 123 of the Transfer of Property Act.

† From the Judgment and Order dated 9-3-2006 in Second Appeal No. 809 of 2003 of the High Court of Judicature of Andhra Pradesh at Hyderabad

Dismissing the donor's appeal, the Supreme Court

Held :

Section 123 read with Section 122 of the TP Act provides that a gift made by a registered instrument duly signed by or on behalf of the donor and attested by at least two witnesses is valid, if the same is accepted by or on behalf of the donee. That such acceptance must be given during the lifetime of the donor and while he is still capable of giving is evident from a plain reading of Section 122. A conjoint reading of Sections 122 and 123 makes it abundantly clear that "transfer of possession" of the property covered by the registered instrument of the gift duly signed by the donor and attested as required is not a sine qua non for the making of a valid gift. (Para 11)

Section 123 of the TP Act is in two parts. The first part deals with gifts of immovable property while the second part deals with gifts of movable property. The difference in the two provisions lies in the fact that insofar as the transfer of movable property by way of gift is concerned the same can be effected by a registered instrument or by delivery. Such transfer in the case of immovable property no doubt requires a registered instrument but the provision does not make delivery of possession of the immovable property gifted as an additional requirement for the gift to be valid and effective. If the intention of the legislature was to make delivery of possession of the property gifted also as a condition precedent for a valid gift, the provision could and indeed would have specifically said so. There is indeed no provision in law that ownership in property cannot be gifted without transfer of possession of such property. Absence of any such requirement can only lead to the conclusion that delivery of possession is not an essential prerequisite for the making of a valid gift in the case of immovable property. (Paras 16 and 18)

K. Balakrishnan v. *K. Kamalam*, (2004) 1 SCC 581, *affirmed*

Lallu Singh v. *Gur Narain*, AIR 1922 All 467, *approved*

Dharmodas Das v. *Nistarini Dasi*, ILR (1887) 14 Cal 446; *Balbhadra* v. *Bhowani*, ILR (1907) 34 Cal 853; *Alabi Koya* v. *Mussa Koya*, ILR (1901) 24 Mad 513; *Madhavrao Moreshvar Pant Amatya* v. *Kashibai Kom Dattubhai*, ILR (1910) 34 Bom 287; *Man Bhari* v. *Naunidh*, ILR (1882) 4 All 40; *Balmakund* v. *Bhagwan Das*, ILR (1894) 16 All 185; *Phul Chand* v. *Lakkhu*, ILR (1903) 25 All 358; *Tricomdas Cooverji Bhoja* v. *Gopinath Jiu Thakur*, (1916-17) 44 IA 65 : (1917) 5 LW 654 : AIR 1916 PC 182, *cited*

The language employed in Section 129 before its amendment was clear enough to give Section 123 an overriding effect vis-à-vis rules of Hindu law pertaining to gift including the rule that required possession of the property gifted to be given to the donee. The amendment has made the position more explicit by bringing all other rules of Hindu and Buddhist law also under Chapter VII and removing the protection earlier available to such rules from the operation of Chapter VII. Judicial pronouncements as to the true and correct interpretation of Section 123 of the TP Act have for a fairly long period held that Section 123 of the Act supersedes the rule of Hindu Law which makes the delivery of possession an essential condition for the completion of a valid gift. (Paras 12, 14 and 15)

Revappa v. *Madhava Rao*, AIR 1960 Mys 97; *Tirath* v. *Manmohan Singh*, AIR 1981 P&H 174, *approved*

Bhagwan Prasad v. *Harisingh*, AIR 1925 Nag 199, *cited*

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The decision in *Maganlal Thakker*, (1997) 2 SCC 255 clearly rests on the facts of that case. Absolute transfer of ownership in the gifted property in favour of the donee was absent in that case which led the Supreme Court to hold that the gift was conditional and had to become operative only after the death of the donee. The judgment is in that view clearly distinguishable and cannot be read to be an authority for the proposition that delivery of possession is an essential requirement for making a valid gift. (Para 19)

Naramadaben Maganlal Thakker v. *Pranjivandas Maganlal Thakker*, (1997) 2 SCC 255, *distinguished on facts*

In the present case, the execution of registered gift deed and its attestation by two witnesses is not in dispute. It has also been concurrently held by all the three courts below that the donee had accepted the gift. The recitals in the gift deed also prove transfer of absolute title in the gifted property from the donor to the donee. What is retained is only the right to use the property during the lifetime of the donor which does not in any way affect the transfer of ownership in favour of the donee by the donor. Therefore, the High Court was justified in refusing to interfere with the decree passed in favour of the donee. (Paras 20 and 21)

R. Rajamma v. *K. Sarwanamma*, Second Appeal No. 809 of 2003, order dated 9-3-2006 (AP), *affirmed*

Renikuntla Rajamma v. *K. Sarwanamma*, (2014) 9 SCC 456, *referred to*

R-D/53542/CV

Advocates who appeared in this case :
Nitin S. Tambwekar, S.B Sai and K. Rajeev, Advocates, for the Appellant;
Venkateswara Rao Anumolu, Prabhakar Parnam and J.N. Singh, Advocates, for the Respondent.

Chronological list of cases cited — ***on page(s)***

1.	(2014) 9 SCC 456, *Renikuntla Rajamma* v. *K. Sarwanamma*	448*a-b*
2.	Second Appeal No. 809 of 2003, order dated 9-3-2006 (AP), *R. Rajamma* v. *K. Sarwanamma*	449*b-c*
3.	(2004) 1 SCC 581, *K. Balakrishnan* v. *K. Kamalam*	448*a-b*, 449*h*, 453*e*, 454*a*, 454*f-g*
4.	(1997) 2 SCC 255, *Naramadaben Maganlal Thakker* v. *Pranjivandas Maganlal Thakker*	448*a*, 449*f-g*, 454*g*, 455*a-b*, 455*d-e*
5.	AIR 1981 P&H 174, *Tirath* v. *Manmohan Singh*	450*a*, 453*a*
6.	AIR 1960 Mys 97, *Revappa* v. *Madhava Rao*	450*a*, 453*a*
7.	AIR 1925 Nag 199, *Bhagwan Prasad* v. *Harisingh*	450*a*
8.	AIR 1922 All 467, *Lallu Singh* v. *Gur Narain*	451*b-c*, 452*a-b*, 452*d-e*
9.	(1916-17) 44 IA 65 : (1917) 5 LW 654 : AIR 1916 PC 182, *Tricomdas Cooverji Bhoja* v. *Gopinath Jiu Thakur*	452*a*
10.	ILR (1910) 34 Bom 287, *Madhavrao Moreshvar Pant Amatya* v. *Kashibai Kom Dattubhai*	451*f*
11.	ILR (1907) 34 Cal 853, *Balbhadra* v. *Bhowani*	451*f*
12.	ILR (1903) 25 All 358, *Phul Chand* v. *Lakkhu*	451*f-g*
13.	ILR (1901) 24 Mad 513, *Alabi Koya* v. *Mussa Koya*	451*f*
14.	ILR (1894) 16 All 185, *Balmakund* v. *Bhagwan Das*	451*f-g*
15.	ILR (1887) 14 Cal 446, *Dharmodas Das* v. *Nistarini Dasi*	451*f*
16.	ILR (1882) 4 All 40, *Man Bhari* v. *Naunidh*	451*f*

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The Judgment of the Court was delivered by

T.S. THAKUR, J.— An apparent conflict between two earlier decisions rendered by this Court, one in *Naramadaben Maganlal Thakker* v. *Pranjivandas Maganlal Thakker*[1] and the other in *K. Balakrishnan* v. *K. Kamalam*[2] has led to this reference to a larger Bench[3] for an authoritative pronouncement as to the true and correct interpretation of Sections 122 and 123 of the Transfer of Property Act, 1882. Before we deal with the precise area in which the two decisions take divergent views, we may briefly set out the factual matrix in which the controversy arises.

2. The respondent-plaintiff in this appeal filed OS No. 979 of 1989 for a declaration to the effect that revocation deed dated 5-3-1986 executed by the appellant-defendant purporting to revoke a gift deed earlier executed by her was null and void. The plaintiff's case as set out in the plaint was that the gift deed executed by the appellant-defendant was valid in the eye of the law and had been accepted by the plaintiff when the defendant donee had reserved to herself during for life, the right to enjoy the benefits arising from the suit property. The purported revocation of the gift in favour of the respondent-plaintiff in terms of the revocation deed was, on that basis, assailed and a declaration about its being invalid and void ab initio prayed for.

3. The suit was contested by the appellant-defendant herein on several grounds including the ground that the gift deed executed in favour of the plaintiff was vitiated by fraud, misrepresentation and undue influence. The parties led evidence and went through the trial with the trial court eventually holding that the deed purporting to revoke the gift in favour of the plaintiff was null and void. The trial court found that the defendant had failed to prove that the gift deed set up by the plaintiff was vitiated by fraud or undue influence or that it was a sham or nominal document. The gift, according to the trial court, had been validly made and accepted by the plaintiff, hence, irrevocable in nature. It was also held that since the donor had taken no steps to assail the gift made by her for more than 12 years, the same was voluntary in nature and free from any undue influence, misrepresentation or suspicion. The fact that the donor had reserved the right to enjoy the property during her lifetime did not affect the validity of the deed, opined the trial court.

4. In the first appeal preferred against the said judgment and decree, the First Additional District Judge, Warangal affirmed the view taken by the trial court and held that the plaintiff had satisfactorily proved the execution of a valid gift in his favour and that the revocation of a validly made gift deed was legally impermissible. The first appellate court also held that the gift deed was not a sham document, as alleged by the defendant and that its purported cancellation/revocation was totally ineffective. The defendant's case that she had apprehended grabbing of the property by Sankaraiah forcing her to make a sham gift deed was held not established especially when Sankaraiah had died three years prior to the execution of the revocation deed by the

1 (1997) 2 SCC 255
2 (2004) 1 SCC 581
3 *Renikuntla Rajamma* v. *K. Sarwanamma*, (2014) 9 SCC 456

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defendant. If the gift deed was executed by the donor to save the property from the covetous eyes of Sankaraiah, as alleged by the defendant, there was
a no reason why the defendant should have waited for three years after the death of Sankaraiah before revoking the same reasoned the court. The first appellate court also affirmed the finding of the trial court that the donee had accepted the gift made in his favour. The appeal filed by the defendant (the appellant herein) was on those findings dismissed.

5. Concurrent findings of facts recorded by the courts below did not deter
b the appellants from preferring Civil Second Appeal No. 809 of 2003 in which the appellants made an attempt to assail the said findings. The High Court, however, declined to interfere with the judgments and orders impugned before it and dismissed[4] the second appeal of the appellant holding that the case set up by the defendant that the gift was vitiated by undue influence or fraud had been thoroughly disproved at the trial. The present appeal is the
c last ditch attempt by the defendants to assail the findings recorded against them.

6. When the special leave petition came up for preliminary hearing before a Division Bench of this Court, the only question which was urged on behalf of the appellant was whether retention of possession of the gifted property for enjoyment by the donor during her lifetime and the right to
d receive the rents of the property in any way affected the validity of the gift. That a gift deed was indeed executed by the donor in favour of the donee and that the donee had accepted the gift was not challenged and the finding to that effect has not been assailed even before us. So also the challenge to the gift on the ground of fraud, misrepresentation and undue influence, having been repelled by the courts below, the gift stands proved in all material
e respects. All that was contended on behalf of the appellant was that since the donor had retained to herself the right to use the property and to receive rents during her lifetime, such a reservation or retention rendered the gift invalid. A conditional gift was not envisaged by the provisions of the Transfer of Property Act, argued the learned counsel for the appellant. Inasmuch as the gift deed failed to transfer title, possession and the right to deal with the
f property in absolute terms in favour of the donee the same was no gift in the eye of the law, contended the learned counsel for the appellant. Reliance in support of that submission was placed by the learned counsel upon the decision of this Court in *Naramadaben Maganlal Thakker* v. *Pranjivandas Maganlal Thakker*[1].

7. On behalf of the respondents it was per contra argued that the validity
g of the gift having been upheld by the courts below, the only question that remains to be examined was whether a gift which reserved a life interest for the donor could be said to be invalid. That question was, according to the learned counsel, squarely answered in favour of the respondents by the decision of this Court in *K. Balakrishnan* v. *K. Kamalam*[2].

h 4 *R. Rajamma* v. *K. Sarwanamma*, Second Appeal No. 809 of 2003, order dated 9-3-2006 (AP)
1 (1997) 2 SCC 255
2 (2004) 1 SCC 581

8. Reliance was also placed by the learned counsel upon *Bhagwan Prasad* v. *Harisingh*[5], *Revappa* v. *Madhava Rao*[6] and *Tirath* v. *Manmohan Singh*[7] in support of the submission that transfer of possession was a condition under the Hindu law for a valid gift which rule of Hindu law stood superseded by Section 123 of the Transfer of Property Act.

9. Chapter VII of the Transfer of Property Act, 1882 deals with gifts generally and, inter alia, provides for the mode of making gifts. Section 122 of the Act defines "gift" as a transfer of certain existing movable or immovable property made voluntarily and without consideration by one person called the donor to another called the donee and accepted by or on behalf of the donee. In order to constitute a valid gift, acceptance must, according to this provision, be made during the lifetime of the donor and while he is still capable of giving. It stipulates that a gift is void if the donee dies before acceptance.

10. Section 123 regulates the mode of making a gift and, inter alia, provides that a gift of immovable property must be effected by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. In the case of movable property, transfer either by a registered instrument signed as aforesaid or by delivery is valid under Section 123. Section 123 may at this stage be gainfully extracted:

> "**123.** ***Transfer how effected***.—For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.
>
> For the purpose of making a gift of movable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.
>
> Such delivery may be made in the same way as goods sold may be delivered."

11. Sections 124 to 129 which are the remaining provisions that comprise Chapter VII deal with matters like gift of existing and future property, gift made to several persons of whom one does not accept, suspension and revocation of a gift, and onerous gifts including effect of non-acceptance by the donee of any obligation arising thereunder. These provisions do not concern us for the present. All that is important for the disposal of the case at hand is a careful reading of Section 123 (supra) which leaves no manner of doubt that a gift of immovable property can be made by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. When read with Section 122 of the Act, a gift made by a registered instrument duly signed by or on behalf of the donor and attested by at least two witnesses is valid, if the same is accepted by or on behalf of the donee. That such acceptance must be given during the lifetime of the donor and while he is still capable of giving is evident from a plain reading of Section 122 of the Act. A conjoint reading of Sections 122 and 123 of the Act makes

5 AIR 1925 Nag 199
6 AIR 1960 Mys 97
7 AIR 1981 P&H 174

it abundantly clear that "transfer of possession" of the property covered by the registered instrument of the gift duly signed by the donor and attested as required is not a sine qua non for the making of a valid gift under the provisions of the Transfer of Property Act, 1882.

12. Judicial pronouncements as to the true and correct interpretation of Section 123 of the TP Act have for a fairly long period held that Section 123 of the Act supersedes the rule of Hindu law if there was any making delivery of possession an essential condition for the completion of a valid gift.

13. A Full Bench comprising five Hon'ble Judges of the High Court of Allahabad has in *Lallu Singh* v. *Gur Narain*[8] referred to several such decisions in which the provisions of Section 123 have been interpreted to be overruling the Hindu law requirement of delivery of possession as a condition for making of a valid gift. This is evident from the following passage from the above decision where the High Court repelled in no uncertain terms the contention that Section 123 of the TP Act merely added one more requirement of law, namely, attestation and registration of a gift deed to what was already enjoined by the Hindu law and that Section 123 did not mean that where there was a registered instrument duly signed and attested, other requirements of the Hindu law stood dispensed with:

> "7. Dr Katju, on behalf of the appellant, has strongly contended that by Section 123 it was merely intended to add one more requirement of law, namely, that of attestation and registration, to those enjoined by the Hindu law, and that the section did not mean that where there was a registered document duly signed and attested, all the other requirements of the Hindu law were dispensed with. Section 123 has, however, been interpreted by all the High Courts continuously for a very long period in the way first indicated, and there is now a uniform consensus of opinion that the effect of Section 123 is to supersede the rule of Hindu law, if there was any, for making the delivery of possession absolutely essential for the completion of the gift. We may only refer to a few cases for the sake of reference, *Dharmodas Das* v. *Nistarini Dasi*[9], *Balbhadra* v. *Bhowani*[10], *Alabi Koya* v. *Mussa Koya*[11], *Madhavrao Moreshvar Pant Amatya* v. *Kashibai Kom Dattubhai*[12], *Man Bhari* v. *Naunidh*[13], *Balmakund* v. *Bhagwan Das*[14] and *Phul Chand* v. *Lakkhu*[15]. Where the terms of a statute or ordinance are clear, then even a long and uniform course of judicial interpretation of it may be overruled, if it is contrary to the clear meaning of the enactment but where such is not the case, then it is our duty to accept the interpretation so often and so long put upon the

8 AIR 1922 All 467
9 ILR (1887) 14 Cal 446
10 ILR (1907) 34 Cal 853
11 ILR (1901) 24 Mad 513
12 ILR (1910) 34 Bom 287
13 ILR (1882) 4 All 40
14 ILR (1894) 16 All 185
15 ILR (1903) 25 All 358

statute by the courts, and not to disturb those decisions, vide the remarks of Their Lordships decisions, of the Privy Council in *Tricomdas Cooverji Bhoja* v. *Gopinath Jiu Thakur*[16]. We are, therefore, clearly of opinion that it must now be accepted that the provisions of Section 123 do away with the necessity for the delivery of possession, even if it was required by the strict Hindu law." a

14. The logic for the above view in *Lallu Singh case*[8] flowed from the language of Section 129 of the TP Act which as on the date of the decision rendered by the High Court of Allahabad used the words "*save as provided by Section 123 of the Act*". Section 129 of the TP Act was, before its amendment in the year 1929, as under: b

> "**129.** ***Saving of donations mortis causa and Muhammadan law***.—Nothing in this Chapter relates to gifts of movable property made in contemplation of death, or shall be deemed to affect any rule of Muhammadan law or, save as provided by Section 123, any rule of Hindu or Buddhist law. " c

A plain reading of the above made it manifest that the "*rules of Hindu law*" and "*Buddhist law*" were to remain unaffected by Chapter VII except to the extent such rules were in conflict with Section 123 of the Transfer of Property Act. This clearly implied that Section 123 had an overriding effect on the rules of Hindu law pertaining to gift including the rule that required possession of the property gifted to be given to the donee. The decisions of the High Courts referred to in the passage extracted above from *Lallu Singh case*[8] have consistently taken the view that Section 123 supersedes the rules of Hindu law which may have required delivery of possession as an essential condition for the completion of a gift. The correctness of that statement of law cannot be questioned. The language employed in Section 129 before its amendment was clear enough to give Section 123 an overriding effect vis-à-vis rules of Hindu law. d e

15. Section 129 was amended by Act 20 of 1929 whereby the words "*or, save as provided by Section 123, any rule of Hindu or Buddhist law*" have been deleted. Section 129 of the TP Act today reads as under:

> "**129.** ***Saving of donations mortis causa and Muhammadan law***.—Nothing in this Chapter relates to gifts of movable property made in contemplation of death, or shall be deemed to affect any rule of Muhammadan law." f

The above leaves no doubt that the law today protects only the rules of Muhammadan law from the rigours of Chapter VII relating to gifts. This implies that the provisions of Hindu law and Buddhist law saved under Section 129 (*which saving did not extend to saving such rules from the provisions of Section 123 of the TP Act*) prior to its amendment are no longer saved from the overriding effect of Chapter VII. The amendment has made the position more explicit by bringing all other rules of Hindu and Buddhist law also under the Chapter VII and removing the protection earlier available g h

16 (1916-17) 44 IA 65 : (1917) 5 LW 654 : AIR 1916 PC 182
8 *Lallu Singh* v. *Gur Narain*, AIR 1922 All 467

to such rules from the operation of Chapter VII. Decisions of the High Court of Mysore in *Revappa* v. *Madhava Rao*[6] and the High Court of Punjab and Haryana in *Tirath* v. *Manmohan Singh*[7], in our opinion, correctly take the view that Section 123 supersedes the rules of Hindu law insofar as such rules required delivery of possession to the donee.

16. The matter can be viewed from yet another angle. Section 123 of the TP Act is in two parts. The first part deals with gifts of immovable property while the second part deals with gifts of movable property. Insofar as the gifts of immovable property are concerned, Section 123 makes transfer by a registered instrument mandatory. This is evident from the use of word "transfer must be effected" used by Parliament insofar as immovable property is concerned. In contradiction to that requirement the second part of Section 123 dealing with gifts of movable property, simply requires that gift of movable property may be effected either by a registered instrument signed as aforesaid or "by delivery". The difference in the two provisions lies in the fact that insofar as the transfer of movable property by way of gift is concerned the same can be effected by a registered instrument or by delivery. Such transfer in the case of immovable property no doubt requires a registered instrument but the provision does not make delivery of possession of the immovable property gifted as an additional requirement for the gift to be valid and effective. If the intention of the legislature was to make delivery of possession of the property gifted also as a condition precedent for a valid gift, the provision could and indeed would have specifically said so. Absence of any such requirement can only lead us to the conclusion that delivery of possession is not an essential prerequisite for the making of a valid gift in the case of immovable property.

17. That brings us to the decisions of this Court which have led to this reference. In *K. Balakrishnan case*[2] the donor executed a gift deed of a specified share of the property inherited by her from her maternal grandfather in favour of her minor son who was the appellant donee before the Court and her four year old daughter. The property gifted included a school building. The gift deed stipulated that the responsibility to sign in regard to the said school and the right to income would be with the donor during her lifetime and thereafter would be vested in the donee. After the execution of the gift deed the donor cancelled the same and made a will bequeathing the property in favour of her daughter whereupon the appellant donee filed a suit for declaration of his title to the suit property on the basis of the gift and a further declaration for annulment of the cancellation deed and the will executed by the donor. The trial court dismissed the suit while the first appellate court decreed the same. The High Court restored the view taken by the trial court and held that when the donor had reserved to herself the right to sign the papers with respect to management of the school and the right to take usufruct from the property where the school was situated, no property was transferred under the deed. In appeal before this Court, the view taken by

6 AIR 1960 Mys 97
7 AIR 1981 P&H 174
2 *K. Balakrishnan* v. *K. Kamalam*, (2004) 1 SCC 581

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the High Court was reversed and that taken by the first appellate court restored. This Court held: (*K. Balakrishnan case*[2], SCC p. 586, paras 10-11)

> "*10.* We have critically examined the contents of the gift deed. To us, it appears that the donor had very clearly transferred to the donees ownership and title in respect of her *1/8th share in properties. It was open to the donor to transfer by gift title and ownership in the property and at the same time reserve its possession and enjoyment to herself during her lifetime. There is no prohibition in law that ownership in a property cannot be gifted without its possession and right of enjoyment. Under Section 6 of the Transfer of Property Act* 'property of any kind may be transferred' except those mentioned in clauses (*a*) to (*i*). Section 6 in relevant part reads thus:
>
> '**6.** ***What may be transferred.***—Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force.
>
> (*a*) * * *
>
> (*b*) A mere right to re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby.
>
> (*c*) * * *
>
> (*d*) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.
>
> (*e*) A mere right to sue cannot be transferred.'
>
> *11.* Clause (*d*) of Section 6 is not attracted on the terms of the gift deed herein because it was not a property, the enjoyment of which was restricted to the owner personally. She was the absolute owner of the property gifted and it was not restricted in its enjoyment to herself. She had inherited it from her maternal father as a full owner. *The High Court was, therefore, apparently wrong in coming to the conclusion that the gift deed was ineffectual merely because the donor had reserved to herself the possession and enjoyment of the property gifted.*"
>
> (emphasis supplied)

18. We are in respectful agreement with the statement of law contained in the above passage in *K. Balakrishnan case*[2]. There is indeed no provision in law that ownership in property cannot be gifted without transfer of possession of such property. As noticed earlier, Section 123 does not make the delivery of possession of the gifted property essential for validity of a gift. It is true that the attention of this Court does not appear to have been drawn to the earlier decision rendered in *Naramadaben Maganlal Thakker*[1] where this Court had on a reading of the recital of the gift deed and the cancellation deed held that the gift was not complete. This Court had in that case found that the donee had not accepted the gift thereby making the gift incomplete. This Court further held that the donor cancelled the gift within a month of the gift and subsequently executed a will in favour of the appellant:

2 *K. Balakrishnan* v. *K. Kamalam*, (2004) 1 SCC 581
1 (1997) 2 SCC 255

on a proper construction of the deed and the deed cancelling the same this Court held that the gift in favour of the donee was conditional and that there
a was no acceptance of the same by the donee. The gift deed conferred a limited right upon the donee and was to become operative after the death of the donee. This is evident from the following passage from the said judgment: (*Naramadaben Maganlal Thakker case*[1], SCC p. 258, para 7)

> "7. It would thus be clear that the execution of a registered gift deed, acceptance of the gift and delivery of the property, together make the gift
> b complete. Thereafter, the donor is divested of his title and the donee becomes the absolute owner of the property. The question is whether the gift in question had become complete under Section 123 of the TP Act? It is seen from the recitals of the gift deed that Motilal Gopalji gifted the property to the respondent. In other words, it was a conditional gift. There is no recital of acceptance nor is there any evidence in proof of
> c acceptance. Similarly, he had specifically stated that the property would remain in his possession till he was alive. Thereafter, the gifted property would become his property and he was entitled to collect mesne profits in respect of the existing rooms throughout his life. The gift deed conferred only limited right upon the respondent donee. The gift was to become operative after the death of the donor and he was to be entitled to
> d have the right to transfer the property absolutely by way of gift or he would be entitled to collect the mesne profits. It would thus be seen that the donor had executed a conditional gift deed and retained the possession and enjoyment of the property during his lifetime."

19. The above decision in *Maganlal Thakker case*[1] clearly rests on the facts of that case. If the gift was conditional and there was no acceptance of the donee it could not operate as a gift. Absolute transfer of ownership in the
e gifted property in favour of the donee was absent in that case which led this Court to hold that the gift was conditional and had to become operative only after the death of the donee. The judgment is in that view clearly distinguishable and cannot be read to be an authority for the proposition that delivery of possession is an essential requirement for making a valid gift.

20. In the case at hand as already noticed by us, the execution of
f registered gift deed and its attestation by two witnesses is not in dispute. It has also been concurrently held by all the three courts below that the donee had accepted the gift. The recitals in the gift deed also prove transfer of absolute title in the gifted property from the donor to the donee. What is retained is only the right to use the property during the lifetime of the donor which does not in any way affect the transfer of ownership in favour of the
g donee by the donor.

21. The High Court was in that view perfectly justified in refusing to interfere with the decree passed in favour of the donee. This appeal accordingly fails and is hereby dismissed but in the circumstances without any order as to costs.

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1 *Naramadaben Maganlal Thakker* v. *Pranjivandas Maganlal Thakker*, (1997) 2 SCC 255

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(2021) 3 Supreme Court Cases 459

(BEFORE N.V. RAMANA, S. ABDUL NAZEER AND SURYA KANT, JJ.)

3J

a DAULAT SINGH (DEAD) THROUGH LEGAL REPRESENTATIVES .. Appellants;

Versus

STATE OF RAJASTHAN AND OTHERS .. Respondents.

Civil Appeal No. 5650 of 2010†, decided on December 8, 2020

b A. **Property Law — Transfer of Property Act, 1882 — Ss. 122 and 123 — Gift of immovable property when becomes complete — Acceptance of gift — Acceptance by or on behalf of donee must be made during lifetime of donor and while he is still capable of giving — Execution of gift deed registered and attested in accordance with S. 123 TPA, and acceptance of such gift make gift of immovable property complete —Thereafter, donor is divested of the title or c interest being gifted, and donee becomes owner of the gifted property, estate or interest — [Ed.: Delivery of possession is not an essential prerequisite for the making of a valid gift in the case of immovable property, as was clarified by a three-Judge Bench in *Renikuntla Rajamma*, (2014) 9 SCC 445, though as in the facts of the present case, delivery of possession would be relevant in inferring acceptance of the gift by conduct—*see* Shortnote *C*] (Paras 20 to 26)**

d B. **Property Law — Transfer of Property Act, 1882 — Ss. 122 and 123 — "Acceptance" — Meaning — Acceptance is the receipt of a thing offered by another with an intention to retain it, for instance, the acceptance of a gift — Words and Phrases — "Acceptance"**

C. **Property Law — Transfer of Property Act, 1882 — Ss. 122 and 123 — Acceptance of gift by conduct — Held, acceptance being an act of receiving e willingly, acceptance can be inferred from conduct of donee in the facts and circumstances of the case**

— There may be various means to prove acceptance of a gift — Document may be handed over to a donee, which in a given situation may also amount to a valid acceptance — Fact that possession had been given to donee also raises a presumption of acceptance — In the present case recitals of gift clearly f indicate that donor intended to part with ownership and possession immediately after execution of gift deed — Donee was already a major at time of execution of gift deed — As donee did not get along with his stepmother, he started living separately and land was transferred to him by virtue of gift deed by his father was under his possession and he was cultivating the same — Therefore, circumstances clearly indicate that there was an acceptance of gift by donee g during lifetime of donor — Not only the gift deed in itself contained recitals about transfer of possession, but also mutation records and statements of both donor and donee indicate that, there has been an acceptance of gift by conduct — Deed is registered, bears signature of donor and has been attested by two witnesses, requirements under S. 123 TPA have been satisfied — Hence, the gift was complete and valid

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† Arising from the impugned Judgment and Order in *State* v. *Daulat Singh* (Rajasthan High Court, Jodhpur Bench, Civil Special Appeal No. 264 of 1999, dt. 25-4-2008)

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D. **Tenancy and Land Laws — Ceiling on Land — Rajasthan Imposition of Ceiling on Agricultural Holdings Act, 1973 (11 of 1973) — S. 15 — Reopening of case — Limitation — Relevant dates for determination of issue of limitation — Held, is the date of order sought to be reopened and date of issuance of show-cause notice under S. 15 — Notice was sent to appellant on 20-11-1976, that is within five years of the earlier order dt. 15-4-1972 — Further, notice also satisfied requirements as provided under S. 15, and hence was valid — Case was, thus, reopened within time period stipulated under S. 15**

E. **Tenancy and Land Laws — Rajasthan Tenancy Act, 1955 (3 of 1955) — Ss. 30-C, 30-D and 30-DD — Standard ceiling area for a family of five members or less — Transfer of land by father to his son before cut-off date — Validity of, in view of Ss. 30-C and 30-DD**

— Legislature has carved out two separate categories of lands, one which is includable and other which is outside purview of Ceiling laws — Once such a classification has been made, with there being no challenge to its vires, it is solemn duty of every authority to give full effect to the same, in both letter and spirit — Although, it is possible that there can be a voluntary transfer which would meet qualifications of both S. 30-D and S. 30-DD, however, S. 30-DD opens up with a non obstante clause with overriding effect on S. 30-D, as a result of which, any land included within its purview would be protected from rigours of S. 30-D — Therefore, if appellant succeeds in his endeavour to establish that transfer was covered under S. 30-DD, then such transferred land has to be exempted from computation of confiscable land, irrespective of fact that it falls within ceiling limit as prescribed under S. 30-D

— Due to certain family issues, appellant and his son were living separately — During such separation, when transferee son had already attained age of majority, appellant owner of land, who was an agriculturalist himself, transferred aforesaid land in favour of his son, so as to enable him to cultivate the same — Statements of transferor and transferee clearly indicate that transferee had equipment and skills and was sustaining himself as an agriculturalist — Aforesaid transfer was executed way before cut-off date stipulated under S. 30-DD i.e. 31-12-1969 — Therefore, registered gift deed dt. 19-12-1963 was a bona fide transfer squarely covered within ambits of S. 30-DD, which intended to protect rights of agriculturalists — Transfer is not invalid as it stands protected as per provision of S. 30-DD

F. **Tenancy and Land Laws — Ceiling on Land — Rajasthan Imposition of Ceiling on Agricultural Holdings Act, 1973 (11 of 1973) — S. 6 — Transfer of land by father to his son — Applicability of S. 6 — Repeal of Ch. III-B of the Tenancy Act, 1955 through S. 40 of the Ceiling Act, 1973 is not retrospective — Hence, provisions of the Ceiling Act, 1973 are not attracted in present case as case was reopened and decided under provisions of Tenancy Act — Further, S. 6 of the Ceiling Act, 1973 declares that every transfer of land including by way of gift, made on or after 26-9-1970 and before 1-1-1973, shall be deemed to have been made to defeat provisions of the Ceiling Act, 1973**

— In the instant case, gift deed was executed on 19-12-1963, that is much before 26-9-1970 — Therefore also, S. 6 of the Ceiling Act, 1973 does not a affect transfer of land by appellant donor in favour of donee son — There is also no finding that gift deed in present case was actuated upon any extraneous consideration — Hence, it constitutes a bona fide transfer which are exempted from rigours of S. 6 of the Ceiling Act — Rajasthan Tenancy Act, 1955 (3 of 1955) — Ch. III-B — Nature of repeal of by S. 40 of the 1973 Ceiling Act

b *D* now represented through his legal representatives and who shall be referred to as the appellant, was owner of 254.2 bighas of land. On 19-12-1963, he gifted away 127.1 bighas of land to his son, *N*. After the said transfer, the appellant was left with 17.25 standard acres of land, which was below the prescribed limit under the Ceiling Act, 1973.

Although, a proceeding was initiated under the Ceiling law, the same c was dropped on 15-4-1972 by the Court of Deputy Sub-Divisional Officer. While dropping the proceedings, the court observed that, the amendment of Section 30-DD of the Rajasthan Tenancy Act, 1955 was effective from 31-12-1969, and since the gift deed was executed before the aforesaid amendment, the aforesaid transfer was valid.

However, by Notice dated 15-3-1982, the Revenue Ceiling Department d reopened the case of the appellant. The Revenue Ceiling Department while issuing the aforesaid notice stated that the earlier order dated 15-4-1972, passed by the Court of Deputy Sub-Divisional Officer was rendered without investigating whether the land transfers are recognisable as per the provisions of Section 30 of the 1955 Act. The same being in contravention of the provisions, needs to be reopened.

The Court of Additional District Collector declared that the mutation of the e land done in favour of the son of the appellant was invalid as there was no acceptance of the gift. It was declared therein that the appellant was holding 11 standard acres of extra land over and above the ceiling limit. The Collector, therefore, directed the appellant to hand over vacant possession of the aforesaid 11 standard acres of extra land to the Tahsildar.

Aggrieved by the aforesaid order, the appellant preferred an appeal before f the Board of Revenue. The Board of Revenue, modified the order passed by the Additional District Collector, and upon recalculation held that the appellant is holding 4.5 standard acres of land in excess of the ceiling limit.

Aggrieved, the appellant preferred a writ petition under Article 227 of the Constitution before the High Court. The Single Judge of the High Court allowed the writ petition preferred by the appellant. The Court held that the case was beyond the purview of Section 6 of the 1973 Ceiling Act because the land was transferred g by way of gift before 26-9-1970. It was further held that the aforesaid transfer of land, by the appellant in favour of his son by virtue of a registered gift deed, being bona fide, was valid in the eye of the law. The Single Judge, therefore held that there is no surplus land which is available with the appellant which can be resumed.

Thereafter, the respondents preferred an appeal against the above order before the Division Bench of the High Court, which allowed the appeal holding that the h gift deed was invalid as the son of the appellant was unaware about the same. The Division Bench of the High Court held that the Single Judge passed the judgment

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in ignorance of the provisions of Sections 30-C and 30-D of the Tenancy Act, 1955. Therefore, the Division Bench of the High Court set aside the order passed by the Single Judge Bench for being untenable and upheld the order passed by the Board of Revenue.

Aggrieved, the appellant has preferred the present appeal by way of special leave petition before the Supreme Court.

The issues for determination before the Supreme Court were:

(*i*) Whether reopening of the case was beyond the period of limitation?

(*ii*) Whether the registered gift deed executed by the appellant is valid in the eye of the law?

(*iii*) Whether the judgment of the Single Judge is in ignorance of the provisions of Sections 30-C and 30-D of the Tenancy Act, 1955?

Allowing the appeal, the Supreme Court

Held :

Section 122 TPA provides that for a gift to be valid, it must be gratuitous in nature and must be made voluntarily. The said giving away implies a complete dispossession of the ownership in the property by the donor. Acceptance of a gift by the donee can be done anytime during the lifetime of the donor. (Para 20)

Acceptance by or on behalf of the donee must be made during the lifetime of the donor and while he is still capable of giving. (Para 22)

Naramadaben Maganlal Thakker v. *Pranjivandas Maganlal Thakker*, (1997) 2 SCC 255, *followed on this point* [**Ed.**: *Naramadaben Maganlal Thakker case* has impliedly been held to be partly per incuriam by a three-Judge Bench in *Renikuntla Rajamma* v. *K. Sarwanamma*, (2014) 9 SCC 445: see paras 16 to 19 thereof]

Section 122 TPA neither defines acceptance, nor does it prescribe any particular mode for accepting the gift. The word "acceptance" is defined as "the receipt of a thing offered by another with an intention to retain it, as acceptance of a gift". (Para 24)

Ramanatha P. Aiyar: *The Law Lexicon*, 2nd Edn., *relied on*

Acceptance of the gift can be ascertained from the surrounding circumstances such as taking into possession the property by the donee or by being in the possession of the gift deed itself. The only requirement stipulated here is that, the acceptance of the gift must be effectuated within the lifetime of the donor itself. (Para 25)

Hence, being an act of receiving willingly, acceptance can be inferred by the implied conduct of the donee. (Para 26)

There may be various means to prove acceptance of a gift. The document may be handed over to a donee, which in a given situation may also amount to a valid acceptance. The fact that possession had been given to the donee also raises a presumption of acceptance. (Para 26)

Asokan v. *Lakshmikutty*, (2007) 13 SCC 210, *affirmed*

In the present case, the recitals in the gift deed clearly indicate that donor intended to part with ownership and possession immediately after the execution of the gift deed. (Para 27)

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The donee was already a major at the time of the execution of the gift deed. He further stated that after execution of the gift deed the donee started cultivating
a on the same. (Para 28)

In the statement rendered by the appellant donor before the Court of Additional District Magistrate the donee clearly stated that, as he did not get along with his stepmother, he started living separately and the land that was transferred to him by virtue of gift deed was under his possession and he was cultivating the same. (Para 29)

b Therefore, the abovementioned circumstances clearly indicate that there was an acceptance of the gift by the donee during the lifetime of the donor. Not only the gift deed in itself contained recitals about transfer of possession, but also the mutation records and the statements of the both the donor and donee indicate that, there has been an acceptance of the gift by conduct. (Para 30)

Moreover, the deed is registered, bears the signature of the donor and has been
c attested by two witnesses, the requirements under Section 123 TPA have been satisfied. Hence there was a complete and valid gift. (Para 31)

Section 15 of the Ceiling Act, 1973 mandates that after the expiry of five years from the date of final order sought to be reopened, or after the expiry of 30-6-1979, whichever is later, no notice for re-opening of such cases can be issued. Therefore, the relevant dates for determination of the issue of limitation is the date
d of order sought to be reopened and the date of issuance of show-cause notice under Section 15 of the Ceiling Act, 1973. (Para 14)

In the present case the notice for re-opening of the case was sent to the appellant on 20-11-1976 i.e. within five years of the earlier order dated 15-4-1972. Further, the notice also satisfied the requirements as provided under Section 15 of the Ceiling Act, 1973, and hence was valid in the eye of the law. The case was, thus,
e reopened within the time period stipulated under Section 15 of the Ceiling Act, 1973. (Para 16)

The High Court, while passing the impugned order, erroneously held the registered gift deed dated 19-12-1963 to be invalid on the basis that it did not meet the requirements as provided under Section 122 of the Transfer of Property Act, 1882. (Para 17)

f Section 30-C of the Tenancy Act of 1955 provides for the ceiling limit of 30 standard acres for a family of five members or less. The appellant admittedly was having a family of less than five members and was originally holding around 34.4 standard acres. Subsequently, by virtue of registered gift deed dated 19-12-1963, the appellant had transferred around 17.25 standard acres to his son. (Para 36)

Section 30-D of the 1955 Act provides that any transfer, on or after 25-2-1958,
g other than the ones provided in sub-sections (1)(*i*) and (1)(*ii*) of Section 30-D of the 1955 Act shall be deemed to have been entered to defeat the purpose of the Ceiling Act. Such transactions were declared to be void. The aforesaid two exceptions being transfer by partition and transfer to a landless person. (Para 37)

However, Section 30-DD of the 1955 Act provides further exceptions to Section 30-D of the 1955 Act as it recognises certain transfer after the cut-off date
h provided under Section 30-D. Section 30-DD recognises transfers of area up to 30 standard acres made in favour of an agriculturalist, his son or brother who are

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capable of doing agriculture and also intend to take up agriculture as a profession. However, such transfer must have been made before 31-12-1969 and the transferee must have attained the age of majority on or before the aforesaid date. (Para 38)

It is, thus, apparent that the legislature has carved out two separate categories of lands, one which is includable and other which is outside the purview of Ceiling laws. Once such a classification has been made, with there being no challenge to its vires, it is the solemn duty of every authority to give full effect to the same, in both letter and spirit. Although, it is possible that there can be a voluntary transfer which would meet the qualifications of both Sections 30-D and Section 30-DD, however, it is significant to note that Section 30-DD opens up with a non obstante clause with overriding effect on Section 30-D, as a result of which, any land included within its purview would be protected from the rigours of Section 30-D of the 1955 Act. Therefore, if the appellant succeeds in his endeavour to establish that the transfer was covered under Section 30-DD of the 1955 Act, then such transferred land has to be exempted from computation of confiscable land, irrespective of the fact that it falls within the ceiling limit as prescribed under Section 30-D of the 1955 Act. (Para 41)

In the present case due to certain family issues, the appellant and his son were living separately. During such separation, when the transferee son had already attained the age of majority, the appellant owner of the land, who was an agriculturalist himself, transferred the aforesaid land in favour of his son, so as to enable him to cultivate the same. The statements of the transferor and the transferee clearly indicate that the transferee had the equipment and skills and was sustaining himself as an agriculturalist. (Para 43)

The aforesaid transfer was executed way before the cut-off date stipulated under Section 30-DD of the 1955 Act i.e. 31-12-1969. Therefore, the registered gift deed dated 19-12-1963 was a bona fide transfer squarely covered within the ambits of Section 30-DD, which intended to protect the rights of agriculturalists. Issue 3, stands answered in favour of the appellant, as the transfer is not invalid as it stands protected as per the provision of Section 30-DD of the 1955 Act. (Para 44)

In light of the aforesaid findings, the transfer of the land being valid under Section 30-DD of the 1955 Act, the ceiling area of the appellant falls within the ceiling limit as provided under Section 30-C of the 1955 Act. (Para 45)

There is no gainsaying that Section 6 of the Ceiling Act, 1973 also does not advance the case of the State. Firstly, the repeal of Chapter III-B of the Tenancy Act, 1955 through Section 40 of the Ceiling Act, 1973 is not retrospective. Hence, the provisions of the Ceiling Act, 1973 are not attracted in the present case as the case was reopened and decided under the provisions of the Tenancy Act, 1955. Secondly, Section 6 of the Ceiling Act, 1973 declares that every transfer of land including by way of gift, made on or after 26-9-1970 and before 1-1-1973, shall be deemed to have been made to defeat the provisions of the Ceiling Act, 1973.In the instant case, the gift deed was executed on 19-12-1963, that is, much before 26-9-1970.Therefore also, Section 6 of the Ceiling Act, 1973 does not affect the transfer of land by the appellant donor in favour of the donee son. Thirdly, there is no finding that the gift deed in the present case was actuated upon any extraneous consideration. Hence, it constitutes a bona fide transfer which is exempted from the rigours of Section 6 of the Ceiling Act, 1973. (Para 46)

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Daulat v. *State*, WP No. 732 of 1991, order dated 2-4-1997 (Raj), *affirmed*

State v. *Daulat Singh*, Civil Special Appeal No. 264 of 1999, order dated 25-4-2008 (Raj), *reversed*

Appeal allowed RM-D/66722/CV

Chronological list of cases cited ***on page(s)***

1. Civil Special Appeal No. 264 of 1999, order dated 25-4-2008 (Raj), *State* v. *Daulat Singh* **(reversed)** 465*c-d*, 466*e*, 466*e-f*, 468*a*, 469*a-b*, 469*b-c*, 471*d*, 474*d-e*
2. (2007) 13 SCC 210, *Asokan* v. *Lakshmikutty* 470*a-b*
3. (1997) 2 SCC 255, *Naramadaben Maganlal Thakker* v. *Pranjivandas Maganlal Thakker* 468*g*
4. WP No. 732 of 1991, order dated 2-4-1997 (Raj), *Daulat* v. *State* 465*d*, 466*b-c*, 466*e*, 466*e-f*, 467*c*, 471*d*

The Judgment of the Court was delivered by

N.V. RAMANA, J.— The present appeal arises out of the impugned judgment dated 25-4-2008, passed by the High Court of Judicature for Rajasthan at Jodhpur in *State* v. *Daulat Singh*[1] wherein the Division Bench of the High Court allowed the appeal preferred by the respondents and upheld the order dated 2-7-1990 passed by the Board of Revenue while setting aside the order dated 2-4-1997[2] of the Single Judge.

2. The facts underlying the appeal are as follows: Daulat Singh (since deceased and now represented through his legal representatives and who shall hereinafter for the sake of convenience be referred to as the appellant) was owner of 254.2 bighas of land. On 19-12-1963, he gifted away 127.1 bighas of land to his son, Narpat Singh. After the said transfer, the appellant was left with 17.25 standard acres of land, which was below the prescribed limit under the Ceiling Act.

3. Although, a proceeding was initiated under the Ceiling law, the same was dropped on 15-4-1972 by the Court of Deputy Sub-Divisional Officer, Pali, Rajasthan. While dropping the proceedings, the court observed that, the amendment of Section 30-DD of the Rajasthan Tenancy Act, 1955 (hereinafter "the Tenancy Act, 1955") was effective from 31-12-1969, and since the gift deed was executed before the aforesaid amendment, the aforesaid transfer was valid.

4. However, by Notice dated 15-3-1982, the Revenue Ceiling Department reopened the case of the appellant. The Revenue Ceiling Department while issuing the aforesaid notice stated that the earlier order dated 15-4-1972, passed by the Court of Deputy Sub-Divisional Officer, Pali was rendered without investigating whether the land transfers are recognisable as per the provisions of Section 30 of the Tenancy Act, 1955. The same being in contravention of the provisions, needs to be reopened.

1 Civil Special Appeal No. 264 of 1999, order dated 25-4-2008 (Raj)
2 *Daulat* v. *State*, WP No. 732 of 1991, order dated 2-4-1997 (Raj)

5. The Court of Additional District Collector, Pali vide order dated 28-10-1988, declared that the mutation of the land done in favour of the son of the appellant was invalid as there was no acceptance of the gift. It was declared therein that the appellant was holding 11 standard acres of extra land over and above the ceiling limit. The Collector, therefore, directed the appellant to hand over vacant possession of the aforesaid 11 standard acres of extra land to the Tahsildar, Pali.

6. Aggrieved by the aforesaid order, the appellant preferred an appeal before the Board of Revenue. Vide order dated 2-7-1990, the Board of Revenue, modified the earlier order dated 28-10-1988, and upon recalculation held that the appellant is holding 4.5 standard acres of land in excess of the ceiling limit.

7. Aggrieved, the appellant preferred a writ petition under Article 227 of the Constitution of India before the High Court. Vide order dated 2-4-1997[2], the learned Single Judge of the High Court allowed the writ petition preferred by the appellant. The Court held that the case was beyond the purview of Section 6 of the Rajasthan Imposition of Ceiling on Agricultural Holdings Act, 1973 (hereinafter "the 1973 Ceiling Act") because the land was transferred by way of gift before 26-9-1970. It was further held that the aforesaid transfer of land, by the appellant in favour of his son by virtue of a registered gift deed, being bona fide, was valid in the eye of the law. The learned Single Judge, therefore held that there is no surplus land which is available with the appellant which can be resumed.

8. Thereafter, the respondents preferred an appeal against the above order before the Division Bench, which allowed the appeal holding that the gift deed was invalid as the son of the appellant was unaware about the same. The Division Bench vide impugned judgment dated 25-4-2008[1], held that the learned Single Judge[2] passed the judgment in ignorance of the provisions of Sections 30-C and 30-D of the Tenancy Act, 1955. Therefore, the Division Bench[1] of the High Court set aside the order passed by the Single Judge Bench[2] for being untenable and upheld the order passed by the Board of Revenue.

9. Aggrieved, the appellant has preferred the present appeal by way of special leave petition before this Court.

10. The counsel on behalf of the appellant argued that the transfer of land was effectuated way back in 1963. The Division Bench clearly erred in not recognising the transfer of 17.25 acres in favour of the appellant's son Narpat Singh, who was a major at the time the gift deed was executed, during his lifetime, as per the requirements of Section 122 of the Transfer of Property Act, 1882. There was an implied acceptance because this is a case of transfer between father and son. On the basis of facts of this case, it is proved that the son was living separately with his family. Moreover, such a transfer does not violate the provisions of Section 30-C and Section 30-D of the Tenancy Act, 1955. Lastly, the counsel also pleaded that the notice given for reopening of the ceiling case was beyond the period of limitation.

2 *Daulat* v. *State*, WP No. 732 of 1991, order dated 2-4-1997 (Raj)
1 *State* v. *Daulat Singh*, Civil Special Appeal No. 264 of 1999, order dated 25-4-2008 (Raj)

11. On the other hand, the counsel on behalf of the respondents argued that the Division Bench rightly upheld the order passed by the Board of Revenue which was passed after detailed assessment of the facts and appropriate reliance upon Section 30-C and 30-D of the Tenancy Act, 1955. The respondents submitted that the findings of facts could not be interfered with in a writ proceeding. The respondents also stated that, issue of limitation was never argued by the appellant in the courts below. Be that as it may, the notice was issued within the limitation period.

12. Having heard the learned counsel, three important issues arise for our consideration:

12.1. (*i*) Whether reopening of the case was beyond the period of limitation?

12.2. (*ii*) Whether the registered gift deed executed by the appellant is valid in the eye of the law?

12.3. (*ii*) Whether the judgment[2] of the learned Single Judge is in ignorance of the provisions of Sections 30-C and 30-D of the Tenancy Act, 1955?

Issue 1

13. Section 15 of the Ceiling Act, 1973 confers upon the State Government the power to reopen the cases, if it is satisfied that the earlier order was in contravention with the provisions of the Act and is prejudicial to the State interest. The aforesaid direction to reopen cases must be preceded by a show-cause notice served upon the person concerned. However, the proviso clause states that no notice can be issued after the expiry of five years from the date of the final order sought to be reopened or after the expiry of 30-6-1979, whichever is later.

14. Therefore, the provision mandates that, after the expiry of five years from the date of final order sought to be reopened, or after the expiry of 30-6-1979, whichever is later, no notice for reopening of such cases can be issued. Therefore, the relevant dates for determination of the issue of limitation is the date of order sought to be reopened and the date of issuance of show-cause notice under Section 15 of the Ceiling Act, 1973.

15. During the course of the hearing and on a query raised by the Bench, the respondents have brought to our notice the xerox copy of the Notice dated 20-11-1976 issued by Deputy Government Secretary, Revenue (Billing), Rajasthan.

16. It ought to be noted that, the aforesaid notice was sent to the appellant on 20-11-1976, that is within five years of the earlier order dated 15-4-1972. Further, the notice also satisfied the requirements as provided under Section 15 of the Ceiling Act, 1973, and hence was valid in the eye of the law. The case was, thus, reopened within the time period stipulated under Section 15 of the Ceiling Act, 1973. Therefore, Issue 1 is answered in favour of the respondent State.

2 *Daulat* v. *State*, WP No. 732 of 1991, order dated 2-4-1997 (Raj)

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Issue 2

17. The High Court, while passing the impugned order[1], held the registered gift deed dated 19-12-1963 to be invalid on the basis that it did not meet the requirements as provided under Section 122 of the Transfer of Property Act, 1882. The Division Bench while upholding the observations of the Board of Revenue, further observed that a perusal of the gift deed does not show acceptance of gift by the donee, rather it seems that donee was even unaware of the gift.

18. Section 122 of the Transfer of Property Act, 1882 provides that:

> "**122.** ***"Gift" defined***.—"**Gift**" is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.
>
> **Acceptance when to be made**.—Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.
>
> If the donee dies before acceptance, the gift is void."

19. Section 123 of the Transfer of Property Act, 1882 provides that:

> "**123.** ***Transfer how effected***.—For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.
>
> For the purpose of making a gift of movable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.
>
> Such delivery may be made in the same way as goods sold may be delivered."

20. Section 122 of the Transfer of Property Act, 1882 provides that for a gift to be valid, it must be gratuitous in nature and must be made voluntarily. The said giving away implies a complete dispossession of the ownership in the property by the donor. Acceptance of a gift by the donee can be done anytime during the lifetime of the donor.

21. Section 123 provides that for a gift of immovable property to be valid, the transfer must be effectuated by means of a registered instrument bearing the signature of the donor and attested by at least two witnesses.

22. A three-Judge Bench of this Court in *Naramadaben Maganlal Thakker* v. *Pranjivandas Maganlal Thakker*[3] had held that: (SCC p. 258, paras 6-7)

> "*6*. Acceptance by or on behalf of the donee must be made during the lifetime of the donor and while he is still capable of giving.

1 *State* v. *Daulat Singh*, Civil Special Appeal No. 264 of 1999, order dated 25-4-2008 (Raj)
3 (1997) 2 SCC 255

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7. It would thus be clear that the execution of a registered gift deed, acceptance of the gift and delivery of the property, together make the gift complete. Thereafter, the donor is divested of his title and the donee becomes the absolute owner of the property.*" (emphasis supplied)

23. The Division Bench of the High Court in the impugned judgment[1] upheld the findings of the Board of Revenue wherein it held that there was no valid acceptance by the donee. The Additional District Collector held that there was no semblance of acceptance in the gift deed. On appeal, the Board of Revenue held that, "*it is irrelevant that after the gift the land remained in possession of the donee or that he got it mutated in his name*". The Division Bench[1] of the High Court, relying on the aforesaid observation, stated that there was no valid acceptance as it seems like the donee was unaware about the gift deed itself.

24. At the outset, it ought to be noted that Section 122 of the Transfer of Property Act, 1882 neither defines acceptance, nor does it prescribe any particular mode for accepting the gift. The word "acceptance" is defined as "*is the receipt of a thing offered by another with an intention to retain it, as acceptance of a gift*". (See Ramanatha P. Aiyar: *The Law Lexicon*, 2nd Edn., p. 19.)

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* **Ed.**: Delivery of possession is not an essential prerequisite for the making of a valid gift in the case of immovable property, as was clarified by a three-Judge Bench in *Renikuntla Rajamma* v. *K. Sarwanamma*, (2014) 9 SCC 445, which also held in para 19 that *Maganlal Thakker*, (1997) 2 SCC 255, "cannot be read to be an authority for the proposition that delivery of possession is an essential requirement for making a valid gift."

In paras 16 and 18 of *Renikuntla Rajamma case* it was held:

"*16.* … Section 123 of the TP Act is in two parts. The first part deals with gifts of immovable property while the second part deals with gifts of movable property. Insofar as the gifts of immovable property are concerned, Section 123 makes transfer by a registered instrument mandatory. This is evident from the use of word "transfer must be effected" used by Parliament insofar as immovable property is concerned. In contradiction to that requirement the second part of Section 123 dealing with gifts of movable property, simply requires that gift of movable property may be effected either by a registered instrument signed as aforesaid or "by delivery". The difference in the two provisions lies in the fact that insofar as the transfer of movable property by way of gift is concerned the same can be effected by a registered instrument or by delivery. Such transfer in the case of immovable property no doubt requires a registered instrument but the provision does not make delivery of possession of the immovable property gifted as an additional requirement for the gift to be valid and effective. If the intention of the legislature was to make delivery of possession of the property gifted also as a condition precedent for a valid gift, the provision could and indeed would have specifically said so. Absence of any such requirement can only lead us to the conclusion that delivery of possession is not an essential prerequisite for the making of a valid gift in the case of immovable property.

* * *

18. We are in respectful agreement with the statement of law contained in the above passage in *K. Balakrishnan*, (2004) 1 SCC 581. There is indeed no provision in law that ownership in property cannot be gifted without transfer of possession of such property. As noticed earlier, Section 123 does not make the delivery of possession of the gifted property essential for validity of a gift.…"

1 *State* v. *Daulat Singh*, Civil Special Appeal No. 264 of 1999, order dated 25-4-2008 (Raj)

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25. The aforesaid fact can be ascertained from the surrounding circumstances such as taking into possession the property by the donee or by being in the possession of the gift deed itself. The only requirement stipulated here is that, the acceptance of the gift must be effectuated within the lifetime of the donor itself. a

26. Hence, being an act of receiving willingly, acceptance can be inferred by the implied conduct of the donee. The aforesaid position has been reiterated by this Court in *Asokan* v. *Lakshmikutty*[4]: (SCC pp. 215-16, para 14)

> "*14.* Gifts do not contemplate payment of any consideration or compensation. It is, however, beyond any doubt or dispute that in order to constitute a valid gift acceptance thereof is essential. *We must, however, notice that the Transfer of Property Act does not prescribe any particular mode of acceptance. It is the circumstances attending to the transaction which may be relevant for determining the question. There may be various means to prove acceptance of a gift. The document may be handed over to a donee, which in a given situation may also amount to a valid acceptance. The fact that possession had been given to the donee also raises a presumption of acceptance*." (emphasis supplied) b c

27. In the present case, the gift deed itself contained certain recitals as mentioned below:

> "… Out of the aforesaid land in all the khasras 1/2 part means 50 per cent I am giving you in gift being my younger son with my pleasure. My elder son Shri Babu Singh has no objection to this gift … From today you are the owner of the half of the land gifted to you and you will have possession hereafter. You have the complete right over the aforesaid land for cultivation from today onward. Now you get the gifted land mutated in your name… These lands have not been sold or under will or under the gift earlier. Further I state that the aforesaid land is free from any debt liability … The registration of the aforesaid gift has been done by me in my sound physical and mental health with consent without any undue coercion and pressure from anyone. I have gifted the aforesaid land with my sweet will and wish.…" d e

These recitals clearly indicate that donor intended to part with ownership and possession immediately after the execution of the gift deed. f

28. In order to show acceptance, the counsel for the appellant drew our attention to the mutation records. The mutation entry in the Revenue Record of Gram Sedriya, District Pali dated 28-10-1968 clearly reflects that half portion of the appellant's land was bestowed as a gift by the appellant to his son through a registered instrument of gift dated 19-12-1963. Furthermore, the statement dated 31-8-1984, rendered by the appellant donor before the Court of Additional District Magistrate indicates that the donee was already a major at the time of the execution of the gift deed. He further stated that after execution of the gift deed the donee started cultivating on the same. g

29. The aforesaid statement of the appellant donor is completely supported by the statement made by the donee on 15-12-1988 before the Court of h

4 (2007) 13 SCC 210

Additional District Magistrate. Therein, the donee clearly stated that, as he did not get along with his stepmother, he started living separately and the land that was transferred to him by virtue of gift deed was under his possession and he was cultivating the same.

30. Therefore, the abovementioned circumstances clearly indicate that there was an acceptance of the gift by the donee during the lifetime of the donor. Not only the gift deed in itself contained recitals about transfer of possession, but also the mutation records and the statements of the both the donor and donee indicate that, there has been an acceptance of the gift by conduct.

31. The respondents failed to bring on record any evidence to rebut the fact that the donee was in enjoyment of the property. In light of the same, the learned Single Judge Bench took a plausible view that, it was a transfer between a father and a son and there was a valid acceptance of the gift when the donee son started living separately. Lastly, it ought to be noted that apart from the point of acceptance by the donee as held above since the deed is registered, bears the signature of the donor and has been attested by two witnesses, the requirements under Section 123 of the Transfer of Property Act, 1882 have been satisfied. In line with the aforementioned observations, Issue 2 is answered in favour of the appellant.

Issue 3

32. The learned Division Bench, while setting aside the judgment[2] of the learned Single Judge observed[1] that the learned Single Judge passed the order in ignorance of the provisions of Sections 30-C and 30-D of the Tenancy Act of 1955. However, the counsel on behalf of the appellant has argued that the transfer of land made by the appellant to his son does not violate the terms of Sections 30-C and Section 30-D as contained in Chapter III-B of the Tenancy Act of 1955 (since repealed by the Rajasthan Imposition of Ceiling on Agricultural Holdings Act, 1973) as such a transfer satisfies the test of Section 30-DD of the Tenancy Act of 1955.

33. Chapter III-B of the Tenancy Act of 1955, comprising of Sections 30-B to 30-J deals with restrictions on holding land in excess of ceiling limit. Section 30-C indicates the extent of ceiling area. This section provides that for a family consisting of five or less members, the ceiling area would be thirty standard acres. When a family exceeds five members, five acres of ceiling area shall be extended for every additional member, however, such area cannot extend beyond sixty standard acres.

34. Section 30-D provides that all transfers, except those which are specified under sub-section (1) are not to be recognised for determination of holding with respect to the ceiling area. Thereafter, Section 30-DD, a subsequent amendment to the Tenancy Act of 1955 provides further exceptions to the general bar under Section 30-D.

35. It is pertinent for us to have a look at the relevant Sections 30-D and 30-DD. The sections read as follows:

> "**30-D.** ***Certain transfers not to be recognised for fixing ceiling area under Section 30-C.***—(1) For the purpose of determining the ceiling area in

2 *Daulat* v. *State*, WP No. 732 of 1991, order dated 2-4-1997 (Raj)
1 *State* v. *Daulat Singh*, Civil Special Appeal No. 264 of 1999, order dated 25-4-2008 (Raj)

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relation to a person under Section 30-C, *any voluntary transfer effected by him on or after 25-2-1958*, otherwise than—

(*i*) by way of partition, or

(*ii*) in favour of a person who was a landless person before the said date and continued to be so till the date of transfer,

of the whole or a part of his holding shall be deemed to be a transfer calculated to defeat the provisions of this Chapter and shall not be recognised and taken into consideration; and the burden of proving whether any such transfer falls under clause (*i*) or clause (*ii*) shall lie on the transferor:

Provided that if by way any such transfer as is mentioned in clause (*ii*) land in excess of the ceiling area applicable to the transferee has been transferred to him, such transfer to the extent of such excess shall not be recognised or taken into consideration for the purpose of this sub-section:

Provided further that no such transfer as is mentioned in clause (*ii*) shall also so taken into consideration or recognised if it has been made after 9-12-1959.

* * *

30-DD. ***Certain transfers to be recognised.***—Notwithstanding anything to the contrary contained in Section 30-D, for the purpose of determining the ceiling area in relation to a person under Section 30-C—

(*i*) *every transfer of land not exceeding thirty standard acres made by a person up to the thirty first day of December, 1969 in favour of an agriculturist domiciled in Rajasthan or in favour of his son or brother intending to take to the profession of agriculture and capable of cultivating land personally and who had attained the age of majority on or before the said date; and*

(*ii*) every transfer to the extent as aforesaid *made by a person before the first day of June, 1970* of land comprised in groves or farms of the nature referred to in clauses (*a*), (*b*), (*d*) and (*e*) of sub-section (1) of Section 30-J as it stood prior to the commencement of the Rajasthan Tenancy (Second Amendment) Act, 1970 and acquired before the first day of May, 1959 in favour of his son or brother fulfilling the conditions mentioned in clause (*i*) and who attains the age of majority on or before the first of the aforementioned dates,

shall also be recognised.

Explanation I.—The expression "agriculturist" in this section shall mean a person who earns his livelihood wholly or mainly from agriculture and cultivates land by his own labour or by the labour of any member of his family or along with such labour as aforesaid with the help of hired labour or servant on wages payable in cash or in kind and shall include an agricultural labourer and a village artisan.

Explanation II.—The expression "domiciled in Rajasthan" in this section shall mean a person who permanently resides in Rajasthan since before the commencement of this Act." (emphasis supplied)

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36. As discussed earlier, Section 30-C of the Tenancy Act of 1955 provides for the ceiling limit of 30 standard acres for a family of five members or less. The appellant admittedly was having a family of less than five members and was originally holding around 34.4 standard acres. Subsequently, by virtue of registered gift deed dated 19-12-1963, the appellant had transferred around 17.25 standard acres to his son.

37. Section 30-D provides that any transfer, on or after 25-2-1958, other than the ones provided in sub-sections (1)(*i*) and (1)(*ii*) shall be deemed to have been entered to defeat the purpose of the Ceiling Act. Such transactions were declared to be void. The aforesaid two exceptions being transfer by partition and transfer to a landless person.

38. However, Section 30-DD provides further exceptions to Section 30-D as it recognises certain transfer after the cut-off date provided under Section 30-D. Section 30-DD recognises transfers of area up to 30 standard acres made in favour of an agriculturalist, his son or brother who are capable of doing agriculture and also intend to take up agriculture as a profession. However, such transfer must have been made before 31-12-1969 and the transferee must have attained the age of majority on or before the aforesaid date.

39. In the present case, the respondents have submitted that the transfer is barred under Section 30-D, therefore the State has a right of resumption over the excess area of 4.5 acres as per Section 30-C. On the contrary, the appellant has argued that the transfer was protected under Section 30-DD.

40. Our attention is drawn again to the registered gift deed dated 19-12-1963. The gift deed itself contains the recitals that:

> "…The aforesaid land which is of my khatedari (ownership) and on *which I am carrying out cultivation* and is in my possession. Out of the aforesaid land in all the khasras 1/2 part means 50 per cent I am giving you in gift being my younger son with my pleasure.… From today you are the owner of the half of the land gifted to you and you will have possession hereafter. *You have the complete right over the aforesaid land for cultivation from today onward*. Now you get the gifted land mutated in your name." (emphasis supplied)

41. It is, thus, apparent that the legislature has carved out two separate categories of lands, one which is includable and other which is outside the purview of Ceiling laws. Once such a classification has been made, with there being no challenge to its vires, it is the solemn duty of every authority to give full effect to the same, in both letter and spirit. Although, it is possible that there can be a voluntary transfer which would meet the qualifications of both Sections 30-D and Section 30-DD, however, it is significant to note that Section 30-DD opens up with a non obstante clause with overriding effect on Section 30-D, as a result of which, any land included within its purview would be protected from the rigours of Section 30-D of the Tenancy Act of 1955. Therefore, if the appellant succeeds in his endeavour to establish that the transfer was covered under Section 30-DD of the Tenancy Act of 1955, then such transferred land has to be exempted from computation of confiscable land, irrespective of the fact that it falls within the ceiling limit as prescribed under Section 30-D of the Tenancy Act of 1955.

42. Another significant piece of evidence is the statement of the transferor appellant dated 31-8-1984, wherein he has stated that the transferee son was living separately and was cultivating the aforesaid gifted property. It is also mentioned that the transferee is in possession of an ox and equipments for ploughing and agriculture. The aforesaid facts have been reiterated by the transferee as well vide his statement dated 15-12-1988, wherein he has clearly stated that, he is in independent possession of the gifted property and has been cultivating the said land.

43. The aforesaid pieces of evidence clearly indicate that due to certain family issues, the appellant and his son were living separately. During such separation, when the transferee son had already attained the age of majority, the appellant owner of the land, who was an agriculturalist himself, transferred the aforesaid land in favour of his son, so as to enable him to cultivate the same. The statements of the transferor and the transferee clearly indicate that the transferee had the equipment and skills and was sustaining himself as an agriculturalist.

44. Lastly, it must be taken into consideration that the aforesaid transfer was executed way before the cut-off date stipulated under Section 30-DD i.e. 31-12-1969. Therefore, the registered gift deed dated 19-12-1963 was a bona fide transfer squarely covered within the ambits of Section 30-DD, which intended to protect the rights of agriculturalists. Issue 3, stands answered in favour of the appellant, as the transfer is not invalid as it stands protected as per the provision of Section 30-DD of the Tenancy Act of 1955.

45. In light of the aforesaid findings, the decision[1] rendered by the Division Bench of the High Court is liable to be set aside. The transfer of the land being valid under Section 30-DD of the Tenancy Act of 1955, the ceiling area of the appellant falls within the ceiling limit as provided under Section 30-C.

46. There is no gainsaying that Section 6 of the Ceiling Act, 1973 also does not advance the case of the State. Firstly, the repeal of Chapter III-B of the Tenancy Act, 1955 through Section 40 of the Ceiling Act, 1973 is not retrospective. Hence, the provisions of the Ceiling Act, 1973 are not attracted in the present case as the case was reopened and decided under the provisions of the Tenancy Act, 1955. Secondly, Section 6 of the Ceiling Act, 1973 declares that every transfer of land including by way of gift, made on or after 26-9-1970 and before 1-1-1973, shall be deemed to have been made to defeat the provisions of the Ceiling Act, 1973. In the instant case, the gift deed was executed on 19-12-1963, that is much before 26-9-1970. Therefore also, Section 6 of the Ceiling Act, 1973 does not affect the transfer of land by the appellant donor in favour of the donee son. Thirdly, there is no finding that the gift deed in the present case was actuated upon any extraneous consideration. Hence, it constitutes a bona fide transfer which are exempted from the rigours of Section 6 of the Ceiling Act, 1973.

47. The appeal stands allowed in the aforesaid terms. Pending applications, if any, stand disposed of.

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1 *State* v. *Daulat Singh*, Civil Special Appeal No. 264 of 1999, order dated 25-4-2008 (Raj)

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(2025) 2 Supreme Court Cases 787

(BEFORE C.T. RAVIKUMAR AND SANJAY KAROL, JJ.)

2J

a

URMILA DIXIT .. Appellant;

Versus

SUNIL SHARAN DIXIT AND OTHERS .. Respondents.

Civil Appeal No. 10927 of 2024†, decided on January 2, 2025

b A. **Family and Personal Laws — Maintenance and Welfare of Parents and Senior Citizens Act, 2007 — Ss. 23 and 22 — Maintenance and welfare of parents — Cancellation of gift deed executed by mother in favour her son, by Tribunal for not fulfilling conditions of gift — Validity — Powers of Tribunal — Nature and scope of — Law clarified**

— When conditions for well-being of senior citizens were not complied c with, there is no illegality in cancellation of gift deed — Act is a beneficial piece of legislation, aimed at securing rights of senior citizens, in view of challenges faced by them — Therefore, the Act must be interpreted in this backdrop and a construction that advances remedies of the Act must be adopted

— Appellant is mother of respondent — Appellant executed a gift deed in favour of respondent wherein it has been stated that donee (respondent) d maintains donor and makes provision for everything — On same day, a vachan patra/promissory note is executed by respondent wherein it has been stated that he will take care of appellant till end of her life and if he does not do so, appellant will be at liberty to take back gift deed — Respondent, alleged this vachanpatra to be fabricated — Thereafter, appellant filed an application under Ss. 22 and 23 alleging that she and her husband were attacked by respondent e for further transfer of property and that love and affection between parties had completely ended — She prayed for setting aside gift deed in question — This application came to be allowed, and gift deed, transferring property of appellant to respondent, was declared null and void — In writ petition Single Judge of High Court upheld order of court below however, in intra court appeal Division Bench of High Court set aside order of Single Judge of High Court f

— For attracting application of S. 23(1) of the 2007 Act, following essentials have been expounded: (a) Transfer must have been made subject to condition that transferee shall provide basic amenities and basic physical needs to transferor; and (b) Transferee refuses or fails to provide such amenities and physical needs to transferor

g — Appellant contended that undertaking given by respondent stands grossly unfulfilled, and in her petition under S. 23, it has been averred that there is a breakdown of peaceful relations inter se parties — In such a situation, two conditions mentioned above must be appropriately interpreted to further

h † Arising out of SLP (C) No. 720 of 2023. Arising from the Final Judgment and Order in *Sunil Sharan Dixit* v. *Urmila Dixit*, 2022 SCC OnLine MP 3776 (Madhya Pradesh High Court, WA No. 1085 of 2022, dt. 31-10-2022) **[Reversed]** beneficial nature of legislation and not strictly which would render otiose intent of legislature —Therefore, Single Judge of High Court and tribunals below had rightly held gift deed to be cancelled since conditions for well-being of senior citizens were not complied with — Setting aside of said order by Division Bench taking strict view of beneficial legislation and holding that S. 23 of the 2007 Act is a stand-alone provision and that there was no condition for maintenance in gift deed, cannot be sustained — Property Law — Transfer of Property Act, 1882, S. 123

B. **Family and Personal Laws — Maintenance and Welfare of Parents and Senior Citizens Act, 2007 — S. 23 — Maintenance and welfare of parents — Competency of Tribunal to hand over possession of property**

— Tribunals under the Act may order eviction if it is necessary and expedient to ensure protection of senior citizen — Therefore, it cannot be said that Tribunals constituted under the Act, while exercising jurisdiction under S. 23, cannot order possession to be transferred — Such interpretation would defeat purpose and object of the Act, which is to provide speedy, simple and inexpensive remedies for elderly

C. **Family and Personal Laws — Maintenance and Welfare of Parents and Senior Citizens Act, 2007 — S. 23 — Maintenance and welfare of parents — Competency of Tribunal to hand over possession of property — Nature of provision — Explained**

— S. 23 cannot be said to be a stand-alone provision of the Act — Relief available to senior citizens under S. 23 is intrinsically linked with Statement of Objects and Reasons of the Act, that elderly citizens of our country, in some cases, are not being looked after — It is directly in furtherance of objectives of the Act and empowers senior citizens to secure their rights promptly when they transfer a property subject to condition of being maintained by transferee

D. **Interpretation of Statutes — Particular Statutes or Provisions — Beneficent or beneficial legislation — Rules of interpretation to be applied when interpreting a beneficial legislation — Explained**

E. **Family and Personal Laws — Generally — Care of senior citizen — Court's duty — Court is bound to advance cause of social justice of such marginalised groups, in furtherance of constitutional vision enshrined in Preamble of Constitution**

F. **Constitution of India — Arts. 21, 39 and 41 — Rights of elderly persons/ senior citizens and their enforcement — Explained**

The issues for determination before the Supreme Court were:

(*i*) Whether when conditions for well-being of senior citizen were not complied with, the Tribunal while exercising power under Section 23 of the 2007 Act committed any illegality in cancelling gift deed or not?

(*i*) Whether the Tribunals constituted under the 2007 Act, while exercising jurisdiction under Section 23, can order possession to be transferred or not?

Allowing the appeal, the Supreme Court

Held :

a A beneficial legislation must receive a liberal construction in consonance with the objectives that the Act concerned seeks to serve. (Paras 8 and 9)

Brahampal v. *National Insurance Co.*, (2021) 6 SCC 512 : (2021) 3 SCC (Civ) 693 : (2021) 3 SCC (Cri) 67; *K.H. Nazar* v. *Mathew K. Jacob*, (2020) 14 SCC 126; *Shivram A. Shiroor* v. *Radhabai Shantram Kowshik*, (1984) 1 SCC 588; *Minister Administering the Crown Lands Act* v. *NSW Aboriginal Land Council*, 2008 HCA 48 : (2008) 237 CLR 285; *Kerala Fishermen's Welfare Fund Board* v. *Fancy Food*, (1995) 4 SCC 341; *Bombay Anand Bhavan* b *Restaurant* v. *ESI Corpn.*, (2009) 9 SCC 61 : (2009) 2 SCC (L&S) 573; *Union of India* v. *Prabhakaran Vijaya Kumar*, (2008) 9 SCC 527 : (2008) 3 SCC (Cri) 813; *Bharat Singh* v. *New Delhi Tuberculosis Centre*, (1986) 2 SCC 614 : 1986 SCC (L&S) 335; *Indian Performing Rights Society Ltd.* v. *Sanjay Dalia*, (2015) 10 SCC 161 : (2016) 1 SCC (Civ) 55, *followed*

Interpretation of the provisions of a beneficial legislation must be in line with a purposive construction, keeping in mind the legislative purpose. Beneficial c legislation must be interpreted in favour of the beneficiaries when it is possible to take two views. (Paras 10 and 11)

Kozyflex Mattresses (P) Ltd. v. *SBI General Insurance Co. Ltd.*, (2024) 7 SCC 140 : (2024) 3 SCC (Civ) 809; *X2* v. *State (NCT of Delhi)*, (2023) 9 SCC 433, *relied on*

The Statement of Objects and Reasons of the Act indicates the purpose behind the enactment. (Para 12)

d *S. Vanitha* v. *Commr.*, (2021) 15 SCC 730, *followed*

The 2007 Act is a beneficial piece of legislation, aimed at securing the rights of senior citizens, in view of the challenges faced by them. It is in this backdrop that the Act must be interpreted and a construction that advances the remedies of the Act must be adopted. (Para 14)

It is a social obligation for both sons and daughters to maintain their parents when they are unable to do so. (Para 15)

e *Vijaya Manohar Arbat* v. *Kashirao Rajaram Sawai*, (1987) 2 SCC 278 : 1987 SCC (Cri) 354, *followed*

The Court is bound to advance the cause of social justice of such marginalised groups, in furtherance of the constitutional vision enshrined in the Preamble of the Constitution. (Para 16)

Badshah v. *Urmila Badshah Godse*, (2014) 1 SCC 188 : (2014) 1 SCC (Civ) 51; *Rajnesh* v. f *Neha*, (2021) 2 SCC 324 : (2021) 2 SCC (Civ) 220 : (2021) 1 SCC (Cri) 749, *followed*

Age catches up with everybody and on occasion, it renders some people completely helpless and dependent on others, either physically or mentally or both. Fortunately, the Constitution of India is organic and the Supreme Court is forward looking. This combination has resulted in path-breaking developments in law, particularly in the sphere of social justice, which has been given tremendous importance and significance in a variety of decisions rendered by the Supreme g Court over the years. (Para 17)

Ashwani Kumar v. *Union of India*, (2019) 2 SCC 636 : (2019) 1 SCC (L&S) 465, *followed*

For attracting the application of Section 23(1) of the 2007 Act, the following essentials were expounded by the Supreme Court: (*a*) The transfer must have been made subject to the condition that the transferee shall provide the basic amenities and basic physical needs to the transferor; and (*b*) The transferee refuses or fails to h provide such amenities and physical needs to the transferor. (Para 21)

Sudesh Chhikara v. *Ramti Devi*, (2024) 14 SCC 225 : 2022 SCC OnLine SC 1684, *followed*

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The appellant contended that undertaking given by the respondent stands grossly unfulfilled, and in her petition under Section 23 of the 2007 Act, it has been averred that there is a breakdown of peaceful relations inter se the parties. In such a situation, the two conditions mentioned above must be appropriately interpreted to further the beneficial nature of the legislation and not strictly which would render otiose the intent of the legislature. Therefore, the Single Judge of the High Court and the tribunals below had rightly held the gift deed to be cancelled since the conditions for the well-being of the senior citizens were not complied with. Finding recorded by the Division Bench of the High Court cannot be approved, because it takes a strict view of a beneficial legislation. (Para 23)

The Tribunals under the 2007 Act may order eviction if it is necessary and expedient to ensure the protection of the senior citizen. Therefore, it cannot be said that the Tribunals constituted under the 2007 Act, while exercising jurisdiction under Section 23 thereof, cannot order possession to be transferred. Such an interpretation would defeat the purpose and object of the Act, which is to provide speedy, simple and inexpensive remedies for the elderly. (Para 24)

S. Vanitha v. *Commr.*, (2021) 15 SCC 730, *followed*

Section 23 of the 2007 Act cannot be said to be a stand-alone provision of the Act. Relief available to senior citizens under Section 23 is intrinsically linked with the Statement of Objects and Reasons of the Act that elderly citizens of India, in some cases, are not being looked after. It is directly in furtherance of the objectives of the Act and empowers senior citizens to secure their rights promptly when they transfer a property subject to the condition of being maintained by the transferee. (Para 25)

Sunil Sharan Dixit v. *Urmila Dixit*, 2022 SCC OnLine MP 3776, *reversed*
Sunil Sharan Dixit v. *Urmila Dixit*, 2022 SCC OnLine MP 6102, *affirmed*

Appeal allowed RM-D/72099/CV

Advocates who appeared in this case :

Ms V. Mohana, Senior Advocate [Sarvam Ritam Khare (Advocate-on-Record), Ms Vrinda Kapoor, Kushagra Sharma and Anuj Agarwal, Advocates], for the Appellant;

Ms Madhavi Divan, Senior Advocate [Uday Prakash Yadav, S.K. Giri, Ms Heena, Antariksh Singh, Yogendra Singh and Ramjee Pandey (Advocate-on-Record), Advocates], for the Respondents.

Chronological list of cases cited ***on page(s)***

1. (2024) 14 SCC 225 : 2022 SCC OnLine SC 1684, *Sudesh Chhikara* v. *Ramti Devi* 795*e*, 795*g*, 796*b-c*
2. (2024) 7 SCC 140 : (2024) 3 SCC (Civ) 809, *Kozyflex Mattresses (P) Ltd.* v. *SBI General Insurance Co. Ltd.* 793*d*
3. (2023) 9 SCC 433, *X2* v. *State (NCT of Delhi)* 793*d-e*
4. 2022 SCC OnLine MP 6102, *Sunil Sharan Dixit* v. *Urmila Dixit* 791*c-d*, 792*b*
5. 2022 SCC OnLine MP 3776, *Sunil Sharan Dixit* v. *Urmila Dixit* **(reversed)** 791*c-d*, 792*b*, 796*c-d*, 796*f*
6. (2021) 15 SCC 730, *S. Vanitha* v. *Commr.* 793*f*, 796*c-d*
7. (2021) 6 SCC 512 : (2021) 3 SCC (Civ) 693 : (2021) 3 SCC (Cri) 67, *Brahampal* v. *National Insurance Co.* 792*f*
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11. (2015) 10 SCC 161 : (2016) 1 SCC (Civ) 55, *Indian Performing Rights Society Ltd.* v. *Sanjay Dalia* 793*b*
12. (2014) 1 SCC 188 : (2014) 1 SCC (Civ) 51, *Badshah* v. *Urmila*
a *Badshah Godse* 794*d*
13. (2009) 9 SCC 61 : (2009) 2 SCC (L&S) 573, *Bombay Anand Bhavan Restaurant* v. *ESI Corpn.* 793*a*
14. (2008) 9 SCC 527 : (2008) 3 SCC (Cri) 813, *Union of India* v. *Prabhakaran Vijaya Kumar* 793*a*
15. 2008 HCA 48 : (2008) 237 CLR 285, *Minister Administering the Crown Lands Act* v. *NSW Aboriginal Land Council* 793*c*
b
16. (1995) 4 SCC 341, *Kerala Fishermen's Welfare Fund Board* v. *Fancy Food* 792*g*
17. (1987) 2 SCC 278 : 1987 SCC (Cri) 354, *Vijaya Manohar Arbat* v. *Kashirao Rajaram Sawai* 794*c-d*
18. (1986) 2 SCC 614 : 1986 SCC (L&S) 335, *Bharat Singh* v. *New Delhi Tuberculosis Centre* 793*a-b*
19. (1984) 1 SCC 588, *Shivram A. Shiroor* v. *Radhabai Shantram Kowshik* 793*b-c*

The Judgment of the Court was delivered by

c **SANJAY KAROL, J.**— The present appeal arises from the final judgment and order dated 31-10-2022 passed by the High Court of Madhya Pradesh at Jabalpur in *Sunil Sharan Dixit* v. *Urmila Dixit*[1], whereby the judgment and order dated 2-8-2022 of the Single Judge of the High Court of Madhya Pradesh in *Sunil Sharan Dixit* v. *Urmila Dixit*[2] was set aside.

2. The Single Judge of the High Court had, in turn, affirmed the
d judgment dated 25-4-2022 passed by the Collector, District Chhatarpur in Case No. 91/Appeal/2021-22 and the judgment dated 27-9-2021 passed by the Sub-Divisional Magistrate and Chairman, Chhatarpur in Case No. 98/B-121/2021-22, allowing the application filed by the appellant herein under Section 23 of the Maintenance and Welfare of the Parents and Senior Citizens Act, 2007 (hereinafter "the Act") seeking setting aside of gift deed
e dated 9-9-2019.

Factual matrix

3. The appellant herein is the mother of the respondent (son). The subject property was purchased by her on 23-1-1968. On 7-9-2019, the appellant executed a gift deed in favour of the respondent wherein it has been stated that
f the donee (respondent) maintains the donor and makes provision for everything. This deed came to be registered on 9-9-2019. Allegedly, on the same day, a *vachan patra*/promissory note is executed by the respondent wherein it has been stated that he will take care of the appellant till the end of her life and if he does not do so, the appellant will be at liberty to take back the gift deed. The respondent, before this Court, has alleged this *vachan patra* to be fabricated.

4. Thereafter, on 24-12-2020, the appellant filed an application under
g Sections 22 and 23 of the Act before the Sub-Divisional Magistrate, Chhatarpur, alleging that she and her husband were attacked by the respondent for further transfer of property and that the love and affection between the parties has completely ended. She prayed for setting aside the gift deed in question. This application came to be allowed, and the gift deed, transferring the property of the appellant to the respondent, was declared null and void. The

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1 2022 SCC OnLine MP 3776
2 2022 SCC OnLine MP 6102

respondents preferred an appeal against this order, which came to be dismissed vide order dated 25-4-2022.

5. The respondents, aggrieved, filed a writ petition bearing No. 11796 of 2022 before the High Court of Madhya Pradesh, at Jabalpur. The Single Judge affirmed the orders of the courts below while observing that the respondents had not approached the court with clean hands and had failed to serve their parents who are senior citizens. The orders of the courts below were held to be well-reasoned and in consonance with the Act.

6. A writ appeal was preferred thereafter, assailing the order[2] of the Single Judge which has been allowed vide the impugned order[1]. The Division Bench of the High Court, while setting aside the judgments of the learned Single Judge, vide the impugned order, made the following observations:

6.1. Section 23 of the Act is a stand-alone provision, and the function of the Tribunal is only to find out whether the condition in the gift deed or otherwise contains a clause providing for basic amenities and whether the transferee has refused or failed to provide them. There is no other jurisdiction vested with the Tribunal.

6.2. No condition is there in the gift deed dated 9-9-2019 for maintenance of the transferor.

6.3. The argument relating to the affidavit dated 7-9-2019, cannot be accepted. If the intention of the parties was such, the gift deed should have had a clause to the same effect.

Issues for consideration

7. We have heard Ms V. Mohana, learned Senior Counsel for the appellant, and Ms Madhavi Divan, learned Senior Counsel appearing for the respondents. We have also perused the written submissions filed by both sides. The issue which arises for consideration of this Court is whether the High Court was correct in setting aside the order of the Tribunal, granting benefit of Section 23 of the Act, to the appellant?

8. To answer the issue at hand, it is imperative for this Court to discuss the rules of interpretation to be applied when interpreting a beneficial legislation akin to the Act at hand. While dealing with certain provisions of the Motor Vehicles Act, this Court in *Brahampal* v. *National Insurance Co.*[3], observed that a beneficial legislation must receive a liberal construction in consonance with the objectives that the Act concerned seeks to serve.

9. This Court in *K.H. Nazar* v. *Mathew K. Jacob*[4] reiterated the above expositions and stated that: (SCC pp. 135-36, paras 11 & 13)

> "*11.* Provisions of a beneficial legislation have to be construed with a purpose-oriented approach.[5] The Act should receive a liberal construction

2 *Sunil Sharan Dixit* v. *Urmila Dixit*, 2022 SCC OnLine MP 6102
1 *Sunil Sharan Dixit* v. *Urmila Dixit*, 2022 SCC OnLine MP 3776
3 (2021) 6 SCC 512 : (2021) 3 SCC (Civ) 693 : (2021) 3 SCC (Cri) 67
4 (2020) 14 SCC 126
5 *Kerala Fishermen's Welfare Fund Board* v. *Fancy Food*, (1995) 4 SCC 341

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> to promote its objects.[6] Also, literal construction of the provisions of a beneficial legislation has to be avoided. It is the Court's duty to
> a discern the intention of the legislature in making the law. Once such an intention is ascertained, the statute should receive a purposeful or functional interpretation.[7]
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> * * *
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> *13*. While interpreting a statute, the problem or mischief that the statute was designed to remedy should first be identified, and *then a*
> b *construction that suppresses the problem and advances the remedy should be adopted*.[8] It is settled law that exemption clauses in beneficial or social welfare legislations should be given strict construction.[9] It was observed in *Shivram A. Shiroor* v. *Radhabai Shantram Kowshik*[9] that the exclusionary provisions in a beneficial legislation should be construed strictly so as to give a wide amplitude to the principal object of the legislation
> c and to prevent its evasion on deceptive grounds. Similarly, in *Minister Administering the Crown Lands Act* v. *NSW Aboriginal Land Council*[10], Kirby, J. held that the principle of providing purposive construction to beneficial legislations mandates that exceptions in such legislations should be construed narrowly." (emphasis supplied)

10. More recently, in *Kozyflex Mattresses (P) Ltd.* v. *SBI General Insurance*
d *Co. Ltd.*[11], this Court held the definition of a consumer under the Consumer Protection Act, 1986 to include a company or corporate person in view of the beneficial purpose of the Act.

11. While considering the provisions of the Medical Termination of Pregnancy Act, this Court in *X2* v. *State (NCT of Delhi)*[12], reiterated that interpretation of the provisions of a beneficial legislation must be in line with a
e purposive construction, keeping in mind the legislative purpose. Furthermore, it was stated that beneficial legislation must be interpreted in favour of the beneficiaries when it is possible to take two views.

12. It is in the above background that we must proceed to examine the Act. The Statement of Objects and Reasons of the Act indicates the purpose behind the enactment, as relied upon by this Court in *S. Vanitha* v. *Commr.*[13], is:
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> "Traditional norms and values of the Indian society laid stress on providing care for the elderly. However, due to withering of the joint family system, a large number of elderly are not being looked after by their family. Consequently, many older persons, particularly widowed women are now forced to spend their twilight years all alone and are exposed to emotional

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6 *Bombay Anand Bhavan Restaurant* v. *ESI Corpn.*, (2009) 9 SCC 61 : (2009) 2 SCC (L&S) 573 and *Union of India* v. *Prabhakaran Vijaya Kumar*, (2008) 9 SCC 527 : (2008) 3 SCC (Cri) 813
7 *Bharat Singh* v. *New Delhi Tuberculosis Centre*, (1986) 2 SCC 614 : 1986 SCC (L&S) 335
8 *Indian Performing Rights Society Ltd.* v. *Sanjay Dalia*, (2015) 10 SCC 161 : (2016) 1 SCC (Civ) 55
9 *Shivram A. Shiroor* v. *Radhabai Shantram Kowshik*, (1984) 1 SCC 588
10 2008 HCA 48 : (2008) 237 CLR 285
h 11 (2024) 7 SCC 140 : (2024) 3 SCC (Civ) 809
12 (2023) 9 SCC 433
13 (2021) 15 SCC 730

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neglect and to lack of physical and financial support. This clearly reveals that ageing has become a major social challenge and there is a need to give more attention to the care and protection for the older persons. Though the parents can claim maintenance under the Code of Criminal Procedure, 1973, the procedure is both time-consuming as well as expensive. Hence, there is a need to have simple, inexpensive and speedy provisions to claim maintenance for parents."

13. The Preamble of the Act states that it is intended towards more effective provisions for maintenance and welfare of parents and senior citizens, guaranteed and recognised under the Constitution.

14. Therefore, it is apparent, that the Act is a beneficial piece of legislation, aimed at securing the rights of senior citizens, in view of the challenges faced by them. It is in this backdrop that the Act must be interpreted and a construction that advances the remedies of the Act must be adopted.

15. Before adverting to the provisions of the Act, we must be cognizant of the larger issue that this case presents i.e. the care of senior citizens in our society. This Court in *Vijaya Manohar Arbat* v. *Kashirao Rajaram Sawai*[14] highlighted that it is a social obligation for both sons and daughters to maintain their parents when they are unable to do so.

16. In *Badshah* v. *Urmila Badshah Godse*[15], this Court observed that when a case pertaining to maintenance of parents or wife is being considered, the Court is bound to advance the cause of social justice of such marginalised groups, in furtherance of the constitutional vision enshrined in the Preamble. Recently, this exposition came to be reiterated in *Rajnesh* v. *Neha*[16].

17. While issuing a slew of directions for the protection of senior citizens in *Ashwani Kumar* v. *Union of India*[17], this Court had highlighted: (SCC p. 641, paras 3-4)

"*3*. The rights of elderly persons is one such emerging situation that was perhaps not fully foreseen by our Constitution-framers. Therefore, while there is a reference to the health and strength of workers, men and women, and the tender age of children in Article 39 of the Constitution and to public assistance in cases of unemployment, old age, sickness and disablement and in other cases of undeserved want in Article 41 of the Constitution, there is no specific reference to the health of the elderly or to their shelter in times of want and indeed to their dignity and sustenance due to their age.

4. Eventually, age catches up with everybody and on occasion, it renders some people completely helpless and dependent on others, either physically or mentally or both. Fortunately, our Constitution is organic and this Court is forward looking. This combination has resulted in path-breaking developments in law, particularly in the sphere of social justice, which has been given tremendous importance and significance in a variety

14 (1987) 2 SCC 278 : 1987 SCC (Cri) 354
15 (2014) 1 SCC 188 : (2014) 1 SCC (Civ) 51
16 (2021) 2 SCC 324 : (2021) 2 SCC (Civ) 220 : (2021) 1 SCC (Cri) 749
17 (2019) 2 SCC 636 : (2019) 1 SCC (L&S) 465

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of decisions rendered by this Court over the years. The present petition is one such opportunity presented before *this Court to recognise and enforce the rights of elderly persons—rights that are recognised by Article 21 of the Constitution as understood and interpreted by this Court in a series of decisions over a period of several decades, and rights that have gained recognition over the years due to emerging situations*."

(emphasis supplied)

18. Keeping in mind the beneficial intention of the statute and the above expositions, we now proceed to consider the issue at hand.

19. Section 23 of the Act reads:

"**23.** ***Transfer of property to be void in certain circumstances***.—(1) Where any senior citizen who, after the commencement of this Act, has transferred by way of gift or otherwise, his property, subject to the condition that the transferee shall provide the basic amenities and basic physical needs to the transferor and such transferee refuses or fails to provide such amenities and physical needs, the said transfer of property shall be deemed to have been made by fraud or coercion or under undue influence and shall at the option of the transferor be declared void by the Tribunal.

(2) Where any senior citizen has a right to receive maintenance out of an estate and such estate or part thereof is transferred, the right to receive maintenance may be enforced against the transferee if the transferee has notice of the right, or if the transfer is gratuitous; but not against the transferee for consideration and without notice of right.

(3) If, any senior citizen is incapable of enforcing the rights under sub-sections (1) and (2), action may be taken on his behalf by any of the organisation referred to in Explanation to sub-section (1) of Section 5."

20. In *Sudesh Chhikara* v. *Ramti Devi*[18], this Court refused to grant the benefit of Section 23 in the absence of an averment that the transfer in question was subject to a condition for maintenance of the parents. It was observed: (SCC para 15)

"*15*. When a senior citizen parts with his or her property by executing a gift or a release or otherwise in favour of his or her near and dear ones, a condition of looking after the senior citizen is not necessarily attached to it. On the contrary, very often, such transfers are made out of love and affection without any expectation in return. *Therefore, when it is alleged that the conditions mentioned in sub-section (1) of Section 23 are attached to a transfer, existence of such conditions must be established before the Tribunal*."

(emphasis supplied)

21. Furthermore, in *Sudesh*[18] for attracting the application of Section 23(1), the following essentials were expounded:

(*a*) The transfer must have been made subject to the condition that the transferee shall provide the basic amenities and basic physical needs to the transferor; and

(*b*) The transferee refuses or fails to provide such amenities and physical needs to the transferor.

18 (2024) 14 SCC 225 : 2022 SCC OnLine SC 1684

22. Adverting to the facts at hand, we find that there are two documents on record. One, a promissory note dated 7-9-2019 which records that the promisor (respondent) shall serve the appellant and her husband till the end of their life, and in the absence of him fulfilling such obligation, the subsequent deed can be taken back by the appellant. Second, the gift deed dated 7-9-2019 also records a similar condition i.e. the donee maintains the donor, and the former makes all necessary provisions for the peaceful life of the appellant donor. Both these documents were signed simultaneously.

23. The appellant has submitted before us that such an undertaking stands grossly unfulfilled, and in her petition under Section 23, it has been averred that there is a breakdown of peaceful relations inter se the parties. In such a situation, the two conditions mentioned in *Sudesh*[18] must be appropriately interpreted to further the beneficial nature of the legislation and not strictly which would render otiose the intent of the legislature. Therefore, the Single Judge of the High Court and the tribunals below had rightly held the gift deed to be cancelled since the conditions for the well-being of the senior citizens were not complied with. We are unable to agree with the view taken by the Division Bench, because it takes a strict view of a beneficial legislation.

24. Before parting with the case at hand, we must clarify the observations made vide the impugned order[1] qua the competency of the Tribunal to hand over possession of the property. In *S. Vanitha*[13], this Court observed that Tribunals under the Act may order eviction if it is necessary and expedient to ensure the protection of the senior citizen. Therefore, it cannot be said that the Tribunals constituted under the Act, while exercising jurisdiction under Section 23, cannot order possession to be transferred. This would defeat the purpose and object of the Act, which is to provide speedy, simple and inexpensive remedies for the elderly.

25. Another observation of the High Court that must be clarified, is Section 23 being a stand-alone provision of the Act. In our considered view, the relief available to senior citizens under Section 23 is intrinsically linked with the Statement of Objects and Reasons of the Act, that elderly citizens of our country, in some cases, are not being looked after. It is directly in furtherance of the objectives of the Act and empowers senior citizens to secure their rights promptly when they transfer a property subject to the condition of being maintained by the transferee.

26. In view of the above, the impugned judgment and order[1] with the particulars as described in para 1 of this judgment, is set aside. Consequently, the gift deed dated 7-9-2019 is quashed. In the attending facts and circumstances of this case, the appeal is allowed. Possession of the premises shall be restored to the appellant by 28-2-2025.

27. The Registry is directed to communicate this judgment to the authorities concerned of the State of Madhya Pradesh who shall ensure compliance. Pending applications, if any, shall stand disposed of.

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18 *Sudesh Chhikara* v. *Ramti Devi*, (2024) 14 SCC 225 : 2022 SCC OnLine SC 1684
1 *Sunil Sharan Dixit* v. *Urmila Dixit*, 2022 SCC OnLine MP 3776
13 *S. Vanitha* v. *Commr.*, (2021) 15 SCC 730

CHAPTER V

PROTECTION OF LIFE AND PROPERTY OF SENIOR CITIZEN

21. Measures for publicity, awareness, etc., for welfare of senior citizens.—The State Government shall, take all measures to ensure that—

(*i*) the provisions of this Act are given wide publicity through public media including the television, radio and the print, at regular intervals;

(*ii*) the Central Government and State Government Officers, including the police officers and the members of the judicial service, are given periodic sensitization and awareness training on the issues relating to this Act;

(*iii*) effective co-ordination between the services provided by the concerned Ministries or Departments dealing with law, home affairs, health and welfare, to address the issues relating to the welfare of the senior citizens and periodical review of the same is conducted.

22. Authorities who may be specified for implementing the provisions of this Act.—(*1*) The State Government may, confer such powers and impose such duties on a District Magistrate as may be necessary, to ensure that the provisions of this Act are properly carried out and the District Magistrate may specify the officer, subordinate to him, who shall exercise all or any of the powers, and perform all or any of the duties, so conferred or imposed and the local limits within which such powers or duties shall be carried out by the officer as may be prescribed.

(*2*) The State Government shall prescribe a comprehensive action plan for providing protection of life and property of senior citizens.

23. Transfer of property to be void in certain circumstances.—(*1*) Where any senior citizen who, after the commencement of this Act, has transferred by way of gift or otherwise, his property, subject to the condition that the transferee shall provide the basic amenities and basic physical needs to the transferor and such transferee refuses or fails to provide such amenities and physical needs, the said transfer of property shall be deemed to have been made by fraud or coercion or under undue influence and shall at the option of the transferor be declared void by the Tribunal.

(*2*) Where any senior citizen has a right to receive maintenance out of an estate and such estate or part thereof is transferred, the right to receive maintenance may be enforced against the transferee if the transferee has notice of the right, or if the transfer is gratuitous; but not against the transferee for consideration and without notice of right.

(*3*) If, any senior citizen is incapable of enforcing the rights under sub-sections (*1*) and (*2*), action may be taken on his behalf by any of the organisation referred to in *Explanation* to sub-section (*1*) of section 5.

CHAPTER VI

OFFENCES AND PROCEDURE FOR TRIAL

24. Exposure and abandonment of senior citizen.—Whoever, having the care or protection of senior citizen leaves, such senior citizen in any place with the intention of wholly abandoning such senior citizen, shall be punishable with imprisonment of either description for a term which may extend to three months or fine which may extend to five thousands rupees or with both.

25. Cognizance of offences.—(*1*)Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence under this Act shall be cognizable and bailable.

(*2*) An offence under this Act shall be tried summarily by a Magistrate.

CHAPTER VII

MISCELLANEOUS

26. Officers to be public servants.—Every officer or staff appointed to exercise functions under this Act shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code(45 of 1860).

27. Jurisdiction of civil courts barred.—No Civil Court shall have jurisdiction in respect of any matter to which any provision of this Act applies and no injunction shall be granted by any Civil Court in respect of anything which is done or intended to be done by or under this Act.

28. Protection of action taken in good faith.—No suit, prosecution or other legal proceeding shall lie against the Central Government, the State Governments or the local authority or any officer of the Government in respect of anything which is done in good faith or intended to be done in pursuance of this Act and any rules or orders made thereunder.

29. Power to remove difficulties.—If any difficulty arises in giving effect to the provisions of this Act, the State Government may, by order published in the Official Gazette, make such provisions not inconsistent with the provisions of this Act, as appear to it to be necessary or expedient for removing the difficulty:

Provided that no such order shall be made after the expiry of a period of two years from the date of the commencement of this Act.

30. Power of Central Government to give directions.—The Central Government may give directions to State Governments as to the carrying into execution of the provisions of this Act.

31. Power of Central Government to review.—The Central Government may make periodic review and monitor the progress of the implementation of the provisions of this Act by the State Governments.

32. Power of State Government to make rules.—(*1*) The State Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(*2*) Without prejudice to the generality of the foregoing power, such rules may provide for—

(*a*) the manner of holding inquiry under section 5 subject to such rules as may be prescribed under sub-section (*1*) of section 8;

(*b*) the power and procedure of the Tribunal for other purposes under sub-section (*2*) of section 8;

(*c*) the maximum maintenance allowance which may be ordered by the Tribunal under sub-section (*2*) of section 9;

(*d*) the scheme for management of old age homes, including the standards and various types of services to be provided by them which are necessary for medical care and means of entertainment to the inhabitants of such homes under sub-section (*2*) of section 19;

(*e*) the powers and duties of the authorities for implementing the provisions of this Act, under sub-section (*1*) of section 22;

(*f*) a comprehensive action plan for providing protection of life and property of senior citizens under sub-section (*2*) of section 22;

(*g*) any other matter which is to be, or may be, prescribed.

(*3*) Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of State Legislature, where it consists of two Houses or where such legislature consists of one House, before that House.

value on the date on which the capital asset became the property of the previous owner.

(12) For the purposes of sections 72 and 73, cost of acquisition in relation to a capital asset—

(*a*) being equity share or shares allotted to a shareholder of a recognised stock exchange in India under a scheme for demutualisation or corporatisation approved by the Securities and Exchange Board of India established under section 3 of the Securities and Exchange Board of India Act, 1992 (15 of 1992), shall be the cost of acquisition of his original membership of the exchange;

(*b*) bring trading or clearing rights of the recognised stock exchange acquired by a shareholder who has been allotted equity share or shares under such scheme of demutualisation or corporatisation, shall be deemed to be *nil*.

Reference to Valuation Officer.

91. (1) For ascertaining the fair market value of a capital asset for this Chapter, the Assessing Officer may refer the valuation of the capital asset to a Valuation Officer,—

(*a*) if the value of the asset claimed by the assessee is as per the estimate by a registered valuer, but the Assessing Officer is of the opinion that the value so claimed is at variance with its fair market value;

(*b*) in any other case, if the Assessing Officer is of the opinion that—

(*i*) the fair market value of the asset exceeds the value claimed by the assessee by more than the percentage of value of such asset or amount, as may be prescribed; or

(*ii*) having regard to the nature of the asset and other relevant circumstances, it is necessary so to do.

(2) The provisions of section 269(3) to (8) shall, with necessary modifications, apply in relation to such reference made under sub-section (1).

F.—Income from other sources

Income from other sources.

92. (1) Income of every kind which is not to be excluded from the total income under this Act, shall be chargeable to income-tax under the head “Income from other sources”, if it is not chargeable to income-tax under any of the heads specified in section 13(*a*) to (*d*).

(2) In particular, and without prejudice to the generality of the provisions of sub-section (1), the following incomes shall be chargeable to income-tax under the head “Income from other sources”:—

(*a*) any dividend;

(*b*) any winning from lotteries, crossword puzzles, races including horse races, card games and other games of any sort or from gambling or betting of any form or nature;

(*c*) any sum received by the assessee from employees as contributions to any provident fund, superannuation fund, any fund set up under the Employees' State Insurance Act, 1948 (34 of 1948), or any other fund for the welfare of such employees, if the income is not chargeable to income-tax under the head "Profits and gains of business or profession";

(*d*) any sum received under a Keyman insurance policy, as defined in Schedule II (Note 1) including the bonus allocated on such policy, if such income is not chargeable to income-tax under the head "Profits and gains of business or profession" or under the head "Salaries";

(*e*) any income by way of interest on securities, if the income is not chargeable to income-tax under the head "Profits and gains of business or profession";

(*f*) any income from machinery, plant or furniture belonging to the assessee and let on hire, if the income is not chargeable to income-tax under the head "Profits and gains of business or profession";

(*g*) any income from letting on hire of machinery, plant or furniture, belonging to the assessee and also buildings, where the letting of the buildings is inseparable from the letting of such machinery, plant or furniture, if the income is not chargeable to income-tax under the head "Profits and gains of business or profession";

(*h*) any sum of money received as an advance or otherwise during negotiations for the transfer of a capital asset, if—

(*i*) such sum is forfeited; and

(*ii*) the negotiations do not result in transfer of such capital asset;

(*i*) any income by way of interest received on compensation or on enhanced compensation referred to in section 278(1);

(*j*) any compensation or other payment, due to or received by any person, by whatever name called, in connection with the termination of his employment, or the modification of its terms and conditions;

(*k*) any specified sum received by a unit holder from a business trust during the tax year with respect to a unit held by him at any time during such tax year, the computation of which shall be—

specified sum = A – B – C (which shall be deemed to be zero, if the sum of B and C is greater than A), where—

A = aggregate of the sum distributed by the business trust with respect to such unit, during the tax year or during any earlier tax year or years, to such unit holder, who holds such unit on the date of distribution of sum or to any other unit holder who held such unit at any time prior to the date of such distribution, which is—

(*a*) not in the nature of income referred to in Schedule V (Table: Sl. No. 3 or 4); and

(*b*) not chargeable to tax under section 223(2);

B = amount at which such unit was issued by the business trust; and

C = amount charged to tax under this clause in any earlier tax year;

(*l*) where any sum, including bonus allocated, is received, during a tax year, under a life insurance policy, other than—

(*a*) sums received under a unit linked insurance policy; or

(*b*) income referred to in clause (*d*),

and such sum is not to be excluded from the total income of that tax year under Schedule II (Table: Sl. No. 2), the sum exceeding the aggregate of the premium paid, during the term of such life insurance policy, and not claimed as a deduction under this Act, computed in such manner, as may be prescribed;

(*m*) where any person receives in any tax year, from any person or persons—

(*i*) any sum of money without consideration, the total of which exceeds ₹ 50000, the whole of such sum;

(*ii*) any immovable property—

(*A*) without consideration, the stamp duty value of which exceeds ₹ 50000, the stamp duty value of such property;

(*B*) for a consideration, the stamp duty value of such property that exceeds such consideration, if this excess amount is more than the higher of the following amounts:—

(*I*) ₹ 50000; or

(*II*) 10% of the consideration;

(*iii*) any property, other than immovable property,—

(*A*) without consideration, the aggregate fair market value of which exceeds ₹ 50000, the whole of the aggregate fair market value of such property;

(*B*) for a consideration which is less than the aggregate fair market value of the property by an amount exceeding ₹ 50000, the aggregate fair market value of such property as exceeds such consideration.

(3) The provisions of sub-section (2)(*m*) shall not apply to any sum of money or any property received—

(*a*) from any relative; or

(*b*) on the occasion of marriage of the individual; or

(*c*) under a will or by way of inheritance; or

(*d*) in contemplation of death of the payer or donor; or

(*e*) from any local authority as defined in Schedule III (Note 6); or (*f*) from or by any registered non-profit organisation as defined in section 355(*g*), except when received by any person referred to in section 355(*h*); or

(*g*) by way of a transaction not regarded as transfer under section 70(1)(*a*), (*c*), (*d*), (*e*), (*f*), (*g*), (*i*), (*j*), (*k*), (*l*), (*n*), (*o*), (*t*), (*u*), (*v*) or (*w*); or

(*h*) from an individual by a trust created or established solely for the benefit of relative of the individual; or

(*i*) from such class of persons and subject to such conditions, as may be prescribed.

(4) For the purposes of sub-section (2)(*m*)(*ii*),—

(*a*) if the date of agreement fixing the amount of consideration for the transfer of immovable property and the date of registration are not the same, the stamp duty value on the date of agreement shall apply, provided the consideration, in whole or in part, has been paid in specified banking or online mode as defined in section 66(*32*) on or before the date of agreement for transfer of such immovable property;

(*b*) if the stamp duty value of immovable property is disputed by the assessee on the grounds mentioned in section 78(2), the Assessing Officer may refer the valuation of such property to a Valuation Officer, and the provisions of sections 78(2) and 288(1) (Table: Sl. No. 8) shall, as far as may be, apply to the stamp duty value of such property as they apply for valuation of capital asset under those sections.

(5) For the purposes of this section,—

(*a*) "assessable" shall have the meaning assigned to it in section 2(*105*);

(*b*) "card game and other game of any sort" includes any game show, an entertainment programme on television or electronic mode, where people compete to win prizes or any similar game;

(*c*) "fair market value" of a property, other than an immovable property, means the value determined by such method as may be prescribed;

(*d*) "jewellery" shall have the meaning assigned to it in section 2(*22*);

(*e*) "lottery" includes winnings from prizes awarded by draw of lots, by chance, or in any other manner under any scheme or arrangement by whatever named called;

(*f*) "property" means the following capital asset of the assessee:—

(*i*) immovable property being land or building or both;

(*ii*) shares and securities;

(*iii*) jewellery;

(*iv*) archaeological collections;

(*v*) drawings;

(*vi*) paintings;

(*vii*) sculptures;

(*viii*) any work of art;

(*ix*) bullion; or

(*x*) virtual digital asset;

(*g*) "relative" means—

(*i*) in case of an individual—

(*A*) spouse;

(*B*) brother or sister;

(*C*) brother or sister of the spouse;

(*D*) brother or sister of either of the parents;

(*E*) any lineal ascendant (maternal as well as paternal) or descendant;

(*F*) any lineal ascendant (maternal as well as paternal) or descendant of the spouse;

(*G*) spouse of the person referred to in items (*B*) to (*F*); and

(*ii*) for a Hindu undivided family, any member thereof;

(*h*) "unit linked insurance policy" shall have the meaning assigned to it in Schedule II (Note 1).

Deductions.

93. (1) The income chargeable under the head "Income from other sources" shall be computed after making the following deductions:—

[10b]**[**(a) *for interest on securities, any reasonable sum paid as commission or remuneration to a banker or any other person for the purpose of realising such interest on behalf of the assessee;***]**

(*b*) for income of the nature referred to in section 92(2)(*c*), so far as may be, an amount as per section 29(1)(*e*);

(*c*) for income of the nature referred to in section 92(2)(*f*) and (*g*), so far as may be, an amount as per section 28(1)(*a*), (*b*), (*d*), section 33, and subject to the provisions of section 28(2);

(*d*) for income in the nature of family pension (a regular monthly amount payable by the employer to a family member of an employee upon the death of such employee),—

(*i*) an amount equal to one-third of such income or ₹ 25000, whichever is less, where income-tax is computed under section 202(1); and

(*ii*) an amount equal to one-third of such income or ₹ 15000, whichever is less, in any other case;

10b. Substituted by the Finance Act, 2026, w.e.f. **1-4-2026**. Prior to its substitution, clause (*a*) read as under :

"(*a*) for dividends [excluding those referred to in section 2(*40*)(*f*)] or interest on securities, any reasonable sum paid as commission or remuneration to a banker or any other person for the purpose of realising such dividend or interest on behalf of the assessee;"

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or acted in a cruel manner. The injuries found by the doctor PW 12, who carried out the post-mortem examination on the body of the deceased Zohra
a Bi, aged 40 years, were in all sixteen incised wounds, similarly, he had noted eleven incised wounds on the dead body of Gulzar, aged about 17 years. On the face of it, it is apparent that the accused acted in a most cruel manner by inflicting a number of dagger blows on a helpless stepmother and younger sister. Hence, even assuming that there was no premeditation and the act was done in the heat of passion because of a sudden quarrel between PW 1 on
b one side and Maqbool and the appellant on the other and that the appellant used the dagger which was brought out by his brother Maqbool for inflicting injuries, yet the main requirements, viz., (*i*) it was a sudden fight and (*ii*) the accused have not taken undue advantage or acted in a cruel or unusual manner of Exception 4 of Section 300 IPC are not satisfied. Further, the contention of the learned counsel for the appellant that PW 1 and the
c accused have reconciled and are staying together or that the accused is the sole earning member of the family would be totally irrelevant on the question of conviction and sentence of the accused for the offence of murder of his stepmother and sister.

6. In the result, the appeal fails and is dismissed accordingly. Bail bond stands cancelled. The appellant must surrender forthwith to serve the
d sentence.

(1999) 3 Supreme Court Cases 573

(BEFORE S. SAGHIR AHMAD AND D.P. WADHWA, JJ.)

e VIDHYADHAR .. Appellant;

Versus

MANIKRAO AND ANOTHER .. Respondents.

Civil Appeal No. 1534 of 1999†, decided on March 17, 1999

A. **Transfer of Property Act, 1882 — S. 54 — Sale — Non-payment or**
f **inadequacy of sale consideration — Plea regarding — Plea that sale deed was void, fictitious, collusive or not intended to be acted upon — Held, can be raised also by a defendant who is a stranger to the sale deed — It would depend upon the pleadings of the parties, nature of the suit, nature of the deed, evidence led by the parties and other circumstances**

B. **Civil Procedure Code, 1908 — Or. 8 — Defendant can raise any legitimate plea available to him under law to defeat the suit of the plaintiff**

g C. **Transfer of Property Act, 1882 — Ss. 54 and 60 — Sale of mortgaged property — Purchaser becomes entitled to right of redemption possessed by the seller**

D. **Civil Procedure Code, 1908 — S. 100 — Scope of High Court's power in second appeal to interfere with concurrent findings of fact (regarding execution of sale deed in this case)**

h

† From the Judgment and Order dated 3-5-1991 of the Bombay High Court in S.A. No. 352 of 1976

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E. **Civil Procedure Code, 1908 — Or. 16 Rr. 1(3) & 1-A — R. 1-A not in derogation of R. 1(3) — Witnesses — A party may bring witnesses even without applying for court summons — But leave of the court has to be obtained before proceeding to examine such witnesses**

F. **Transfer of Property Act, 1882 — S. 54 — Sale — Consideration — "Price paid or promised or part paid and part promised" — Actual payment of full price at the time of execution of sale deed is not a sine qua non for completion of sale — Real test of sale is intention of the parties**

G. **Transfer of Property Act, 1882 — S. 55(4)(b) — Provision based on English doctrine of equitable lien — Where ownership of the property is transferred to the buyer before payment of the wholesale price, vendor is entitled to a charge on that property for the amount of sale price as also interest thereon — Such charge provides him right to enforce the charge by a suit but does not entitle the seller to retain the property as against the buyer**

H. **Transfer of Property Act, 1882 — S. 58(c) proviso — Mortgage by conditional sale — Whether transaction was an out and out sale or a mortgage — Intention of the parties to the deed is the real test — Document styled as 'kararkharedi' executed by Defendant 2 in favour of Defendant 1 for a sum of Rs 1500 with the stipulation therein that if the entire amount of Rs 1500 returned to Defendant 1 before a specified date the property would be reconveyed to Defendant 2 — Held, deed must be treated as a mortgage by conditional sale**

Defendant 2 who owned a plot of land, executed a document styled as 'Kararkharedi' in favour of Defendant 1 for a sum of Rs 1500 and delivered possession of the land to the latter. There was a stipulation in the document that if the entire amount of Rs 1500 was returned to Defendant 1 before 15-3-1973, the land would be given back to Defendant 2. The land was subsequently transferred by Defendant 2 in favour of the plaintiff for a sum of Rs 5000 by a registered sale deed dated 19-6-1973. After having obtained the sale deed, the plaintiff filed a suit in which it was given out that Defendant 2 had offered the entire amount to Defendant 1 but the latter did not accept the amount and, therefore, Defendant 2 had to send it by money order on 7-6-1973 which was refused by Defendant 1. A notice dated 5-6-1973 had also been sent by Defendant 2 to Defendant 1. It was pleaded that since the document executed by Defendant 2 in favour of Defendant 1 was a mortgage by conditional sale, the property was liable to be redeemed. It was also pleaded in the alternative that if it was held by the Court that the document did not create a mortgage but was an out and out sale, the plaintiff as transferee of Defendant 2, was entitled to a decree for reconveyance of the property as Defendant 2 had already offered the entire amount of sale consideration to Defendant 1 which the latter had refused and which amount the plaintiff was still prepared to offer to Defendant 1 and was also otherwise ready and willing to perform his part of the contract. Defendant 2 admitted the claim of the plaintiff by filing a one-sentence written statement that the claim of the plaintiff was admitted. When the plaintiff entered the witness-box, Defendant 2 did not cross-examine him. He did not put it to the plaintiff that the entire amount of consideration had not been paid by him. Defendant 1 alone raised the question of validity of the sale deed in favour of the plaintiff by pleading that it was a fictitious transaction as the sale consideration had not been paid to Defendant 2 in its entirety. Defendant 1 also pleaded that the document in his favour was not a mortgage by conditional sale but was an out and out sale and since the amount of consideration had not been tendered within the time stipulated therein, the plaintiff could not claim reconveyance of the property in question. Having pleaded these facts and having raised the question relating to the validity of the sale deed on the ground

that the amount of consideration had not been paid, Defendant 1 did not, in support of his case, enter the witness-box. Instead, he deputed his brother to appear as a witness in the case. He did enter the witness-box but could not prove that the sale
a consideration had not been paid to Defendant 2. On a consideration of the entire evidence on record, the trial court recorded a positive finding of fact that Defendant 2 had mortgaged the land in question to Defendant 1 for Rs 1500 on 24-3-1971, that the sale deed executed by Defendant 2 in favour of the plaintiff was a genuine document and the entire amount of sale consideration had been paid and, therefore, the plaintiff was entitled to redeem the mortgage executed by Defendant 2 in favour
b of Defendant 1. This finding was affirmed by the lower appellate court but the High Court intervened and recorded a finding that the plaintiff had not paid the entire amount of sale consideration to Defendant 2. Out of a sum of Rs 5000 for which sale deed was executed, a sum of Rs 500 alone had been paid to Defendant 2 before the Sub-Registrar and the rest of the amount was not paid. The High Court further held that the document "kararkharedi" which purports to have been executed for a sum of Rs 1500 by Defendant 2 in favour of Defendant 1 was, in fact, executed for a sum of
c Rs 800 which was paid before the Sub-Registrar. The High Court then disposed of the suit by directing that the land in question shall be restored to Defendant 2 who shall pay back a sum of Rs 800 (in instalments) to Defendant 1 and a sum of Rs 500 (in instalments) to the plaintiff. On behalf of the plaintiff-appellant it was contended that the sale deed executed by Defendant 2 in favour of the plaintiff was not challenged by Defendant 2 who, on the contrary, had admitted the entire claim set out by the plaintiff in his plaint and, therefore, the High Court was in error in setting
d aside the sale deed. It was also contended that Defendant 1 who had challenged the sale deed as fictitious had not appeared as a witness in the case and had avoided the witness-box in order to avoid cross-examination and, therefore, an adverse inference should have been drawn against him and this plea ought not to have been rejected by the High Court which, it was also contended, could not have legally set aside the findings of fact in second appeal. It was also contended that Defendant 1 being a stranger to the sale deed should not have been allowed to raise the plea relating to
e inadequacy or non-payment of consideration money. Respondent-Defendant 1, on the contrary, tried to justify the interference by the High Court at the stage of second appeal by contending that the findings recorded by the courts were not borne out by the evidence on record and were perverse which could be set aside under Section 100 CPC. Defendant 1 also contended that since the plaintiff had filed the suit on the basis of the sale deed executed by Defendant 2 in his favour and had sought
f possession over that property from Defendant 1, it was open to the latter to show that the plaintiff had no title to the property in the suit and, therefore, the suit was liable to be dismissed. It was contended that in his capacity as a defendant in the suit, it was open to Defendant 1 to raise all the pleas on the basis of which the suit could be defeated. He also contended that the document of title in favour of Defendant 1 was misread as a mortgage deed although it constituted an out and out sale. Moreover, on the commission of default, as contemplated by the document in question, the whole
g transaction, even if it was a mortgage, converted itself into an absolute sale as agreed upon between the parties. The sale having thus become absolute in favour of Defendant 1, no title was left in Defendant 2 to convey it to the plaintiff through the sale deed in question. Allowing the appeal

Held :

As regards right of Defendant 1 to raise pleas, it is not possible to subscribe to the view expressed in broad terms in *Lal Achal Ram case* by Privy Council that a
h stranger to a sale deed cannot dispute payment of consideration or its adequacy. A distinction has to be drawn between a deed which was intended to be real or

operative between the parties and a deed which is fictitious in character and was never designed as a genuine document to effect transfer of title. In such a situation, it would be open even to a stranger to impeach the deed as void and invalid on all possible grounds. A person in his capacity as a defendant can raise any legitimate plea available to him under law to defeat the suit of the plaintiff. This would also include the plea that the sale deed by which the title to the property was intended to be conveyed to the plaintiff was void or fictitious or, for that matter, collusive and not intended to be acted upon. Thus, the whole question would depend upon the pleadings of the parties, the nature of the suit, the nature of the deed, the evidence led by the parties in the suit and other attending circumstances. (Para 21)

In the instant case, the property which was mortgaged in favour of Defendant 1 was transferred by Defendant 2, who was the owner of the property, to the plaintiff. This transfer does not, in any way, affect the rights of Defendant 1 who was the mortgagee and the mortgage in his favour, in spite of the transfer, subsisted. (Para 22)

Lal Achal Ram v. *Raja Kazim Husain Khan*, (1905) 32 IA 113 : ILR 27 All 271, *overruled*

Kamini Kumar Deb v. *Durga Charan Nag*, AIR 1923 Cal 521 : 37 Cal LJ 122; *Saradindu Mukherjee* v. *Kunja Kamini Roy*, AIR 1942 Cal 514 : 46 CWN 798; *Jugal Kishore Tewari* v. *Umesh Chandra Tewari*, AIR 1973 Pat 352 : 1973 BLJR 255; *Sanatan Mohapatra* v. *Hakim Mohammad Kazim Mohmmad*, AIR 1977 Ori 194 : 44 Cut LT 606, *approved*

Defendant 1 himself was not a party to the transaction of sale between Defendant 2 and the plaintiff. He himself had no personal knowledge of the terms settled between Defendant 2 and the plaintiff. The transaction was not settled in his presence nor was any payment made in his presence. Nor, for that matter, was he a scribe or marginal witness of that sale deed. Defendant 1 could not have raised a plea as to the validity of the sale deed on the ground of inadequacy of consideration or part-payment thereof. Defendant 2 alone, who was the executant of the sale deed, could have raised an objection as to the validity of the sale deed on the ground that it was without consideration or that the consideration paid to him was highly inadequate. But he admitted the claim of the plaintiff whose claim in the suit was based on the sale deed, executed by Defendant 2 in his favour. The property having been transferred to him, the plaintiff became entitled to all the reliefs which could have been claimed by Defendant 2 against Defendant 1 including redemption of the mortgaged property. (Para 18)

The findings of fact concurrently recorded by the trial court as also by the lower appellate court could not have been legally upset by the High Court in a second appeal under Section 100 CPC unless it was shown that the findings were perverse, being based on no evidence or that on the evidence on record, no reasonable person could have come to that conclusion. In the face of the findings recorded by the trial court as also by the lower appellate court on the question of execution of sale deed by Defendant 2 in favour of the plaintiff with the further finding that it was a valid sale deed which properly conveyed the title of the property in question to the plaintiff, the High Court could not set aside those findings merely on the ground that the circumstances which had already been considered by the lower courts appeared to suggest some other conclusion from proved facts. (Paras 23 and 26)

Suggested Case Finder Search Text (*inter alia*) :

high court appeal concurrent* fact* 100

The High Court erred in commenting upon the production of Defendant 2 as a witness by saying "The plaintiff while examining this witness has not incorporated the name of this witness in the list of witnesses nor any application was made for the examination of Defendant 2. The willingness of Defendant 2 was also not placed on record to appear as a witness for the plaintiff". Even though the name of Defendant 2 was not mentioned in the list of witnesses furnished by the plaintiff, he was properly examined as a witness and his testimony was not open to any criticism on the ground that he was produced as a witness without being summoned through the Court and without his name being mentioned in the list of witnesses. (Paras 28 and 32)

Rules 1 and 1-A of Order 16 CPC read together clearly indicate that it is open to a party to summon the witnesses to the court or may, without applying for summons, bring the witnesses to give evidence or to produce documents. Since Rule 1-A is subject to the provisions of sub-rule (3) of Rule 1, all that can be contended is that before proceeding to examine any witness who might have been brought by a party for that purpose, the leave of the court may be necessary but this by itself will not mean that Rule 1-A was in derogation of sub-rule (3) of Rule 1. (Para 31)

Mange Ram v. *Brij Mohan*, (1983) 4 SCC 36 : AIR 1983 SC 925 : (1983) 3 SCR 525, *relied on*

The recital in the registered sale deed that out of the amount of Rs 5000, which was the sale price, a sum of Rs 4500 had been paid earlier while Rs 500 was paid before the Sub-Registrar, read in the light of the admission made by Defendant 2 in his written statement and, thereafter, in his statement on oath as a witness clearly establishes the fact that Defendant 2 had executed a sale deed in favour of the plaintiff for a price which was paid to Defendant 2. Even if the findings recorded by the High Court that the plaintiff had paid only Rs 500 to Defendant 2 as sale consideration and the remaining amount of Rs 4500 which was shown to have been paid before the execution of the deed was, in fact, not paid, the sale deed would not, for that reason, become invalid on account of the provisions contained in Section 54, TPA. The definition of sale contained in Section 54 indicates that in order to constitute a sale, there must be a transfer of ownership from one person to another, i.e., transfer of all rights and interests in the properties which are possessed by that person are transferred by him to another person. The transferor cannot retain any part of his interest or right in that property or else it would not be a sale. Price constitutes an essential ingredient of the transaction of sale. But the words "price paid or promised or part-paid and part-promised" indicate that actual payment of the whole of the price at the time of the execution of sale deed is not a sine qua non to the completion of the sale. Even if the whole of the price is not paid but the document is executed and thereafter registered, if the property is of the value of more than Rs 100, the sale would be complete, the transaction of sale will take effect and the title would pass under that transaction. The real test is the intention of the parties. In order to constitute a "sale", the parties must intend to transfer the ownership of the property and they must also intend that the price would be paid either in praesenti or in future. The intention is to be gathered from the recital in the sale deed, the conduct of the parties and the evidence on record. (Paras 36 to 38)

Gayatri Prasad v. *Board of Revenue*, 1973 All LJ 412; *Sukaloo* v. *Punau*, AIR 1961 MP 176 : ILR 1960 MP 614, *approved*

In the present case, the facts clearly establish that a complete and formidable sale deed was executed by Defendant 2 in favour of the plaintiff and the title in the property passed to the plaintiff. The findings recorded by the High Court on this question cannot, therefore, be upheld. (Para 39)

The judgment of the High Court on this point is also erroneous for the reason that it totally ignored the provisions contained in Section 55(4)(*b*), TPA. They apply to a situation where the ownership in the property has passed to the buyer before the whole of the purchase money was paid to the seller or the vendor. What is contained in this clause is based on the English doctrine of equitable lien as propounded by Baron Rolfe in *Goode* v. *Burton*. This clause confers statutory recognition on the

English doctrine of equitable lien. The statutory charge under this paragraph is inflexible. The charge does not entitle the seller to retain possession of the property as against the buyer but it positively gives him a right to enforce the charge by suit. (Paras 40 and 42) a

Goode v. *Burton*, (1847) 74 RR 633 : 1 Ex 189; *Webb* v. *Macpherson*, (1903) 30 IA 238; *Venkataperumal Naidu* v. *M. Rathnasabhapathi Chettiar*, AIR 1953 Mad 821; *Shobhalal Shyamlal Kurmi* v. *Sidhelal Halkelal Bania*, AIR 1939 Nag 210 : ILR 1939 Nag 636; *Basalingaya Revanshiddappa* v. *Chinnava Karibasappa*, AIR 1932 Bom 247 : 34 Bom LR 427, *approved*

In view of the above, the High Court was wholly in error in coming to the conclusion that there was no sale as only a sum of Rs 500 was paid to Defendant 2 and the balance amount of Rs 4500 was not paid. Since the title in the property had already passed, even if the balance amount of sale price was not paid, the sale would not become invalid. The property sold would stand transferred to the buyer subject to the statutory charge for the unpaid part of the sale price. (Para 43) b

It is not possible to accept the contention of Defendant 1 that the deed dated 24-3-1971 was not a mortgage deed but an out and out sale with the result that the property having been transferred to Defendant 1 was not available for being sold to the plaintiff. The contents of the document indicate that Defendant 2 had executed a mortgage by conditional sale in favour of Defendant 1. He had promised to pay back Rs 1500 to him by a particular date failing which the document was to be treated as a sale deed. The intention of the parties is reflected in the contents of the document which is described as a mortgage by conditional sale. In the body of the document, the mortgage money has also been specified. Having regard to the circumstances of this case as also the fact that the condition of repurchase is contained in the same document by which the mortgage was created in favour of Defendant 1, the deed in question cannot but be treated as a mortgage by conditional sale. Mortgage by conditional sale is defined under Section 58(*c*). The proviso was introduced in this clause only to set at rest the controversy about the nature of the document, whether the transaction would be a sale or a mortgage. It has been specifically provided by the amendment that the document would not be treated as a mortgage unless the condition of repurchase was contained in the same document. The basic principle is that the form of transaction is not the final test and the true test is the intention of the parties in entering into the transaction. If the intention of the parties was that the transfer was by way of security, it would be a mortgage. As between the parties to the document, the intention to treat the transaction as an out and out sale or as a mortgage has to be found out on a consideration of the contents of the document in the light of surrounding circumstances. (Paras 44, 49, 46, 47 and 48) c d e f

Balkishen Das v. *Legge*, (1899) 27 IA 58; *Bhaskar Waman Joshi* v. *Shrinarayan Rambilas Agarwal*, AIR 1960 SC 301 : (1960) 2 SCR 117; *P.L. Bapuswami* v. *N. Pattay Gounder*, AIR 1966 SC 902 : (1966) 2 SCR 918, *relied on*

So far as the contention of Defendant 1 that the mortgage money was not paid within the time stipulated in the document and, therefore, the transaction, even if it was a mortgage, became an absolute sale is concerned, the finding of the courts below is that this money was tendered to Defendant 1 who refused to accept it. Defendant 2 had thus performed his part of the agreement and had offered the amount to Defendant 1 so that the property may be reconveyed to him but Defendant 1 refused to accept the money. He, therefore, cannot complain of any default in not paying the amount in question within the time stipulated in the deed. Since there was no default on the part of Defendant 2, the document would not convert itself into a sale deed and would remain a mortgage deed. The suit for redemption was, therefore, properly filed by the plaintiff who was the assignee of Defendant 2. (Para 50) g h

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I. **Evidence Act, 1872 — S. 114 Ill. (g) — Presumption — If a party abstains from entering the witness-box, an adverse inference would arise against him**

a Where a party to the suit does not appear in the witness-box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct. (Para 17)

Sardar Gurbakhsh Singh v. *Gurdial Singh*, AIR 1927 PC 230 : 32 CWN 119; *Kirpa Singh* v. *Ajaipal Singh*, AIR 1930 Lah 1 : ILR 11 Lah 142; *Martand Pandharinath Chaudhari* v. *Radhabai Krishnarao Deshmukh*, AIR 1931 Bom 97 : 32 Bom LR 924; *Gulla Kharagjit Carpenter* v. *Narsingh Nandkishore Rawat*, AIR 1970 MP 225 : 1970 MPLJ b 586; *Arjun Singh* v. *Virendra Nath*, AIR 1971 All 29; *Bhagwan Dass* v. *Bhishan Chand*, AIR 1974 P&H 7, *approved*

Suggested Case Finder Search Text (*inter alia*) :

evidence "114 ill (g)" (court or witness* or examine*)

R-M/TZ/20919/C

c Advocates who appeared in this case :

S.K. Gambhir, Advocate, for the Appellant;

Makrand D. Adkar, S.D. Singh and Vishwajit Singh, Advocates, for the Respondents.

Chronological list of cases cited	***on page(s)***
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d 2. AIR 1977 Ori 194 : 44 Cut LT 606, *Sanatan Mohapatra* v. *Hakim Mohammad Kazim Mohmmad*	585*b*
3. AIR 1974 P&H 7, *Bhagwan Dass* v. *Bhishan Chand*	584*b-c*
4. AIR 1973 Pat 352 : 1973 BLJR 255, *Jugal Kishore Tewari* v. *Umesh Chandra Tewari*	585*a-b*
5. 1973 All LJ 412, *Gayatri Prasad* v. *Board of Revenue*	591*a*
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g 14. AIR 1932 Bom 247 : 34 Bom LR 427, *Basalingaya Revanshiddappa* v. *Chinnava Karibasappa*	592*e-f*
15. AIR 1931 Bom 97 : 32 Bom LR 924, *Martand Pandharinath Chaudhari* v. *Radhabai Krishnarao Deshmukh*	584*a-b*
16. AIR 1930 Lah 1 : ILR 11 Lah 142, *Kirpa Singh* v. *Ajaipal Singh*	584*a*
17. AIR 1927 PC 230 : 32 CWN 119, *Sardar Gurbakhsh Singh* v. *Gurdial Singh*	584*a*, 584*a-b*
h 18. AIR 1923 Cal 521 : 37 Cal LJ 122, *Kamini Kumar Deb* v. *Durga Charan Nag*	585*a-b*

19. (1905) 32 IA 113 : ILR 27 All 271, *Lal Achal Ram* v. *Raja Kazim Husain Khan* 584*f-g*, 585*e-f*
20. (1903) 30 IA 238, *Webb* v. *Macpherson* 592*d-e* a
21. (1899) 27 IA 58, *Balkishen Das* v. *Legge* 593*g*
22. (1847) 74 RR 633 : 1 Ex 189, *Goode* v. *Burton* 592*d-e*

The Judgment of the Court was delivered by

S. SAGHIR AHMAD, J.— Leave granted.

2. Vidhyadhar, the appellant before us, who shall hereinafter be referred to as the plaintiff, had instituted a suit against the respondents, who shall b hereinafter be referred to as Defendants 1 and 2, respectively, for redemption of the mortgage by conditional sale or in the alternative, for a decree for specific performance of the contract for repurchase which was decreed by the trial court on 29-4-1975. The decree was upheld by the lower appellate court by its judgment dated 28-9-1976 but the High Court, by the impugned judgment dated 3-5-1991, set aside both the judgments and passed a unique c order to which a reference shall be made presently in this judgment. The plaintiff is in appeal before us.

3. The property in dispute is 4.04 acres of land of Survey Plot No. 15 of Kasba Amdapur, District Buldana. The whole area of Survey Plot No. 15 is 16.09 acres and except the land in dispute, namely, an area of 4.04 acres, the entire land is in possession of the plaintiff. Defendant 2 was the owner of the d whole Plot No. 15. On 24-3-1971, he executed a document styled as "kararkharedi" in favour of Defendant 1 for a sum of Rs 1500 and delivered possession thereof to the latter. There was a stipulation in the document that if the entire amount of Rs 1500 was returned to Defendant 1 before 15-3-1973, the property would be given back to Defendant 2.

4. This land was subsequently transferred by Defendant 2 in favour of e the plaintiff for a sum of Rs 5000 by a registered sale deed dated 19-6-1973. After having obtained the sale deed, the plaintiff filed the aforesaid suit in which it was given out that Defendant 2 had offered the entire amount to Defendant 1 but the latter did not accept the amount and, therefore, Defendant 2 had to send it by money order on 7-6-1973 which was refused by Defendant 1. A notice dated 5-6-1973 had also been sent by Defendant 2 f to Defendant 1. It was pleaded that since the document executed by Defendant 2 in favour of Defendant 1 was a mortgage by conditional sale, the property was liable to be redeemed. It was also pleaded in the alternative that if it was held by the Court that the document did not create a mortgage but was an out and out sale, the plaintiff as transferee of Defendant 2, was entitled to a decree for reconveyance of the property as Defendant 2 had g already offered the entire amount of sale consideration to Defendant 1 which the latter had refused and which amount the plaintiff was still prepared to offer to Defendant 1 and was also otherwise ready and willing to perform his part of the contract.

5. Defendant 2 admitted the whole claim of the plaintiff by filing a one-line written statement in the trial court. But Defendant 1 contested the suit h and pleaded that the document in his favour was not a mortgage by conditional sale but was an out and out sale and since the amount of consideration had not been tendered within the time stipulated therein, the plaintiff could not claim reconveyance of the property in question. The trial court framed the following issues:

"*1*. Does the plaintiff prove that Defendant 2 mortgaged the suit field with Defendant 1 for Rs 1500 on 24-3-1971?

2. Does the plaintiff prove that the suit field was purchased by him from Defendant 2 for Rs 5000 on 19-6-1973?

3. Is the plaintiff entitled to redeem the mortgage executed by Defendant 2 in favour of Defendant 1?

4. Was Defendant 2 ready and willing to repurchase the suit field prior to 15-3-1971?

5. Is the plaintiff entitled to claim retransfer of the suit field from Defendant 1?

6. Relief and costs?"

6. The finding on Issue 1 was that Defendant 2 had mortgaged the land in question to Defendant 1 for Rs 1500 on 24-3-1971. On Issue 2, it was found that Defendant 2 had transferred the property in favour of the plaintiff for a sum of Rs 5000 on 19-6-1973 by a registered sale deed and, therefore, the plaintiff was entitled to redeem the mortgage executed by Defendant 2 in favour of Defendant 1. Issues 4 and 5 were decided in the negative as the trial court had held the document in question to be a mortgage deed. In view of these findings, the suit was decreed and the trial court passed the following order:

"It is hereby declared that the amount due to Defendant 1 on the mortgage mentioned in the plaint dated 24-3-1971 is Rs 1500. It is further ordered and decreed that the plaintiff to pay into court on or before 29-10-1975 or any later date into which time for payment may be extended by the Court the said sum of Rs 1500.

That on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due interest as may be payable under Rule 10, together with such subsequent interest as may be payable under Rule 11 of Order 34 of the First Schedule to the Code of Civil Procedure, 1908, Defendant 1 shall bring into court all documents in his possession or power relating to the mortgaged property in the plaint mentioned and all such documents shall be delivered over to the plaintiff or to such person as he appoints, and Defendant 1 shall, if so required, reconvey or retransfer the said property from the said mortgage and clear of and from all encumbrances created by Defendant 1 or any person claiming under him or any person under whom he claims, and free from all liability whatsoever arising from the mortgage or this suit and shall deliver to the plaintiff quiet and peaceful possession of the said property. And it is further ordered and decreed that, in default of payment as aforesaid, Defendant 1 may apply to the Court for a final

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decree that the plaintiff be debarred from all right to redeem the property."

7. This decree was confirmed in appeal but, as pointed out above, was reversed by the High Court in the second appeal. a

8. The High Court was of the opinion that the plaintiff had not paid the entire amount of sale consideration to Defendant 2. Out of a sum of Rs 5000 for which sale deed was executed, a sum of Rs 500 alone had been paid to Defendant 2 before the Sub-Registrar and the rest of the amount was not paid. The High Court further held that the document "kararkharedi" which b purports to have been executed for a sum of Rs 1500 by Defendant 2 in favour of Defendant 1 was, in fact, executed for a sum of Rs 800 which was paid before the Sub-Registrar. The High Court then disposed of the suit by directing that the land in question shall be restored to Defendant 2 who shall pay back a sum of Rs 800 (in instalments) to Defendant 1 and a sum of Rs 500 (in instalments) to the plaintiff. c

9. Learned counsel for the appellant has contended that the sale deed executed by Defendant 2 in favour of the plaintiff was not challenged by Defendant 2 who, on the contrary, had admitted the entire claim set out by the plaintiff in his plaint and, therefore, the High Court was in error in setting aside the sale deed. It is also contended that Defendant 1 who had challenged the sale deed as fictitious had not appeared as a witness in the d case and had avoided the witness-box in order to avoid cross-examination and, therefore, an adverse inference should have been drawn against him and this plea ought to have been rejected by the High Court which, it is also contended, could not have legally set aside the findings of fact in second appeal. It is also contended that Defendant 1 being a stranger to the sale deed should not have been allowed to raise the plea relating to inadequacy or non- e payment of consideration money.

10. Learned counsel for Defendant 1, on the contrary, has tried to justify the interference by the High Court at the stage of second appeal by contending that the findings recorded by the courts were not borne out by the evidence on record and were perverse which could be set aside under Section 100 CPC. He also contended that the document of title in favour of f Defendant 1 was misread as a mortgage deed although it constituted an out and out sale. Moreover, on the commission of default, as contemplated by the document in question, the whole transaction, even if it was a mortgage, converted itself into an absolute sale as agreed upon between the parties. The sale having thus become absolute in favour of Defendant 1, no title was left in Defendant 2 to convey it to the plaintiff through the sale deed in question. g

11. Let us examine the respective contentions.

12. Beginning with the pleadings, Defendant 2 in his written statement filed before the trial court, admitted the claim of the plaintiff.

13. Annexure P-III to the special leave petition is the true translation of the copy of the written statement filed by Defendant 2 in the suit. It reads as under: h

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"IN THE COURT OF THE HON'BLE CIVIL JUDGE,
SENIOR DIVISION,
a BULDANA

RCS No. 195 of 1973 FF ...

Plaintiff: *Vidhyadhar Vishnupant Ratnaparkhi*

v.

Defendant: (1) *Manikrao Babarao Deshmukh*

b (2) *Pandu Ganu Bhalerao*

Written Statement of Defendant 2, Pandu Ganu Bhalerao

(1) The suit filed by the plaintiff is admitted. Hence this written statement.

Buldana
Dated sd/-
c 20-12-1973 (Pandu Ganu Bhalerao)

I, Defendant 2 state on oath that the contents of para 1 of the written statement are true as per my personal knowledge.

Hence this affidavit is signed and executed at Buldana on this 20-12-1973.

d sd/-
(Pandu Ganu Bhalerao)"

14. The lower appellate court has noticed this and observed in its judgment as under:

> "Defendant 2 filed his written statement at Ex. 15 which is e extremely brief comprising only a sentence, stating that the suit filed by the plaintiff is admitted by him."

15. Even while the plaintiff was in the witness-box, Defendant 2 declined to cross-examine the plaintiff which shows that Defendant 2 after admitting the case of the plaintiff, had no interest in the litigation particularly as he had already transferred the property in favour of the f plaintiff.

16. It was Defendant 1 who contended that the sale deed executed by Defendant 2 in favour of the plaintiff was fictitious and the whole transaction was a bogus transaction as only Rs 500 were paid as sale consideration to Defendant 2. He further claimed that payment of Rs 4500 to Defendant 2 at his home before the registration of the deed was wholly incorrect. This plea was not supported by Defendant 1 as he did not enter the g witness-box. He did not state the facts pleaded in the written statement on oath in the trial court and avoided the witness-box so that he may not be cross-examined. This, by itself, is enough to reject the claim that the transaction of sale between Defendant 2 and the plaintiff was a bogus transaction.

h **17.** Where a party to the suit does not appear in the witness-box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is

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not correct as has been held in a series of decisions passed by various High Courts and the Privy Council beginning from the decision in *Sardar Gurbakhsh Singh* v. *Gurdial Singh*[1]. This was followed by the Lahore High Court in *Kirpa Singh* v. *Ajaipal Singh*[2] and the Bombay High Court in *Martand Pandharinath Chaudhari* v. *Radhabai Krishnarao Deshmukh*[3]. The Madhya Pradesh High Court in *Gulla Kharagjit Carpenter* v. *Narsingh Nandkishore Rawat*[4] also followed the Privy Council decision in *Sardar Gurbakhsh Singh case*[1]. The Allahabad High Court in *Arjun Singh* v. *Virendra Nath*[5] held that if a party abstains from entering the witness-box, it would give rise to an adverse inference against him. Similarly, a Division Bench of the Punjab and Haryana High Court in *Bhagwan Dass* v. *Bhishan Chand*[6] drew a presumption under Section 114 of the Evidence Act, 1872 against a party who did not enter the witness-box.

18. Defendant 1 himself was not a party to the transaction of sale between Defendant 2 and the plaintiff. He himself had no personal knowledge of the terms settled between Defendant 2 and the plaintiff. The transaction was not settled in his presence nor was any payment made in his presence. Nor, for that matter, was he a scribe or marginal witness of that sale deed. Could, in this situation, Defendant 1 have raised a plea as to the validity of the sale deed on the ground of inadequacy of consideration or part-payment thereof? Defendant 2 alone, who was the executant of the sale deed, could have raised an objection as to the validity of the sale deed on the ground that it was without consideration or that the consideration paid to him was highly inadequate. But he, as pointed out earlier, admitted the claim of the plaintiff whose claim in the suit was based on the sale deed, executed by Defendant 2 in his favour. The property having been transferred to him, the plaintiff became entitled to all the reliefs which could have been claimed by Defendant 2 against Defendant 1 including redemption of the mortgaged property.

19. Learned counsel for Defendant 1 contended that since the plaintiff had filed the suit on the basis of the sale deed executed by Defendant 2 in his favour and had sought possession over that property from Defendant 1, it was open to the latter to show that the plaintiff had no title to the property in the suit and, therefore, the suit was liable to be dismissed. It was contended that in his capacity as a defendant in the suit, it was open to Defendant 1 to raise all the pleas on the basis of which the suit could be defeated.

20. In *Lal Achal Ram* v. *Raja Kazim Husain Khan*[7] the Privy Council laid down the principle that a stranger to a sale deed cannot dispute payment of consideration or its adequacy. This decision has since been considered by

1 AIR 1927 PC 230 : 32 CWN 119
2 AIR 1930 Lah 1 : ILR 11 Lah 142
3 AIR 1931 Bom 97 : 32 Bom LR 924
4 AIR 1970 MP 225 : 1970 MPLJ 586
5 AIR 1971 All 29
6 AIR 1974 P&H 7
7 (1905) 32 IA 113 : ILR 27 All 271

various High Courts and a distinction has been drawn between a deed which was intended to be real or operative between the parties and a deed which is
a fictitious in character and was never designed as a genuine document to effect transfer of title. In such a situation, it would be open even to a stranger to impeach the deed as void and invalid on all possible grounds. This was also laid down in *Kamini Kumar Deb* v. *Durga Charan Nag*[8] and again in *Saradindu Mukherjee* v. *Kunja Kamini Roy*[9]. The Patna High Court in *Jugal Kishore Tewari* v. *Umesh Chandra Tewari*[10] and the Orissa High Court in
b *Sanatan Mohapatra* v. *Hakim Mohammad Kazim Mohmmad*[11] have also taken the same view.

21. The above decisions appear to be based on the principle that a person in his capacity as a defendant can raise any legitimate plea available to him under law to defeat the suit of the plaintiff. This would also include the plea that the sale deed by which the title to the property was intended to be
c conveyed to the plaintiff was void or fictitious or, for that matter, collusive and not intended to be acted upon. Thus, the whole question would depend upon the pleadings of the parties, the nature of the suit, the nature of the deed, the evidence led by the parties in the suit and other attending circumstances. For example, in a landlord-tenant matter where the landlord is possessed of many properties and cannot possibly seek eviction of his
d tenant for bona fide need from one of the properties, the landlord may ostensibly transfer that property to a person who is not possessed of any other property so that that person, namely, the transferee, may institute eviction proceedings on the ground of his genuine need and thus evict the tenant who could not have been otherwise evicted. In this situation, the deed by which the property was intended to be transferred, would be a collusive
e deed representing a sham transaction which was never intended to be acted upon. It would be open to the tenant in his capacity as a defendant to assert, plead and prove that the deed was fictitious and collusive in nature. We, therefore, cannot subscribe to the view expressed by the Privy Council in the case of *Lal Achal Ram*[7] in the broad terms in which it is expressed but do approve the law laid down by the Calcutta, Patna and Orissa High Courts as
f pointed out above.

22. In the instant case, the property which was mortgaged in favour of Defendant 1 was transferred by Defendant 2, who was the owner of the property, to the plaintiff. This transfer does not, in any way, affect the rights of Defendant 1 who was the mortgagee and the mortgage in his favour, in spite of the transfer, subsisted. When the present suit for redemption was
g filed by the plaintiff, Defendant 2, as pointed out above, admitted the claim of the plaintiff by filing a one-sentence written statement that the claim of the plaintiff was admitted. When the plaintiff entered the witness-box, Defendant 2 did not cross-examine him. He did not put it to the plaintiff that

8 AIR 1923 Cal 521 : 37 Cal LJ 122
h 9 AIR 1942 Cal 514 : 46 CWN 798
10 AIR 1973 Pat 352 : 1973 BLJR 255
11 AIR 1977 Ori 194 : 44 Cut LT 606

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the entire amount of consideration had not been paid by him. Defendant 1 alone raised the question of validity of the sale deed in favour of the plaintiff by pleading that it was a fictitious transaction as the sale consideration had not been paid to Defendant 2 in its entirety. Having pleaded these facts and having raised the question relating to the validity of the sale deed on the ground that the amount of consideration had not been paid, Defendant 2 (*sic* 1) did not, in support of his case, enter the witness-box. Instead, he deputed his brother to appear as a witness in the case. He did enter the witness-box but could not prove that the sale consideration had not been paid to Defendant 2. On a consideration of the entire evidence on record, the trial court recorded a positive finding of fact that the sale deed executed by Defendant 2 in favour of the plaintiff was a genuine document and the entire amount of sale consideration had been paid. This finding was affirmed by the lower appellate court but the High Court intervened and recorded a finding that although the property was mentioned to have been sold for a sum of Rs 5000, the plaintiff had, in fact, paid only Rs 500 to Defendant 2. The amount of Rs 4500 which was indicated in the sale deed to have been paid to Defendant 2, prior to registration, was not correct. It was for this reason that the High Court while redeeming the property directed that the amount of sale consideration which was paid by the plaintiff to Defendant 2 shall be returned by Defendant 2 and the property would revert back to him.

23. The findings of fact concurrently recorded by the trial court as also by the lower appellate court could not have been legally upset by the High Court in a second appeal under Section 100 CPC unless it was shown that the findings were perverse, being based on no evidence or that on the evidence on record, no reasonable person could have come to that conclusion.

24. The findings of fact concurrently recorded by the lower courts on the question of title of the plaintiff on the basis of sale deed executed in his favour by Defendant 2 have been upset by the High Court on the ground that the full amount of consideration does not appear to have been paid by the plaintiff to Defendant 2. It will be worthwhile to reproduce the findings recorded by the High Court on this question. The High Court observed:

> "*14.* As already stated above, the plaintiff had paid a nominal amount of Rs 500 before the Sub-Registrar and got the document executed considering the plight of Defendant 2 that his seven acres of land was already mortgaged with the plaintiff and, in fact, no further consideration of Rs 4500, as alleged, had been paid to Defendant 2. This conclusion is supported by the conduct of Defendant 2, who had served the plaintiff with a notice alleging that the sale deed executed in his favour was a sham and bogus one and without any consideration. Even a complaint came to be made before the police about the said bogus transaction, which was subsequently withdrawn in view of the fact that Defendant 2's lands to the extent of 7 acres were already mortgaged with the plaintiff. All these would show that the plaintiff was pursuing Defendant 2 to transfer his property in his favour to the extent of 4 acres

4 gunthas and under pressure, Defendant 2 admitted to have received the sum of Rs 4500. As stated above, this admission was made by Defendant 2 in one sentence. Therefore, considering all these aspects, the learned lower appellate court has held that no consideration has passed in favour of Defendant 2 except the sum of Rs 500 only alleged to have been paid before the Sub-Registrar. It is apparent that the plaintiff might have purchased the property only for Rs 2000, i.e., Rs 1500 which were to be paid to Defendant 1 for redemption of mortgage and Rs 500 paid to Defendant 2 before the Sub-Registrar.

15. Considering all the above facts and circumstances, I am of the view that the conclusion arrived at by the learned lower appellate court directing Defendant 1 to receive the amount of redemption and to deliver the possession of the suit field to the plaintiff is not correct. It is pertinent to note that the transaction between Defendants 1 and 2 itself was a moneylending transaction and that the sale deed was a mortgage sale. Therefore, Defendant 1 cannot become the owner of the property. Even, as held by the learned trial court, that nothing has been placed on record by Defendant 1 to support his contention that he had paid Rs 700 at home and the consideration of Rs 800 had been paid before the Sub-Registrar to Defendant 2, the learned trial court observed that it is doubtful whether this amount of Rs 700 has also been paid to Defendant 2 by Defendant 1. This shows that the said mortgage was only for Rs 800 and that the amount of Rs 700 has not passed to Defendant 2 from Defendant 1. It is clear that except Rs 500, nothing has been paid by the plaintiff to Defendant 2 as the amount of Rs 4500 alleged to have been paid at home to Defendant 2 has not been established. Therefore, the view taken by both the courts below under no circumstances, can be sustained."

25. The circumstances relied upon by the High Court had already been considered by the courts below and ultimately the lower appellate court proceeded to say as under:

"But it would appear as though all this discussion is worthless in view of the fact that Defendant 2 himself admitted in his deposition that he executed the sale deed in favour of the plaintiff and accepted the price. His written statement and deposition is quite eloquent on that point. On the fact of these admissions, there cannot be any other circumstance which would assist the Court to hold that the document executed in favour of the plaintiff by Defendant 2 was bogus, sham and without consideration, notwithstanding the fact that the circumstances and the facts of the case infallibly point out that the document of sale does not convey the real transaction that had taken place between the plaintiff and Defendant 2. As such, although with reluctance, it has to be held that the plaintiff had purchased the property from Defendant 2."

26. In the face of the findings recorded by the trial court as also by the lower appellate court on the question of execution of sale deed by Defendant

2 in favour of the plaintiff with the further finding that it was a valid sale deed which properly conveyed the title of the property in question to the plaintiff, it was not expected of the High Court to set aside those findings merely on the ground that the circumstances which had already been considered by the lower courts appeared to suggest some other conclusion from proved facts. a

27. Let us scrutinise the circumstances relied upon by the High Court.

28. In order to prove his case, the plaintiff had examined Defendant 2 as a witness who admitted to have executed the sale deed in favour of the plaintiff and further admitted to have received the entire amount of sale consideration. The High Court has adversely commented upon the production of Defendant 2 as a witness by saying as under: b

> "Next witness examined by the plaintiff was Defendant 2. The plaintiff while examining this witness has not incorporated the name of this witness in the list of witnesses nor any application was made for the examination of Defendant 2. The willingness of Defendant 2 was also not placed on record to appear as a witness for the plaintiff." c

This is wholly an erroneous view.

29. Summoning and attendance of witnesses has been provided for in Order 16 of the Code of Civil Procedure. Order 16 Rule 1 which speaks of the list of witnesses and summons to witnesses provides as under: d

> "1. *List of witnesses and summons to witnesses*.—(1) On or before such date as the court may appoint, and not later than fifteen days after the date on which the issues are settled, the parties shall present in court a list of witnesses whom they propose to call either to give evidence or to produce documents and obtain summons to such persons for their attendance in court. e
>
> (2) A party desirous of obtaining any summons for the attendance of any person shall file in court an application stating therein the purpose for which the witness is proposed to be summoned.
>
> (3) The court may, for reasons to be recorded, permit a party to call, whether by summoning through court or otherwise, any witness, other than those whose names appear in the list referred to in sub-rule (1), if such party shows sufficient cause for the omission to mention the name of such witness in the said list. f
>
> (4) Subject to the provisions of sub-rule (2), summons referred to in this Rule may be obtained by parties on an application to the court or to such officer as may be appointed by the court in this behalf."

30. Rule 1-A which allows production of witnesses without summons provides as under: g

> "1-A. *Production of witnesses without summons*.—Subject to the provisions of sub-rule (3) of Rule 1, any party to the suit may, without applying for summons under Rule (1), bring any witness to give evidence or to produce documents."

31. These two Rules read together clearly indicate that it is open to a party to summon the witnesses to the court or may, without applying for summons, bring the witnesses to give evidence or to produce documents. h

Sub-rule (3) of Rule 1 provides that although the name of a witness may not find place in the list of witnesses filed by a party in the court, it may allow the party to produce a witness though he may not have been summoned through the court. Rule 1-A which was introduced by the Code of Civil Procedure (Amendment) Act, 1976 with effect from 1-2-1977 has placed the matter beyond doubt by providing in clear and specific terms that any party to the suit may bring any witness to give evidence or to produce documents. Since this Rule is subject to the provisions of sub-rule (3) of Rule 1, all that can be contended is that before proceeding to examine any witness who might have been brought by a party for that purpose, the leave of the court may be necessary but this by itself will not mean that Rule 1-A was in derogation of sub-rule (3) of Rule 1. The whole position was explained by this Court in *Mange Ram* v. *Brij Mohan*[12] in which it was held that sub-rule (3) of Rule 1 and Rule 1-A operate in two different areas and cater to two different situations. It was held: (pp. 43-44, para 10)

> "There is no inner contradiction between sub-rule (1) of Rule 1 and Rule 1-A of Order XVI. Sub-rule (3) of Rule 1 of Order XVI confers a wider jurisdiction on the court to cater to a situation where the party has failed to name the witness in the list and yet the party is unable to produce him or her on his own under Rule 1-A and in such a situation the party of necessity has to seek the assistance of the court under sub-rule (3) to procure the presence of the witness and the court may if it is satisfied that the party has sufficient cause for the omission to mention the name of such witness in the list filed under sub-rule (1) of Rule 1, still extend its assistance for procuring the presence of such a witness by issuing a summons through the court or otherwise which ordinarily the court would not extend for procuring the attendance of a witness whose name is not shown in the list. Therefore, sub-rule (3) of Rule 1 and Rule 1-A operate in two different areas and cater to two different situations."

32. In view of the above, even though the name of Defendant 2 was not mentioned in the list of witnesses furnished by the plaintiff, he was properly examined as a witness and his testimony was not open to any criticism on the ground that he was produced as a witness without being summoned through the Court and without his name being mentioned in the list of witnesses.

33. The next circumstance relied upon by the High Court in discarding the sale deed is that Defendant 2 himself had given a notice to the plaintiff in which it was set out that the sale deed was a sham transaction for which the consideration was not paid. In relying upon this circumstance, the High Court overlooked the fact that Defendant 2 in his capacity as a witness for the plaintiff had stated in clear terms that this notice was issued to the plaintiff at the instance of Defendant 1. Defendant 2 also stated that the complaint made by him to the police in that regard was withdrawn by him. This circumstance, therefore, also could not have been legally relied upon by the High Court in holding that the full amount of consideration was not paid.

12 (1983) 4 SCC 36 : AIR 1983 SC 925 : (1983) 3 SCR 525

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34. It could not be ignored that the plaintiff's case had been admitted in unequivocal terms by Defendant 2 in his written statement. It could also not be ignored that when the plaintiff examined himself as a witness in the suit, Defendant 2 refused to cross-examine him. The circumstance which, however, clinches the matter is the statement of Defendant 2 on oath in which he admitted that he had executed a sale deed in favour of the plaintiff and had obtained the full amount of consideration. The sale deed is a registered document which recites that out of the amount of Rs 5000, which was the sale price, a sum of Rs 4500 had been paid earlier while Rs 500 was paid before the Sub-Registrar. This recital read in the light of the admission made by Defendant 2 in his written statement and, thereafter, in his statement on oath as a witness clearly establishes the fact that Defendant 2 had executed a sale deed in favour of the plaintiff for a price which was paid to Defendant 2.

35. Even if the findings recorded by the High Court that the plaintiff had paid only Rs 500 to Defendant 2 as sale consideration and the remaining amount of Rs 4500 which was shown to have been paid before the execution of the deed was, in fact, not paid, the sale deed would not, for that reason, become invalid on account of the provisions contained in Section 54 of the Transfer of Property Act, 1882 which provide as under:

> "54. 'Sale' is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.
>
> Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.
>
> In the case of tangible immovable property, of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.
>
> Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.
>
> A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.
>
> It does not, of itself, create any interest in or charge on such property."

36. The definition indicates that in order to constitute a sale, there must be a transfer of ownership from one person to another, i.e., transfer of all rights and interests in the properties which are possessed by that person are transferred by him to another person. The transferor cannot retain any part of his interest or right in that property or else it would not be a sale. The definition further says that the transfer of ownership has to be for a "price paid or promised or part-paid and part-promised". Price thus constitutes an essential ingredient of the transaction of sale. The words "price paid or promised or part-paid and part-promised" indicate that actual payment of the whole of the price at the time of the execution of sale deed is not a sine qua non to the completion of the sale. Even if the whole of the price is not paid but the document is executed and thereafter registered, if the property is of the value of more than Rs 100, the sale would be complete.

37. There is a catena of decisions of various High Courts in which it has been held that even if the whole of the price is not paid, the transaction of sale will take effect and the title would pass under that transaction. To cite only a few, in *Gayatri Prasad* v. *Board of Revenue*[13] it was held that non-payment of a portion of the sale price would not affect validity of sale. It was observed that part-payment of consideration by the vendee itself proved the intention to pay the remaining amount of the sale price. To the same effect is the decision of the Madhya Pradesh High Court in *Sukaloo* v. *Punau*[14].

38. The real test is the intention of the parties. In order to constitute a "sale", the parties must intend to transfer the ownership of the property and they must also intend that the price would be paid either in praesenti or in future. The intention is to be gathered from the recital in the sale deed, the conduct of the parties and the evidence on record.

39. Applying these principles to the instant case, it will be seen that Defendant 2 executed a sale deed in favour of the plaintiff, presented it for registration, admitted its execution before the Sub-Registrar before whom the remaining part of the sale consideration was paid and, thereafter, the document was registered. The additional circumstances are that when the plaintiff instituted a suit on the basis of his title based on the aforesaid sale deed, Defendant 2, who was the vendor, admitted in his written statement, the whole case set out by the plaintiff and further admitted in the witness-box that he had executed a sale deed in favour of the plaintiff and had also received the full amount of consideration. These facts clearly establish that a complete and formidable sale deed was executed by Defendant 2 in favour of the plaintiff and the title in the property passed to the plaintiff. The findings recorded by the High Court on this question cannot, therefore, be upheld.

40. The judgment of the High Court on this point is also erroneous for the reason that it totally ignored the provisions contained in Section 55(4)(*b*) of the Transfer of Property Act which are set out below:

> "55. In the absence of a contract to the contrary, the buyer and seller of immovable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold:
>
> (1)-(3) * * *
>
> (4) The seller is entitled—
>
> (*a*) * * *
>
> (*b*) where the ownership of the property has passed to the buyer before payment of the whole of the purchase money, to a charge upon the property in the hands of the buyer, any transferee without consideration or any transferee with notice of the non-payment, for the amount of the purchase money, or any part thereof remaining

13 1973 All LJ 412

14 AIR 1961 MP 176 : ILR 1960 MP 614

unpaid, and for interest on such amount or part from the date on which possession has been delivered.

(5)-(6) * * *"

41. Clause (*b*) extracted above provides that where the ownership of the property is transferred to the buyer before payment of the whole of the sale price, the vendor is entitled to a charge on that property for the amount of the sale price as also for interest thereon from the date of delivery of possession. Originally, there was no provision with regard to the date from which interest would be payable on the amount of unpaid purchase money. The Special Committee which suggested an amendment in this section gave the following reason:

> "This clause is also silent as to the date from which the interest on the unpaid purchase money should run. It seems fair that it should run from the date when the buyer is put in possession."

It was on the recommendation of the Special Committee that the words "from the date on which possession has been delivered" were inserted into this clause by Section 17 of the Transfer of Property (Amendment) Act, 1929 (20 of 1929).

42. This clause obviously applies to a situation where the ownership in the property has passed to the buyer before the whole of the purchase money was paid to the seller or the vendor. What is contained in this clause is based on the English doctrine of equitable lien as propounded by Baron Rolfe in *Goode* v. *Burton*[15]. This clause confers statutory recognition on the English doctrine of equitable lien. As pointed out by the Privy Council in *Webb* v. *Macpherson*[16] the statutory charge under this paragraph is inflexible. The charge does not entitle the seller to retain possession of the property as against the buyer but it positively gives him a right to enforce the charge by suit. (See: *Venkataperumal Naidu* v. *M. Rathnasabhapathi Chettiar*[17]; *Shobhalal Shyamlal Kurmi* v. *Sidhelal Halkelal Bania*[18] and *Basalingaya Revanshiddappa* v. *Chinnava Karibasappa*[19].)

43. In view of the above, the High Court was wholly in error in coming to the conclusion that there was no sale as only a sum of Rs 500 was paid to Defendant 2 and the balance amount of Rs 4500 was not paid. Since the title in the property had already passed, even if the balance amount of sale price was not paid, the sale would not become invalid. The property sold would stand transferred to the buyer subject to the statutory charge for the unpaid part of the sale price.

44. Learned counsel for Defendant 1 thereafter contended that the deed dated 24-3-1971 was not a mortgage deed but an out and out sale with the result that the property having been transferred to Defendant 1 was not

15 (1847) 74 RR 633 : 1 Ex 189
16 (1903) 30 IA 238
17 AIR 1953 Mad 821
18 AIR 1939 Nag 210 : ILR 1939 Nag 636
19 AIR 1932 Bom 247 : 34 Bom LR 427

available for being sold to the plaintiff. This contention must meet the same fate as it met in the courts below.

45. The document is headed as MORTGAGE BY CONDITIONAL SALE (KARARKHAREDI). It is mentioned in this deed that the immovable property which was described in areas and boundaries was being mortgaged by conditional sale in favour of Defendant 1 for a sum of Rs 1500 out of which Rs 700 were paid at home while Rs 800 were paid before the Sub-Registrar. The further stipulation in the deed is that the aforesaid amount of Rs 1500 would be returned to Defendant 1 on or before 15-3-1973 and the property would be reconveyed to Defendant 2. If it was not done then Defendant 1 would become the owner of the property.

46. Mortgage by conditional sale is defined under Section 58(*c*) as under:

> "58. (*a*)-(*b*) * * *
>
> (*c*) Where the mortgagor ostensibly sells the mortgaged property—
>
> on condition that on default of payment of the mortgage money on a certain date the sale shall become absolute, or
>
> on condition that on such payment being made the sale shall become void, or
>
> on condition that on such payment being made the buyer shall transfer the property to the seller,
>
> the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:
>
> Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.
>
> (*d*)-(*g*) * * *"

47. The proviso to this clause was added by Section 19 of the Transfer of Property (Amendment) Act, 1929 (20 of 1929). The proviso was introduced in this clause only to set at rest the controversy about the nature of the document, whether the transaction would be a sale or a mortgage. It has been specifically provided by the amendment that the document would not be treated as a mortgage unless the condition of repurchase was contained in the same document.

48. The basic principle is that the form of transaction is not the final test and the true test is the intention of the parties in entering into the transaction. If the intention of the parties was that the transfer was by way of security, it would be a mortgage. The Privy Council as early as in *Balkishen Das* v. *Legge*[20] had laid down that, as between the parties to the document, the intention to treat the transaction as an out and out sale or as a mortgage has to be found out on a consideration of the contents of the document in the light of surrounding circumstances. The decisions of this Court in *Bhaskar Waman Joshi* v. *Shrinarayan Rambilas Agarwal*[21] and *P.L. Bapuswami* v. *N. Pattay Gounder*[22] are also to the same effect.

20 (1899) 27 IA 58
21 AIR 1960 SC 301 · (1960) 2 SCR 117
22 AIR 1966 SC 902 · (1966) 2 SCR 918

49. The contents of the document have already been considered above which indicate that Defendant 2 had executed a mortgage by conditional sale in favour of Defendant 1. He had promised to pay back Rs 1500 to him by a particular date failing which the document was to be treated as a sale deed. The intention of the parties is reflected in the contents of the document which is described as a mortgage by conditional sale. In the body of the document, the mortgage money has also been specified. Having regard to the circumstances of this case as also the fact that the condition of repurchase is contained in the same document by which the mortgage was created in favour of Defendant 1, the deed in question cannot but be treated as a mortgage by conditional sale. This is also the finding of the courts below.

50. So far as the contention of the learned counsel for Defendant 1 that the mortgage money was not paid within the time stipulated in the document and, therefore, the transaction, even if it was a mortgage, became an absolute sale is concerned, the finding of the courts below is that this money was tendered to Defendant 1 who refused to accept it. Defendant 2 had thus performed his part of the agreement and had offered the amount to Defendant 1 so that the property may be reconveyed to him but Defendant 1 refused to accept the money. He, therefore, cannot complain of any default in not paying the amount in question within the time stipulated in the deed. Since there was no default on the part of Defendant 2, the document would not convert itself into a sale deed and would remain a mortgage deed. The suit for redemption was, therefore, properly filed by the plaintiff who was the assignee of Defendant 2.

51. For the reasons stated above, the appeal is allowed and the impugned judgment passed by the High Court is set aside. The judgment and decree passed by the trial court as upheld by the lower appellate court are restored but without any order as to costs.

(1999) 3 Supreme Court Cases 594

(BEFORE B.N. KIRPAL AND V.N. KHARE, JJ.)

(*Record of Proceedings*)

STATE OF MAHARASHTRA AND OTHERS .. Petitioners;

Versus

CHHAYA AND OTHERS .. Respondents.

SLP (C) No. ... of 1999† (CC No. 1675 of 1999) with IA No. 1, decided on April 9, 1999

Service Law — Administrative Tribunals Act, 1985 — S. 5(4)(a) — Scope — Explained — Held, it does not enable the Chairman, if he is a Judicial Member, to act as an Administrative Member or vice versa

Rejecting the petitioners' contention that Section 5(4)(*a*) of the Administrative Tribunals Act, 1985 enabled the Chairman, who was otherwise a Judicial Member, to act as an Administrative Member also, the Supreme Court

† From the Judgment and Order dated 13-11-1998 in WP No. 1394 of 1998 of the High Court of Bombay, Aurangabad Bench, Aurangabad

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(2009) 2 Supreme Court Cases 582

(BEFORE R.V. RAVEENDRAN AND P. SATHASIVAM, JJ.)

ALOKA BOSE .. Appellant;

Versus

PARMATMA DEVI AND OTHERS .. Respondents.

Civil Appeal No. 6197 of 2000†, decided on December 17, 2008

A. **Specific Relief Act, 1963 — Ss. 9, 10 and 20 — Specific performance of agreement to sell — Agreement signed/executed only by vendor, and not by purchaser — Validity and enforceability of — Use of format in agreement for execution by both parties — Intention of parties to the contrary — Evidence of existence of oral contract — Effect — Considering S. 10, Contract Act and its proviso and the fact that attention of court not drawn to any law applicable in the State concerned at the relevant time which required an agreement of sale to be made in writing or in the presence of witnesses or to be registered, held, even an oral agreement to sell will be valid — If so, a written agreement signed by one of the parties, if it evidences such an oral agreement will also be valid — In India, an agreement of sale signed by vendor alone and delivered to purchaser, and accepted by purchaser, has always been considered to be a valid contract — In the event of breach by vendor, it can be specifically enforced by purchaser — There is, however, no practice of purchaser alone signing an agreement of sale — In the present case, facts indicated that the intention of the parties was that the agreement should be complete on signature of vendor only — Thus, in view of the aforesaid, the agreement of sale signed only by vendor, held, valid and enforceable by the purchaser — Contract and Specific Relief — Formation of contract — Formal requirements — Contract Act, 1872 — Ss. 2(e) & (h) and 10 — Transfer of Property Act, 1882 — Ss. 54 & 5**

B. **Contract and Specific Relief — Formation of contract — Formal requirements — Agreement of sale — Different ways in which it can be brought into existence, indicated — Contract Act, 1872 — Ss. 2(e) & (h) and 10 — Transfer of Property Act, 1882 — Ss. 54 & 5 — Deeds and Documents — Particular Deeds and Documents — Sale agreement**

Dismissing the appeal, the Supreme court

Held :

An agreement of sale comes into existence when the vendor agrees to sell and the purchaser agrees to purchase, for an agreed consideration on agreed terms. It can be oral. It can be by exchange of communications which may or may not be signed. It may be by a single document signed by both parties. It can also be by a document in two parts, each party signing one copy and then exchanging the signed copy as a consequence of which the purchaser has the copy signed by the vendor and a vendor has a copy signed by the purchaser. Or it can be by the vendor executing the document and delivering it to the purchaser who accepts it. (Para 16)

† From the Final Judgment and Order dated 7-9-1999 of the High Court of Patna, Ranchi Bench, Ranchi in Letters Patent Appeal No. 29 of 1993 (R)

Considering Section 10 of the Contract Act, 1872 and the proviso thereto, no attention has been drawn to any law applicable in the State concerned at the relevant time, which requires an agreement of sale to be made in writing or in the presence of witnesses or to be registered. Therefore, even an oral agreement to sell is valid. If so, a written agreement signed by one of the parties, if it evidences such an oral agreement will also be valid. In India, an agreement of sale signed by the vendor alone and delivered to the purchaser, and accepted by the purchaser, has always been considered to be a valid contract. In the event of breach by the vendor, it can be specifically enforced by the purchaser. There is, however, no practice of the purchaser alone signing an agreement of sale. (Paras 17 and 18)

From the facts it is clear that the intention of the parties was that the agreement should be complete on signature by only the vendor. Even though the draftsman who prepared the agreement might have used a format intended for execution by both vendor and purchaser, the manner in which the parties had proceeded, clearly demonstrated that it was intended to be executed only by the vendor alone. Thus, in view of the aforesaid it is held that the agreement of sale signed only by the vendor was valid and enforceable by the purchaser. (Paras 20 to 22)

S.M. Gopal Chetty v. *Raman*, AIR 1998 Mad 169, *overruled*

C. **Contract and Specific Relief — Specific contracts — Sale — Sale agreement — Nature of — Held, is a bilateral contract, and not a unilateral contract as observed in *Mohd. Mohar Ali case*, AIR 1998 Gau 92 — Contract and Specific Relief — Contract Act, 1872 — Ss. 2(e) & (h) and 10 — Words and Phrases — "Unilateral contract" — Transfer of Property Act, 1882 — S. 54** **(Para 15)**

D. **Contract and Specific Relief — Generally — Unilateral contract — What is — Unilateral and bilateral contracts, distinguished** **(Para 15)**

Mohd. Mohar Ali v. *Mohd. Mamud Ali*, AIR 1998 Gau 92, *overruled*

John D. Calamari and Joseph M. Perillo: *The Law of Contracts*, 4th Edn., Para 2-10(*a*) at pp. 64-65, *referred to*

E. **Specific Relief Act, 1963 — Ss. 16(c) and 20 — Specific performance — Entitlement to, on showing of readiness and willingness to perform by vendee — Readiness and willingness — How may be evidenced — In the present case, vendee made part-payment on a condition that the sale deed would be executed within three months and balance consideration money would be paid at the time of execution of the sale deed — Vendee thus performed her part by paying the earnest money — She sent a notice conveying her willingness and readiness to pay the balance amount — Said notice acknowledged by vendor — However, vendor did not execute the sale deed within the agreed period — Considering the facts, held, vendee fulfilled the conditions stated in S. 16(c) — She was entitled to decree for specific performance** **(Paras 23 and 24)**

W-D/39867/C

Advocates who appeared in this case :
Ranjan Mukherjee and S.C. Ghosh, Advocates, for the Appellant;
Shekhar Prit Jha, Advocate, for the Respondents.

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Chronological list of cases cited	***on page(s)***
1. AIR 1998 Mad 169, *S.M. Gopal Chetty* v. *Raman* **(overruled)**	586*a-b*, 586*f*
2. AIR 1998 Gau 92, *Mohd. Mohar Ali* v. *Mohd. Mamud Ali* **(overruled)**	586*b*, 586*c-d*

a

The Judgment of the Court was delivered by

P. SATHASIVAM, J.— The challenge in this appeal is to the order dated 7-9-1999 passed by the Division Bench of the High Court of Patna, Ranchi Bench allowing LPA No. 29 of 1993 (R) filed by Smt Parmatma Devi, first respondent herein.

2. The facts of the case, in a nutshell, are as follows: *b*

By virtue of a written agreement of sale on 7-9-1979, one Kanika Bose (since deceased) had agreed to sell to the first respondent the southern portion of house being Holding No. 786-C, Ward No. 1, Mohalla Barmasia under Giridih Municipality for a consideration of Rs 34,500. The first respondent paid a sum of Rs 2001 as earnest money and the part-payment and a further sum of Rs 2000 on 10-10-1979 to Kanika Bose on a condition *c* that the sale deed would be executed within three months and balance consideration money would be paid at the time of execution of the sale deed.

3. As Kanika Bose did not execute the sale deed on 6-12-1979, the first respondent instituted a suit being TS No. 54 of 1979 for specific performance in the Court of Subordinate Judge, Giridih, Bihar. In the said suit, the defendant, Kanika Bose filed her written statement denying the averments *d* made in the plaint.

4. By judgment dated 28-9-1983, the Subordinate Judge, Giridih decreed the suit against the defendant. Challenging the said decree, the defendant preferred a first appeal before the High Court of Patna, Ranchi Bench and the same was registered as First Appeal No. 111 of 1983 (R). By judgment dated 4-10-1993, learned Single Judge allowed the first appeal and dismissed the *e* suit. Against the said judgment, the first respondent herein filed LPA No. 29 of 1993 (R).

5. A Division Bench of the High Court by the impugned judgment dated 7-9-1999 allowed the said LPA by setting aside the judgment dated 4-10-1993 passed by the learned Single Judge and restoring the judgment and decree of the trial court. Aggrieved by the said judgment, Kanika Bose, the *f* defendant had preferred this appeal by way of special leave before this Court.

6. Pending appeal, Kanika Bose died on 27-5-2007. On an application for bringing the legal heirs on record, three legal representatives were brought on record i.e. Aloka Bose as appellant and other two legal heirs as pro forma Respondents 2 and 3.

7. We have heard Mr Ranjan Mukherjee, learned counsel appearing for *g* the appellant. On the contentions urged, the following points arise for consideration in this appeal:

(*i*) Whether an agreement of sale (Ext. 2) executed only by the vendor, and not by the purchaser, is valid?

(*ii*) Whether the plaintiff has satisfied and established her case for decree for specific performance under Section 16(*c*) of the Specific *h* Relief Act, 1963.

8. The main contention urged on behalf of the defendant is that the signature found in the agreement was forged and in any event, in the absence of signature of the purchaser, Ext. 2 is neither a complete nor a valid agreement; and consequently the plaintiff is not entitled to enforce the same. In this respect, it is relevant to point out that the learned trial Judge framed specific issues, namely, Issues 5 and 6 and discussed the same in detail.

9. In the plaint, the plaintiff has asserted that an agreement of sale was duly executed by the defendant and she had put her signature in token of its execution after receiving the earnest money. In order to prove the genuineness of the agreement of sale (Ext. 2), the plaintiff has asserted that the defendant had executed the said agreement. She also got the signature of the defendant in the agreement of sale, Ext. 2 examined and compared with the admitted signature of the defendant through handwriting expert PW 1, Syed Ekbal Taiyab Hussain Raza who opined that the signature on the agreement of sale as well as specimen signatures of the defendant are one and the same.

10. Apart from the expert evidence, the plaintiff has also produced PW 3 Shankar Lal, a land broker, who asserted on oath that the defendant had put her signature in the agreement of sale. Apart from this, PW 4 Jagdish Prasad, brother of the plaintiff's husband and PW 9 Ishwari Prasad Budholia, the husband of the plaintiff also asserted that the defendant Kanika Bose had put her signature in the agreement of sale in their presence.

11. As stated earlier, it is not the case of the defendant that she did not put any signature in the agreement of sale. On the other hand, she had given an explanation how her signature was obtained on a blank paper. Though the defendant has also examined one expert, DW 2 S.K. Chatterjee, the trial court has concluded that the said DW 2 has not compared all the signatures alleged to have been put by the defendant in the agreement of sale nor examined those endorsements which are alleged to be made by the defendant Kanika Bose. Since the trial court analysed and compared the opinion of two experts with materials placed before them and preferred to accept the opinion of expert examined by the side of the plaintiff, there is no reason to dispute the said conclusion.

12. In the light of the controversy the Division Bench of the High Court also compared the signature found in other documents such as vakalatnama, written statement with that of the signature found in Ext. 2 and concluded that the signature found in the agreement of sale was that of the defendant Ms Kanika Bose. We are of the view that there is no valid reason to disturb the above factual finding based on acceptable materials. The learned Single Judge of the High Court committed an error in taking a contrary view.

13. The defendant submitted that a contract for sale, like any other contract, is bilateral in nature under which both vendor and the purchaser have rights and obligations. It is submitted that an agreement for sale being a contract for sale, creating a right in the purchaser to obtain a deed of conveyance in terms of the agreement under which, the vendor agrees to convey to the purchaser, and the purchaser agrees to purchase, the subject-matter of the agreement for an agreed consideration, subject to the terms and conditions stipulated in the said agreement, it is bilateral. It is therefore contended that an agreement of sale is neither complete nor enforceable unless it is signed by both the parties.

14. Certain amount of confusion is created on account of two divergent views expressed by two High Courts. In *S.M. Gopal Chetty* v. *Raman*[1] a learned Single Judge held that where the agreement of sale was not signed by the purchaser, but only by the vendor, it cannot be said that there was a contract between the vendor and the purchaser; and as there was no contract, the question of specific performance of an agreement signed only by the vendor did not arise. On the other hand, in *Mohd. Mohar Ali* v. *Mohd. Mamud Ali*[2] a learned Single Judge held that an agreement of sale was a unilateral contract (under which the vendor agreed to sell the immovable property to the purchaser in accordance with the terms contained in the said agreement), that such an agreement for sale did not require the signatures of both parties, and that therefore an agreement for sale signed only by the vendor was enforceable by the purchaser.

15. We find that neither of the two decisions have addressed the real issue and cannot be said to be laying down the correct law. The observation in *Mohd. Mohar Ali*[2] stating that an agreement of sale is an unilateral contract is not correct. An unilateral contract refers to a gratuitous promise where only one party makes a promise without a return promise. Unilateral contract is explained thus by John D. Calamari and Joseph M. Perillo in *The Law of Contracts* [4th Edn., Para 2-10(*a*) at pp. 64-65]:

> "If *A* says to *B*, 'If you walk across the Brooklyn Bridge I will pay you $100,' *A* has made a promise but has not asked *B* for a return promise. *A* has asked *B* to perform, not a commitment to perform. *A* has thus made an offer looking to a unilateral contract. *B* cannot accept this offer by promising to walk the bridge. *B* must accept, if at all, by performing the act. Because no return promise is requested, at no point is *B* bound to perform. If *B* does perform, a contract involving two parties is created, but the contract is classified as unilateral because only one party is ever under an obligation."

All agreements of sale are bilateral contracts as promises are made by both — the vendor agreeing to sell and the purchaser agreeing to purchase.

16. On the other hand, the observation in *S.M. Gopal Chetty*[1] that unless agreement is signed both by the vendor and purchaser, it is not a valid contract is also not sound. An agreement of sale comes into existence when the vendor agrees to sell and the purchaser agrees to purchase, for an agreed consideration on agreed terms. It can be oral. It can be by exchange of communications which may or may not be signed. It may be by a single document signed by both parties. It can also be by a document in two parts, each party signing one copy and then exchanging the signed copy as a consequence of which the purchaser has the copy signed by the vendor and a vendor has a copy signed by the purchaser. Or it can be by the vendor executing the document and delivering it to the purchaser who accepts it.

1 AIR 1998 Mad 169
2 AIR 1998 Gau 92

17. Section 10 of the Act provides that all agreements are contracts if they are made by the free consent by the parties competent to contract, for a lawful consideration and with a lawful object, and are not expressly declared to be void under the provisions of the Contract Act. The proviso to Section 10 of the Act makes it clear that the section will not apply to contracts which are required to be made in writing or in the presence of witnesses or any law relating to registration of documents. Our attention has not been drawn to any law applicable in Bihar at the relevant time, which requires an agreement of sale to be made in writing or in the presence of witnesses or to be registered. Therefore, even an oral agreement to sell is valid. If so, a written agreement signed by one of the parties, if it evidences such an oral agreement will also be valid.

18. In any agreement of sale, the terms are always negotiated and thereafter reduced in the form of an agreement of sale and signed by both parties or the vendor alone (unless it is by a series of offers and counter-offers by letters or other modes of recognised communication). In India, an agreement of sale signed by the vendor alone and delivered to the purchaser, and accepted by the purchaser, has always been considered to be a valid contract. In the event of breach by the vendor, it can be specifically enforced by the purchaser. There is, however, no practice of purchaser alone signing an agreement of sale.

19. The defendant next contended that the agreement of sale in this case (Ext. 2) was clearly in a form which required signatures of both the vendor and purchaser. It is pointed out that the agreement begins as: "Agreement for sale *between* Kanika Bose *and* Parmatma Devi" and not an "Agreement of sale executed *by* Kanika Bose *in favour of* Parmatma Devi". Our attention is also drawn to the testimonium clause (the provision at the end of the instrument stating when and by whom it was signed) of the agreement, which reads thus:

> "In witnesses whereof, the parties hereto have hereunto set and subscribed their respective hands and seals on these presents."

It is therefore contended that the agreement specifically contemplated execution by both parties; and as it was not so executed, it was incomplete and unenforceable.

20. We have carefully examined the agreement (Ext. 2), a photocopy of which is produced. The testimonium portion in the agreement is in an archaic form which has lost its meaning. Parties no longer "subscribe their respective hands and seals". It is true that the format obviously contemplates signature by both parties. But it is clear that the intention of the parties was that it should be complete on signature by only the vendor. This is evident from the fact that the document is signed by the vendor and duly witnessed by four witnesses and was delivered to the purchaser. Apart from a separate endorsement made on the date of the agreement itself (7-9-1979) by the vendor acknowledging the receipt of Rs 2001 as advance, it also contains a second endorsement (which is also duly witnessed) made on 10-10-1979 by the vendor, acknowledging the receipt of a further sum of Rs 2000 and confirming that the total earnest money received was Rs 4001. This shows that the purchaser accepted and acted in terms of the agreement which was signed, witnessed and delivered to her as a complete instrument and that she then obtained an endorsement thereon by the vendor, in regard to second payment. If the agreement was not complete, the vendor would not have received a further amount and endorsed an acknowledgment thereon on 10-10-1979.

21. Apart from the above, the evidence of the witnesses also shows that there was a concluded contract. Therefore, even though the draftsman who prepared the agreement might have used a format intended for execution by both vendor and purchaser, the manner in which the parties had proceeded, clearly demonstrated that it was intended to be executed only by the vendor alone.

22. Thus we hold that the agreement of sale (Ext. 2) signed only by the vendor was valid and enforceable by the purchaser.

23. The trial court as well as the Division Bench of the High Court on the analysis of the materials in the form of oral and documentary evidence concluded that the vendee had performed her part by paying the earnest money and sent a notice conveying her willingness and readiness to pay the balance of sale consideration. The said notice was acknowledged by the defendant. The clauses in the agreement clearly show that the vendor had to perform and fulfil the terms of agreement by executing the sale deed on receipt of the consideration. We have already adverted to the fact that the vendee had performed her part of the contract.

24. The trial court and the Division Bench also concluded that the plaintiff had fulfilled the conditions as stated in Section 16(*c*) of the Specific Relief Act and in that event the plaintiff is entitled to decree for specific performance which was rightly granted by the trial court. Though learned counsel for the appellants pointed out that the claim of the plaintiff that she was put in possession of a portion of the suit property in part-performance was not accepted by the trial court, in the light of the categorical findings about the validity of Ext. 2 and satisfactory proof of other conditions for granting the decree for specific performance, we are unable to accept the said contention. On the other hand, we agree with the conclusion arrived at by the Division Bench and hold that the agreement of sale was enforceable and the trial court has rightly granted the decree which was affirmed by the Division Bench of the High Court.

25. Looked at from any angle, the judgment of the Division Bench of the High Court setting aside the order of the Single Judge and affirming the judgment and decree of the trial court, does not warrant any interference by this Court. Consequently, the appeal fails and the same is dismissed. No costs.

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(2009) 7 Supreme Court Cases 363

(BEFORE R.V. RAVEENDRAN AND J.M. PANCHAL, JJ.)

a SURAJ LAMP AND INDUSTRIES PRIVATE LIMITED THROUGH DIRECTOR .. Petitioner;

Versus

STATE OF HARYANA AND ANOTHER .. Respondents.

b SLP (C) No. … of 2009 (CC No. 5804 of 2009)†, decided on May 15, 2009

A. **Registration Act, 1908 — Ss. 49 and 17 — Compulsory registration of conveyance of immovable property — Purpose and benefits — Registration, held, ensures safety and transparency — It avoids fraud and forgery — Registration ensures that every person dealing with immovable property can rely with confidence on statements contained in registers maintained**
c **under the Act — Property Law — Ownership and Title**

Held :

The Registration Act, 1908 was enacted with the intention of providing orderliness, discipline and public notice in regard to transactions relating to immovable property and protection from fraud and forgery of documents of transfer. This is achieved by requiring compulsory registration of certain types of
d documents and providing for consequences of non-registration. Registration provides safety and security to transactions relating to immovable property, even if the document is lost or destroyed. It gives publicity and public exposure to documents thereby preventing forgeries and frauds in regard to transactions and execution of documents. Registration provides information to people who may deal with a property, as to the nature and extent of the rights which persons may have, affecting that property. It enables people to find out whether any particular
e property with which they are concerned, has been subjected to any legal obligation or liability and who is, or are the person(s) presently having right, title, and interest in the property. It gives solemnity of form and perpetuate documents which are of legal importance or relevance by recording them, where people may see record and enquire and ascertain what the particulars are, and as far as land is concerned, what obligations exist with regard to them. It ensures
f that every person dealing with immovable property can rely with confidence upon statements contained in the registers (maintained under the said Act) as a full and complete account of all transactions by which the title to property may be affected and secure extracts/copies duly certified. (Paras 15 and 18)

B. **Registration Act, 1908 — Ss. 49 and 17 — Immovable property — Sale-purchase through sale agreement (SA), general power of attorney (GPA) and will, instead of registered conveyance deed — Malpractice**
g **prevailing in certain States — Deprecated and its ill-effects like tax evasion, loss of revenue, concealment of black money, etc. highlighted — Notices also issued to ascertain views of Central Government and State Governments concerned about steps to be taken to curb this malpractice — Transfer of Property Act, 1882 — S. 54 — Income Tax Act, 1961 — Ch. XX-A (Ss. 269-A to 269-S) — Income Tax — Tax evasion — Stamp Act, 1899 — Ss. 62 and 64**

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† From the Judgment and Order dated 25-11-2008 of the High Court of Punjab and Haryana at Chandigarh in CWP No. 19864 of 2008

— Constitution of India — Art. 136 — Exercise of power — Suo motu cognizance of malpractice by Supreme Court — Notices issued to Central Government and some State Governments for ascertaining their views and taking steps to curb malpractice — Practice and Procedure — Suo motu cognizance — Property Law — Ownership and Title

C. **Succession and Inheritance — Will — Execution of, in favour of a company — Validity — Held, an individual executing will in favour of a registered company is incongruous and absurd — Corporate Laws — Companies Act, 1956 — Ss. 34 and 41 — Company Law — Inheriting under a will — Permissibility and plausibility**

Deprecating the practice of affecting sale-purchase of free hold property, the Supreme Court

Held :

The consequences of SA/GPA/will transactions are disturbing and far-reaching, adversely affecting economy, civil society and law and order. Firstly, it enables large-scale evasion of income tax, wealth tax, stamp duty and registration fees thereby denying benefit of such revenue to Government and the public. Secondly, such transactions enable persons with undisclosed wealth/income to invest their black money and also earn profit/income, thereby encouraging circulation of black money and corruption. These kind of transactions have disastrous collateral effects also. Any process which interferes with regular transfers under deeds of conveyance properly stamped, registered and recorded in registers of Registration Department, is to be discouraged and deprecated. The present case is a typical example of the consequences of not obtaining a registered sale deed. There is apparently no reason as to why a company registered under the Companies Act should resort to such a transaction. Execution of a will by an individual bequeathing an immovable property to a company, is also incongruous and absurd. It is the dream of every citizen to own a house or a plot of land. The citizens must be enabled by Government to do so with safety, security and without fear of litigation or defects in title.

(Paras 20, 21, 23 and 25)

The Solicitor General is directed to appear in the matter and give suggestions on behalf of the Union of India. It is also directed that notices be issued to States of Punjab, Haryana, Delhi, Uttar Pradesh and Maharashtra to consider the following issues: (*a*) Whether "power of attorney sales" (that is, transactions involving execution of sale agreement/GPA/will) instead of regular sales are prevalent in their respective States? (*b*) What are the views of the respective State Governments in respect of such transactions? (*c*) What steps have been taken and/or proposed to be taken by the respective States to deal with the chaotic situation and confusion arising from such transactions? (Para 26)

D. **Right to Information Act, 2005 — S. 20 — Power to impose penalty vested with the Information Commission — S. 20 whether directory or mandatory — High Court holding it to be directory — Supreme Court issuing notice to State Government on the issue (Para 8)**

K-D/42051/C

Advocates who appeared in this case :

K.V. Vishwanathan, Senior Advocate (Jayant Kr. Mehta, Neeraj Chaudhari and Sandeep Phogat, Advocates) for the Petitioner.

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The Order of the Court was delivered by

R.V. RAVEENDRAN, J.— Delay condoned. Issue notice. The petitioner to file copies of correspondence with the State Information Commissioner as also its title deeds to the disputed property.

2. As this case is a typical example of an irregular process spreading across the country, we propose to refer to some aspects of the case at this preliminary stage itself.

3. The petitioner, a company incorporated under the Companies Act, claims that one Ramnath and his family members sold two-and-half acres of land in Wazirabad Village, Gurgaon to them by means of an agreement of sale, general power of attorney (for short "GPA") and a will in the year 1991 for a consideration of Rs 7,16,695.

4. It is further alleged that the petitioner verbally agreed to sell a part of the said property measuring one acre to one Dharamvir Yadav for Rs 60 lakhs in December 1996. It is stated that the said Dharamvir Yadav, and his son, Mohit Yadav (an ex-MLA and Minister), instead of proceeding with the transaction with the petitioner, directly got in touch with Ramnath and his family members and in 1997 got a GPA in favour of Dharamvir Yadav in regard to the entire two-and-half acres executed and registered and illegally cancelled the earlier GPA in favour of the petitioner.

5. The petitioner claims that when its Director, S.K. Chandak, confronted Dharamvir Yadav in the year 1999 in this behalf, the said Yadav apologised and issued a cheque for Rs 10 lakhs towards part-payment and agreed to pay the balance of Rs 50 lakhs shortly but that the said cheque was dishonoured necessitating a complaint under Section 138 of the Negotiable Instruments Act being filed against Dharamvir Yadav which is pending in a criminal court at Patiala House, New Delhi.

6. It is further alleged that in the year 2001, the petitioner lodged a criminal complaint against Ramnath and members of his family who executed the sale agreement/GPA/will in favour of the petitioner and another complaint against Dharamvir Yadav and his son in the District Court, Gurgaon, for the offences punishable under Sections 406, 420, 467, 468, 471 and 120-B IPC. The petitioner claims that in December 2005 it lodged an FIR in respect of offences under Sections 406, 467, 468, 471 and 120-B IPC against all of them.

7. The petitioner claims that as no action was taken on its FIR by the Station House Officer/investigating officer ("SHO/IO", for short), the petitioner filed an application under the Right to Information Act, 2005 ("the RTI Act", for short) seeking the status, in response to which the SHO/IO gave contradictory and misleading versions about the status of the investigation and about the seizure and custody of the agreement and power of attorney from the accused. An appeal filed by the petitioner was disposed of by the Chief Information Commissioner, Haryana, by an order dated 27-12-2007 merely directing that police should reinvestigate the FIR as per the order of the court and the Department should give a specific proper reply about the status of the documents to the appellant by 25-1-2008.

8. According to the petitioner, the Commissioner ought to have initiated action against the police for giving false and misleading information under Section 20 of the RTI Act. The petitioner therefore filed a writ petition challenging the order of the Chief Information Commissioner and seeking initiation of proceedings under Section 20 of the RTI Act and imposition of penalty. The said writ petition was disposed of by the High Court by the impugned order holding that Section 20 was directory and not mandatory. This SLP seeks leave to file an appeal against the said order.

9. We are of the view that the matter involves an issue whose seriousness is underestimated. The issue to be addressed is avoidance of execution and registration of deeds of conveyance as the mode of transfer of freehold immovable property by increasing tendency to adopt "power of attorney sales", that is, execution of sale agreement/general power of attorney/will (for short "SA/GPA/will transactions") instead of execution and registration of regular deeds of conveyance, on receiving full consideration. This method adopted has the following variants:

(*i*) Execution of an agreement of sale, one or two powers of attorney, with or without a will, all unregistered.

(*ii*) Execution of an agreement of sale, power(s) of attorney and will, registering either all of them, or any two of them, or any one of them.

10. The "power of attorney sales" as a method of "transfer" was evolved by lawyers and document writers in Delhi, to overcome certain restrictions on transfer of flats by the Delhi Development Authority (for short "DDA").

11. DDA had undertaken large-scale development by constructing flats. It is stated that when DDA allotted a flat to an allottee, any transfer of the assignment by the allottee required the permission of DDA and such permission was granted only on payment to DDA of the "unearned increase", that is, the difference between the market value/sale price and the original cost of allotment. To avoid the cumbersome procedure in obtaining permission and to avoid payment of the huge part of the price to DDA as unearned increase, a hybrid system was evolved whereby the allottee/holder of the flat, on receiving the agreed consideration would deliver the possession of the flat to the purchaser and execute the following documents:

(*a*) An agreement of sale confirming the terms of the sale, delivery of possession and payment of full consideration and undertaking to execute any document when required in future.

(*b*) An irrevocable general power of attorney in favour of the purchaser or his nominee authorising him to manage, deal with and dispose of the property without reference to the vendor.

(*c*) A will bequeathing the property to the purchaser as safeguard against the consequences of death of the vendor before transfer.

12. The "power of attorney sales", as noticed above, was adopted to overcome the restrictions/prohibitions in terms of allotment and the rules of allotment of DDA governing the allotment of flats. Such transactions were obviously irregular and illegal being contrary to the rules and terms of allotment. Further, in the absence of a registered deed of conveyance, no right, title or interest in an immovable property could be transferred to the purchaser.

13. However, the Delhi High Court in a few cases accepted such "power of attorney sales" as creating an "interest" in the DDA flat which was so "transferred" and consequently, protected such interest of the purchaser by issuing injunctions or decrees preventing the vendor from further dealing with the property. This led to a general impression that the "power of attorney sales" were valid recognised modes of transfer and the very purpose of DDA prohibiting transfers and requiring permission on payment of certain difference in price was defeated by this process.

14. We are not presently concerned with the validity, propriety or wisdom of such judgments which virtually put the seal of approval of the court on transactions which were irregular and illegal. In fact, it is stated that DDA itself ultimately recognises "power of attorney sales" by accepting applications from purchasers under the "power of attorney sales" for conversion from leasehold to freehold and conveyance of the flats. We will therefore presently exclude the "power of attorney sales" of DDA flats from the purview of the present exercise. What we are concerned with is extension of the concept of such "power of attorney sales" by execution of SA/GPA/will with reference to freehold properties.

15. The Registration Act, 1908 was enacted with the intention of providing orderliness, discipline and public notice in regard to transactions relating to immovable property and protection from fraud and forgery of documents of transfer. This is achieved by requiring compulsory registration of certain types of documents and providing for consequences of non-registration.

16. Section 17 of the Registration Act clearly provides that any document (other than testamentary instruments) which purports or operates to create, declare, assign, limit or extinguish whether in present or in future "any right, title or interest" whether vested or contingent of the value of Rs 100 and upwards to or in immovable property.

17. Section 49 of the said Act provides that no document required by Section 17 to be registered shall, affect any immovable property comprised therein or received as evidence of any transaction affecting such property, unless it has been registered. Registration of a document gives notice to the world that such a document has been executed.

18. Registration provides safety and security to transactions relating to immovable property, even if the document is lost or destroyed. It gives publicity and public exposure to documents thereby preventing forgeries and frauds in regard to transactions and execution of documents. Registration provides information to people who may deal with a property, as to the nature and extent of the rights which persons may have, affecting that property. In other words, it enables people to find out whether any particular property with which they are concerned, has been subjected to any legal obligation or liability and who is or are the person(s) presently having right, title, and interest in the property. It gives solemnity of form and perpetuate documents which are of legal importance or relevance by recording them, where people may see the record and enquire and ascertain what the particulars are and as far as land is concerned what obligations exist with regard to them. It ensures that every person dealing with immovable property can rely with confidence upon the statements contained in the registers (maintained under the said Act) as a full and complete account of all transactions by which the title to the property may be affected and secure extracts/copies duly certified.

19. Recourse to "SA/GPA/will" transactions is taken in regard to freehold properties, even when there is no bar or prohibition regarding transfer or conveyance of such property by the following categories of persons:

(*a*) Vendors with imperfect title who cannot or do not want to execute registered deeds of conveyance.

(*b*) Purchasers who want to invest undisclosed wealth/income in immovable properties without any public record of the transactions. The process enables them to hold any number of properties without disclosing them as assets held.

(*c*) Purchasers who want to avoid the payment of stamp duty and registration charges either deliberately or on wrong advice. Persons who deal in real estate resort to these methods to avoid multiple stamp duties/ registration fees so as to increase their profit margin.

20. Whatever be the intention, the consequences of SA/GPA/will transactions are disturbing and far-reaching, adversely affecting the economy, civil society and law and order. Firstly, it enables large-scale evasion of income tax, wealth tax, stamp duty and registration fees thereby denying the benefit of such revenue to the Government and the public. Secondly, such transactions enable persons with undisclosed wealth/income to invest their black money and also earn profit/income, thereby encouraging circulation of black money and corruption.

21. These kinds of transactions have disastrous collateral effects also. For example, when the market value increases, many vendors (who effected power of attorney sales without registration) are tempted to resell the property taking advantage of the fact that there is no registered instrument or record in any public office thereby cheating the purchaser. When the purchaser under such "power of attorney sales" comes to know about the vendor's action, he invariably tries to take the help of musclemen to "sort out" the issue and protect his rights. On the other hand, real estate mafia many a time purchase properties which are already subject to power of attorney sale and then threaten the previous "power of attorney sale"

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purchasers from asserting their rights. Either way, such power of attorney sales indirectly lead to growth of real estate mafia and criminalisation of real
a estate transactions.

22. Some States have made some efforts to control such "power of attorney sales" by subjecting agreements of sale involving delivery of possession and irrevocable powers of attorney for consideration to the same stamp duty as deeds of conveyance or by making such documents compulsorily registrable. But the steps taken are neither adequate nor
b properly implemented resulting in multiple transactions in regard to the same property by greedy and unscrupulous vendors and/or purchasers giving nightmares to bona fide purchasers intending to buy a property with certainty regarding title. It also makes it difficult for lawyers in tracing and certifying title.

23. Any process which interferes with regular transfers under deeds of
c conveyance properly stamped, registered and recorded in the registers of the Registration Department, is to be discouraged and deprecated. The present case is a typical example of the consequences of not obtaining a registered sale deed. There is apparently no reason as to why a company registered under the Companies Act should resort to such a transaction. Execution of a will by an individual bequeathing an immovable property to a company, is
d also incongruous and absurd.

24. If there was a bar and the process was adopted to overcome such bar regarding sale of lands, then courts should not go to their assistance, as that would amount to perpetuating illegalities. If there was no bar, then the questions that arise are: why should a company hold a property in a state of suspended animation from 1991? How can a company "verbally" agree to
e sell a property to someone? What is the reason for the delay in lodging the complaints? If the petitioner had purchased the property under a registered sale deed, numerous disputes, litigations and criminal proceedings could have been avoided. The illegal and irregular process of "power of attorney sales" spawns several disputes relating to possession and title, and also results in criminal complaints and cross-complaints and extra-legal
f enforcement and forced settlements by land mafia. We are, therefore, of the view that the situation warrants special measures.

25. We are informed that some time back in 2008, there was a proposal to amend Section 147 of the Delhi Municipal Corporation Act, 1957 to check and discourage "power of attorney sales". There was also a proposal to have special enactment relating to registration and recording of title in Delhi. But
g so far nothing appears to have fructified. It is the dream of every citizen to own a house or a plot of land. The citizens must be enabled by the Government to do so with safety, security and without fear of litigation or defects in title.

26. We, therefore, request the Solicitor General to appear in the matter
h and give suggestions on behalf of the Union of India. We also direct notice to the States of Punjab, Haryana, Delhi, Uttar Pradesh and Maharashtra

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(represented by their respective Chief Secretary/Revenue Secretary) to consider the following issues:

(*a*) Whether "power of attorney sales" (that is, transactions involving execution of sale agreement/GPA/will) instead of regular sales are prevalent in their respective States? a

(*b*) What are the views of the respective State Governments in respect of such transactions?

(*c*) What steps have been taken and/or proposed to be taken by the respective States to deal with the chaotic situation and confusion arising from such transactions? b

27. List the matter in the last week of August, 2009.

(2009) 7 Supreme Court Cases 370 c

(BEFORE DR. ARIJIT PASAYAT AND A.K. GANGULY, JJ.)

UNION OF INDIA AND OTHERS .. Appellants;

Versus

DIPAK KUMAR SANTRA .. Respondent.

Civil Appeal No. 8535 of 2002†, decided on May 6, 2009 d

Armed Forces — Army Rules, 1954 — R. 13, Table — Discharge — Grounds — Recruit considered unlikely to become an efficient soldier — Respondent discharged from service on the ground that he had failed twice in clerks' proficiency and aptitude test and for that reason, he could not be remustered due to absence of any vacancy of storekeeper or any trade — Held, case squarely covered by R. 13(3) — Interference by High Court was not warranted — Service Law — Termination — Grounds — Failure to pass proficiency and aptitude test (Paras 6 and 8) e

Appeal allowed K-D/42063/CL

Advocates who appeared in this case :
B.V. Balaram Das, Advocate, for the Appellants;
S.K. Bhattacharya, Advocate, for the Respondent. f

The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J.— The challenge in this appeal is to the judgment of a Division Bench of the Calcutta High Court allowing the Appeal MAT No. 653 of 1998. In the said appeal challenge was to the order passed by the learned Single Judge of the High Court dated 4-12-1997 whereby the writ petition filed by the present respondent was dismissed. The writ petitioner had challenged the order passed by the Army Authorities discharging the writ petitioner from service purportedly under Rule 13(3) of the Army Rules, 1954 (in short "the Rules"). g

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† From the Judgment/Order dated 22-1-2001 of the High Court of Calcutta in MAT No. 653 of 1998

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.   /2024
(@SLP (C) No. 330/2017)

SANJAY SHARMA   APPELLANT(S)

VERSUS

KOTAK MAHINDRA BANK LTD. & ORS.   RESPONDENT(S)

O R D E R

Leave granted.

2. Being aggrieved by the order dated 30.05.2016 passed by the Division Bench of the Delhi High Court in W.P.(C) No.6881/2014, the appellant is before this Court.

3. For the sake of convenience, the parties herein may be referred to in terms of their status in the entire gamut of proceedings: the appellant herein is the auction-purchaser who was successful in the auction conducted by respondent No.1-Kotak Mahindra Bank Ltd. (“respondent No.1”) on 21.12.2010 inasmuch as the sale certificate has also been issued in favour of the appellant on 27.12.2010. Respondent No.1 is the Bank to whom Champa Bhen Kundia is indebted as a borrower; respondent No.2 is said to be the person who is in possession of the scheduled premises pursuant to an Agreement to sell and a General Power of Attorney; respondent Nos.3 to 8 have really no connection with the present dispute in question.

4. Briefly stated, the facts of this case are that the secured asset, in this case, is the piece and parcel of land (measuring 55.7 Sq. yards) and the building and the Basement of House property bearing no. 2/22, Old Rajinder Nagar, New Delhi-110018 (hereinafter referred to as "secured asset"). One Champa Bhen Kundia was the owner of the said secured asset. The basement of the secured asset was sold in favour of her son Chandu Bhai vide an unregistered sale deed dated 28.04.2000 allegedly for a consideration of Rs.4,00,000/-. Chandu Bhai again created an unregistered document to show the sale of the basement of the secured assets in favour of Satnam Singh and Surinder Wadhwa vide an unregistered sale deed dated 30.03.2001 for an alleged consideration of Rs.90,000/-. Further, once again, Satnam Singh and Surinder Wadhwa created unregistered document, i.e., Agreement to Sell dated 23.04.2001 for the sale of the basement of the secured assets in favour of Raj Kumar Vij, i.e., respondent No. 2.

5. Be that as it may, Champa Bhen Kundia, the original owner of the secured asset took a loan from M/s Associated India Financial Service Pvt Ltd and mortgaged the secured asset on 16.06.2001. Said financing Company M/s Associated India Financial Service P Ltd, was taken over by M/s Citi Financial Consumer India Ltd which ultimately assigned its debts to M/s Kotak Mahindra Bank, i.e., respondent No. 1.

6. Respondent No.1 served notice dated 28.10.2006 under Section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "SARFAESI Act") to Champa Bhen Kundia as the loan was not repaid. The notice remained non-complied, therefore, respondent No. 1 got the secured asset attached and took the physical possession of the secured asset by appointment of a Court Receiver under Section 14 of the SARFAESI Act under the orders of Chief Metropolitan Magistrate, Delhi vide order dated 06.09.2007.

7. After the physical possession of the secured asset was taken over by the Court Receiver, respondent Nos. 2 to 6 herein filed an application under Section 17 of the SARFAESI Act being S.A. No. 118/2007 before the Debt Recovery Tribunal–III ("DRT") claiming themselves to be the successor-in-interest of the principal borrowers and purchasers of the property.

8. By its order dated 23.11.2007, the DRT directed respondent Nos.2 to 6 to deposit Rs.2,00,000/- by 26.11.2007 and further directed respondent No.1 to restore their possession on payment of the said amount. Respondent Nos. 3 to 6 availed the benefit of the order dated 23.11.2007 and deposited the amount. However, respondent No.2 herein did not make the said payment. Subsequently, by order dated 08.09.2009, the DRT disposed of the S.A. No. 118/2007, *inter alia*, directing respondent No.2 to pay respondent No.1 a sum of Rs.2,50,000/- approximately within a period of sixty days from the date of receipt of the order. The DRT further went on to hold that if respondent Nos.3 to 6 deposit the remaining amount

with the Bank, the authorised officer of the bank shall immediately issue a "No Dues Certificate" and return the Original Title Deed to the five appellants before the DRT after obtaining five Certificates of Acknowledgment from them. The said order of DRT dated 08.09.2009 was challenged by respondent Nos.3 to 6 before the Debt Recovery Appellate Tribunal, New Delhi (“Appellate Tribunal”) by filing Appeal No.3 of 2010. However, this came to be disposed of by an order dated 02.06.2010 without interfering with the order passed by the DRT dated 08.09.2009.

9. Thereafter, respondent No.1 gave a notice in the Newspaper "Business Standard" on 20.11.2010 regarding a public auction to be conducted on 21.12.2010 with respect to the basement of the secured asset. The appellant being the successful bidder made the payment of the bid amount of Rs. 7,50,000/- to respondent No. 1 and the latter issued a confirmation certificate dated 22.12.2010. Thereafter, respondent No. 1 issued a sale certificate in favour of the appellant on 27.12.2010.

10. Being aggrieved, respondent No.2 approached the Appellate Tribunal in MA Nos.22 and 23 of 2011 in Appeal No. 3 of 2010 contending that respondent No.2 was not summoned at all in the proceedings before the Appellate Tribunal while passing the order dated 02.06.2010 while there is a dispute concerning the ownership of the basement of the secured asset. By order dated 21.02.2011, the Appellate Tribunal directed the DRT to examine the case of respondent No.2. Pursuant to the remand, the DRT by its order dated 30.08.2012, allowed the case of respondent No.2 and set aside the

auction holding that respondent No.2 has the right of redemption under Section 13(8) of the SARFESI Act subject to deposit of amount due to respondent No.1 with 9% simple interest.

11. Being aggrieved by the above order dated 30.08.2012, the appellant approached the Appellate Tribunal and filed Appeal No. 368 of 2012. By order dated 03.09.2014, the Appellate Tribunal allowed the appeal preferred by the appellant and set aside the order dated 30.08.2012. Thereby, the auction sale was restored. The Appellate Tribunal observed that respondent No.2 cannot be given an unfettered right to deposit the amount at any time according to his convenience. The Appellate Tribunal further observed that there are serious disputes regarding the title of respondent No.2 to be a subsequent purchaser of the secured asset.

12. Being aggrieved, respondent No.2 approached the High Court by filing Writ Petition (Civil) No.6881 of 2014. By the impugned order, the High Court has set aside the order dated 03.09.2014 passed by the Appellate Tribunal and has restored the order dated 30.08.2012 passed by the DRT in setting aside the auction sale and has directed respondent No.2 herein to comply with the order of the High Court within a period of thirty days. Consequently, the appellant herein was entitled to a refund of the amount Rs.7,50,000/-(Rupees Seven Lakhs and Fifty Thousand Only) deposited by him with such interest as he would be entitled to as per the order passed by the DRT. The High Court has also permitted respondent No.2 to redeem the mortgage by paying proportionately and to recompense the appellant to pay interest at 9% of the sum

deposited by the appellant and consequently, has disposed of the Writ Petition. Hence this instant appeal.

13. We have heard learned counsel for the appellant, learned counsel for respondent No.1 and learned counsel for respondent No.2 and we have perused the material on record.

14. Learned counsel for the appellant submitted that the appellant is the successful auction-purchaser of the scheduled property which was conducted by respondent No.1 on 21.12.2010; that he had purchased the said property for a total valuable consideration of Rs.7,50,000/- being the highest bidder and this bid being accepted, sale certificate dated 27.12.2010 was also issued to the appellant herein. However, respondent No.2 has sought to get the sale certificate cancelled and consequently, the High Court has held in favour of respondent No.2.

15. Learned counsel for the appellant submitted that respondent No.2 has no right, title and interest in the scheduled property and despite the same is seeking to set aside the auction which was conducted by respondent No.1 and is trying to get the sale certificate dated 27.12.2010 set aside. He submitted that respondent No.2 has no locus standi to interfere in the matter and therefore, the appeal may be allowed by restoring the order dated 03.09.2014 and setting aside the order passed by the Appellate Tribunal and setting aside the order dated 30.08.2012 passed by the DRT.

16. On the other hand, learned counsel for respondent No.1 submitted that the Bank has acted in accordance with Section 13 of the SARFAESI Act and when the original borrower Champa Bhen Kundia did not respond to the notices issued under the said provisions, the Bank was constrained to put up the secured asset for auction and consequently, seek to recover the unpaid debt by the original borrower Champa Bhen Kundia. He submitted that the auction was conducted by respondent No.1 subsequent to the proceeding under Section 14 of the SARFAESI Act and on taking possession of the secured asset. That respondent No.1 has not been in a position to comply with handing over of possession to the appellant herein owing to the litigation that was commenced by respondent No.2 herein.

17. In the circumstances, this Court may protect the action taken by respondent No.1 and, accordingly, pass appropriate orders in this appeal.

18. Learned counsel for respondent No.2 submitted that Champa Bhen Kundia, the original owner of the scheduled property and also the borrower, on 28.04.2000 had executed a registered Power of Attorney in favour of her son Chandu Bhai. Thereafter Chandu Bhai had entered into a registered General Power of Attorney in favour of Satnam Singh and Surinder Wadhwa on 30.03.2001. Satnam Singh and Surinder Wadhwa had executed a registered will, a General Power of Attorney and an agreement to sell on 16.04.2001. The will dated 16.04.2001 was registered, the general power of attorney in favour of respondent No.2 was also a registered one. Thereafter, Champa

Bhen Kundia mortgaged the Scheduled Property in favour Associate Finance Limited on 16.06.2001 and respondent No.1 is an assignee of the said mortgage.

19. Learned counsel for respondent No.2 therefore submitted that the transactions entered into with respondent No.2 being prior to the actual mortgage and the debt which came into existence subsequently on 16.06.2001, respondent No.2 had an equitable right to get the title to the scheduled property; therefore respondent No.2 raised objections even prior to auctioning of the said property. However, the respondent No.1 did not take into consideration, his objections and instead proceeded to auction the property on 21.12.2010.

20. In the circumstances, respondent No.2 was constrained to file S.A. No.118/2007 before the DRT and after two rounds of litigation ultimately passed an order in favour of respondent No.2 on 30.08.2012 which order was set aside by the Appellate Tribunal on 03.09.2014. Therefore, respondent No.2 was constrained to file W.P.(C) No.6881/2014 before the Delhi High Court which has disposed of the said writ petition in favour of respondent No.2 herein. Learned counsel, therefore submitted that there is no merit in this appeal and hence, the same may be dismissed.

21. The detailed narration of facts and contentions would not call for a reiteration. Although learned counsel for respondent No.2 emphasized the fact that respondent No.2 is presently in possession of the scheduled premises on the strength of the registered General

Power of Attorney dated 16.04.2001 as well as the agreement to sell of the same date, the fact remains that the agreement to sell executed by Smt. Champa Bhen Kundia is not by a registered document. In the circumstances, respondent No.1 could not have known that even prior to her seeking a loan and mortgaging the very same property to the Bank on 16.06.2001, there was already an encumbrance as such created in favour of respondent No.2. Therefore, the Bank although had done its due diligence would not have known the fact that there was a prior transaction in respect of the very same secured asset.

22. Learned counsel for respondent No.2 submitted that the fact that there was a registration of the General Power of Attorney in favour of respondent No.2 and thereafter there was an agreement to sell also executed in his favour which created an interest in the secured asset and therefore, the said fact having been brought to the notice of respondent No.1, the objection raised by respondent No.2 ought to have been taken note of by the Bank. Respondent No.1 having ignored the objection raised by respondent No.2 *vis-a-vis* the proposed auction of the secured asset has in fact let down not only the potential auction-purchaser but also has adversely affected the right, title and interest of respondent No.2 *vis-a-vis* the secured asset.

23. We do not think that the aforesaid submission could have any bearing insofar as the rights of the appellant is concerned for the reason that the said appellant would have been under an obligation to conduct a due diligence exercise in respect of the secured asset

and ascertain the encumbrance accrued therein, had the agreement to sell been a registered agreement to sell. But in the absence of there being any registration of the said agreement dated 23.04.2001, the appellant could not have detected, whether there was any kind of prior interest created in favour of respondent No.2. In fact, for the very same reason, respondent No.1 also would not have been in the knowledge of the said fact even if due diligence exercise had been carried out by the Bank as stated above as the agreement to sell was not a registered instrument.

24. In the circumstances, respondent No.1 sought to recover the outstanding debt on the basis of the fact that there was a mortgage dated 16.06.2001 which was made in favour of Associated Finances Limited from whom Champa Bhen Kundia had borrowed certain amounts and which date was assigned to respondent No.1. The respondent No.1 consequently, as a financial institution took steps against the borrower under Sections 13 and 14 and other relevant provisions of the SARFAESI Act and conducted the auction of the property on 21.12.2010 so as to recover the outstanding debt. The appellant herein being the highest bidder promising to pay Rs.7,50,000/- was permitted by respondent No.1 and the sale certificate was issued in his favour on 27.12.2010 after accepting his bid. It is thereafter that during the pedency of its appeal before the DRT that the auction proceedings were challenged by respondent No.2.

25. Learned counsel for respondent No.1 drew our attention to the fact that on three occasions that is by orders dated 23.11.2007, 08.09.2009 and 30.08.2012 opportunities were given to respondent

No.2 to pay the outstanding dues so as to ensure that secured asset could be saved from the auction proceedings conducted and possibly the appellant could be paid the amount that he had deposited with the Bank with suitable rate of interest. But respondent No.2 did not make use of the said opportunities to repay the outstanding dues.

26. In the circumstances, we find that the Appellate Tribunal was justified in holding in favour of the appellant herein by order dated 03.09.2024 by setting aside the order dated 30.08.2012 passed by the DRT. The High Court has reversed the said orders and consequently, the appellant has been directed to receive the amounts deposited by him as the sale certificate dated 27.12.2010 has been set aside on the basis that the auction conducted itself was not in accordance with law. The High Court, in our view, was not justified in holding so.

27. Section 54 of the Transfer of Property Act, 1882, defines a “sale” as the transfer of ownership in exchange for a price that is either paid, promised, or part-paid and part-promised. This provision further describes the manner in which a sale is effected. It stipulates that, in the case of tangible immovable property valued at one hundred rupees or more, the transfer can be made only through a registered instrument. The use of the term “only” signifies that, for tangible immovable property valued at one hundred rupees or more, a sale becomes lawful only when it is executed through a registered instrument. Where the sale deed requires registration, ownership does not pass until the deed is

registered, even if possession is transferred, and consideration is paid without such registration. The registration of the sale deed for an immovable property is essential to complete and validate the transfer. Until registration is effected, ownership is not transferred.

28. In the present case, the original owner/borrower, Champa Ben Kundia, 'sold' the secured asset to her son, Chandu Bhai by an unregistered sale deed dated 28.04.2000. Subsequently, the basement of the secured asset was "transferred" to Satnam Singh and Surinder Wadhwa through another unregistered sale deed dated 30.03.2001. Further, an unregistered agreement to sell, dated 23.04.2001, allegedly transferred the basement of the secured asset to respondent No.2. Therefore, all the documents relied upon by respondent No.2 to claim ownership of the basement of the secured asset are unregistered documents and fail to meet the requirements of a valid sale under Section 54 of the Transfer of Property Act. Respondent No.2 thus did not have any title to claim the ownership of the basement of the secured asset. All the transactions made in respect of the secured asset from Champa Bhen Kundia to the subsequent vendors were through an unregistered deed including the agreement to sell dated 23.04.2001 through which respondent No.2 was claiming ownership of the basement of the secured asset.

29. This Court in *Babasheb Dhondiba Kute vs. Radhu Vithoba Barde in SLP(C) No.29462 OF 2019* held that the conveyance by way of sale would take place only at the time of registration of a sale deed in accordance with Section 17 of the Registration Act, 2008. Till

then, there is no conveyance in the eyes of law.

30. The High Court went on to observe that respondent No.1 which advanced the loan would be deemed to have notice of the possessory rights in favour of Satnam Singh and later in favour of respondent No.2 relying on Explanation II to Section 3 of the Transfer of Property Act. However, we do not find merit in the said finding of the High Court. We say so, because, unless the deeds of conveyance through which the alleged transfer took place were registered in accordance with the provision of the Registration Act, respondent No.1 did not have access to the said information since there would be no entry of the said transfer of an immovable property in the encumbrance records.

31. We also take note of the fact that respondent No.1 has conducted the auction in terms of the provisions of the SARFESI Act. When the original owner/borrower Champa Bhen Kundia failed to repay the loan, respondent No.1 issued a notice under Section 13 of the SARFESI Act on 28.10.2006. Thereafter, physical possession of the secured asset was taken over and a Receiver was appointed in terms of Section 14 of the SARFESI Act on 06.07.2007. Thereafter, a notice was issued regarding the public auction of the basement being the secured asset as per Section 13 of the Act on 20.11.2010. The appellant herein participated in the said auction and was declared the highest bidder. Ultimately, respondent No.1 also issued a sale certificate in favour of the appellant on 27.12.2010. Thus, the auction was in due compliance with the statutory requirements and constituted a valid sale.

32. No doubt, objections were raised by respondent No.2 in respect of the said public auction as well as in the issuance of a sale certificate to the appellant. The counsel for respondent No.2 vehemently argued that respondent No.2 has to have the right of redemption of the property on payment of the dues. However, this right is not unfettered and there is a statutory limitation prescribed to it. As per the unamended Section 13(8) of the SARFAESI Act, the right of the borrower to redeem the secured asset was available till the sale or transfer of such secured asset. Subsequent to the amendment in 2016, the right of redemption available to the borrower would be available only till the date of publication of the notice under Rule 9(1) of the Security Interest (Enforcement) Rules, 2002. The material on record shows that ample opportunities were given to respondent No.2 to avail the said right on redemption *vide* orders dated 23.11.2007, 08.09.2009 and 30.08.2012 passed by the DRT. However, respondent No.2 failed to make use of the said opportunities provided to him.

33. It is now a well-settled principle that a sale by way of public auction cannot be set aside until there is any material irregularity and/or illegality committed in holding the auction or if such auction was vitiated by any fraud or collusion. This Court in *V.S. Palanivel vs. P. Sriram reported in 2024 INSC 659* held that unless there are some serious flaws in the conduct of the auction as for example perpetration of a fraud/collusion, grave irregularities that go to the root of such an auction, courts must ordinarily refrain from setting them aside keeping in mind the

domino effect such an order would have. Recently, this Court in *Celir LLP vs. Ms Sumati Prasad Bafna and others* Contempt Petition (C) Nos.158-159 of 2024 in Civil Appeal Nos. 5542-5543 of 2023 held as follows:

> "218.Any sale by auction or other public procurement methods once already confirmed or concluded ought not to be set-aside or interfered with lightly except on grounds that go to the core of such sale process, such as either being collusive, fraudulent or vitiated by inadequate pricing or underbidding. Mere irregularity or deviation from a rule that does not have any fundamental procedural error does not take away the foundation of authority for such a proceeding. In such cases, courts, in particular, should be mindful to refrain entertaining any ground for challenging an auction which either could have been taken earlier before the sale was conducted and confirmed or where no substantial injury has been caused on account of such irregularity."

34. Consequently, the impugned order of the High Court is set aside. The order of the Appellate Tribunal dated 03.09.2014 is restored and consequently, the order dated 30.08.2012 passed by the DRT is set aside. Respondent No.1 shall take steps to hand over possession of the scheduled premises to the appellant herein. We also reserve liberty to the appellant herein to take possession in accordance with law by making a suitable application before the DRT or the High Court, as the case may be, for the purpose of collecting the keys of the scheduled premises that have been deposited by respondent No.2.

35. The amounts with accrued interest, if any, deposited by respondent No.2 before the DRT, the Appellate Tribunal, the High Court or with the Bank would be withdrawn by respondent No.2 by making suitable applications. If such applications are made, the

same shall be considered expeditiously and disposed of.

36. The appeal is allowed and disposed of in the aforesaid terms.

No costs.

…………………………………………………………………………,J.
(B.V. NAGARATHNA)

…………………………………………………………………………,J.
(NONGMEIKAPAM KOTISWAR SINGH)

NEW DELHI;
DECEMBER 10, 2024.

ITEM NO.23 COURT NO.8 SECTION XIV

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Petition(s) for Special Leave to Appeal (C) No(s). 330/2017
[Arising out of impugned final judgment and order dated 30-05-2016 in WPC No. 6881/2014 passed by the High Court of Delhi at New Delhi]

SANJAY SHARMA Petitioner(s)

VERSUS

KOTAK MAHINDRA BANK LTD. & ORS. Respondent(s)

Date : 10-12-2024 This petition was called on for hearing today.

CORAM :
HON'BLE MRS. JUSTICE B.V. NAGARATHNA
HON'BLE MR. JUSTICE NONGMEIKAPAM KOTISWAR SINGH

For Petitioner(s) Mr. R. C. Kaushik, AOR
Mr. M.K.Goel, Adv.

For Respondent(s) Mr. Arun Aggarwal, AOR
Ms. Anshika Agarwal, Adv.
Mr. Shivam Saini, Adv.
Mr. Praful Rawat, Adv.

Ms. Kanika Agnihotri, Adv.
Ms. Supriya Juneja, AOR

Mr. Rajeev Singh, AOR

UPON hearing the counsel the Court made the following

O R D E R

Leave granted.

The appeal is allowed and disposed of in terms of the signed order.

Pending application(s), if any, shall stand disposed of.

(RADHA SHARMA) (DIVYA BABBAR)
ASTT. REGISTRAR-cum-PS COURT MASTER (NSH)
(Signed order is placed on the file)

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(2022) 18 Supreme Court Cases 489

(BEFORE AJAY RASTOGI AND ABHAY S. OKA, JJ.)

2J

a KEWAL KRISHAN .. Appellant;

Versus

RAJESH KUMAR AND OTHERS .. Respondents.

Civil Appeals Nos. 6989-92 of 2021†, decided on November 22, 2021

b A. **Property Law — Transfer of Property Act, 1882 — S. 54 — Sale without consideration is void — Capacity to pay sale consideration is a relevant factor**

— Two brothers joint owners of suit property — Power of attorney issued by plaintiff in favour of his defendant brother — Defendant executed two sale deeds purporting to sell one part of the property to his minor sons and remaining part to his wife for stated amounts of consideration — Two suits c filed by plaintiff for injunction restraining defendants from interfering with possession of plaintiff and from alienating his half-share — First appellate court (District Court) recorded categorical finding that no evidence adduced to show that defendant brother's wife and minor sons had any source of income and paid considerations as shown in sale deeds and that defendant brother by taking advantage of power of attorney transferred entire suit land in d favour of his minor sons and wife — High Court without disturbing District Court's finding of want of evidence regarding payment of consideration under sale deeds, merely observed that sale consideration being not exorbitant, was within the reach of minor sons and wife — Held, High Court's observation unfounded — Sale deeds were void being without consideration — As no title was transferred under sale deeds, plaintiff continued to have half-share in suit e property (Paras 18 to 20)

B. **Contract and Specific Relief — Specific Relief Act, 1963 — S. 35 — Sale deed which was pleaded to be, and found void, need not be challenged by claiming a separate declaration as that plea can be set up even in collateral proceedings — Therefore, amendment of pleading seeking declaration that power of attorney and sale deeds were null and void not required — Civil f Procedure Code, 1908 — Or. 6 Rr. 2 and 17 — Property Law — Transfer of Property Act, 1882, S. 54 (Para 19)**

Held :

A sale of an immovable property has to be for a price. The price may be payable in future. It may be partly paid and the remaining part can be made payable in future. The payment of price is an essential part of a sale covered by Section 54 of g the TP Act. If a sale deed in respect of an immovable property is executed without payment of price and if it does not provide for the payment of price at a future date, it is not a sale at all in the eye of the law. It is of no legal effect. Therefore, such a sale will be void. It will not effect the transfer of the immovable property. (Para 18)

h † Arising out of SLPs (C) Nos. 2033-36 of 2016. Arising from the impugned Final Judgment and Order in *Rajesh Kumar* v. *Kewal Krishan*, 2015 SCC OnLine P&H 20782 [Punjab and Haryana High Court, RSA No. 1930 of 1988 (O&M), dt. 12-5-2015] **[Reversed]**

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In the present case, the sale deeds of 10-4-1981 will not confer any right, title and interest on *S*'s wife and children as the sale deeds will have to be ignored being void. It was not necessary for the appellant to specifically claim a declaration as regards the sale deeds by way of amendment to the plaint. The reason being that there were specific pleadings in the plaints as originally filed that the sale deeds were void. A document which is void need not be challenged by claiming a declaration as the said plea can be set up and proved even in collateral proceedings. (Para 19)

Rajesh Kumar v. *Kewal Krishan*, 2015 SCC OnLine P&H 20782, *reversed*
Kewal Krishan v. *Rajesh Kumar*, 2021 SCC OnLine SC 1126, *referred to*

R-D/68180/SV

Advocates who appeared in this case :
Neeraj Kr. Jain, Umang Shankar (Advocate-on-Record) and Nirmal Singh Berchiwal, Advocates, for the Appellant;
Surjeet Singh, Senior Advocate [Roshan Lal Sharma, K.G. Bhagat, Vineet Bhagat (Advocate-on-Record), Ms Archna Midha and Ms Manju Bhagat, Advocates], for the Respondents.

Chronological list of cases cited ***on page(s)***
1. 2021 SCC OnLine SC 1126, *Kewal Krishan* v. *Rajesh Kumar* 493*g-h*
2. 2015 SCC OnLine P&H 20782, *Rajesh Kumar* v. *Kewal Krishan* **(reversed)** 492*c*, 492*e-f*, 492*f*, 496*e*, 496*f*

The Judgment of the Court was delivered by

ABHAY S. OKA, J.— Leave granted.

Factual aspects

2. The appellant Kewal Krishan and his elder brother (one of the respondents) Sudarshan Kumar acquired the properties which are the subject-matter of these appeals (for short "the suit properties") under the sale deeds dated 12-8-1976 and 19-10-1976.

3. The appellant Kewal Krishan executed a power of attorney in favour of Sudarshan Kumar on 28-3-1980. Acting on the basis of the said power of attorney, two sale deeds were executed by Sudarshan Kumar on 10-4-1981. The first sale deed was executed by him by which he purported to sell a part of the suit properties to his minor sons. The sale consideration was shown as Rs 5500. The other sale deed was executed by Sudarshan Kumar in favour of his wife in respect of remaining part of the suit properties. The consideration shown in the sale deed was of Rs 6875. The respondents are Sudarshan Kumar, his wife and his sons.

4. Two separate suits were instituted by the appellant on 10-5-1983. One was against Sudarshan Kumar and his two sons and the other one was against Sudarshan Kumar and his wife. Both the suits, as originally filed, were for injunction restraining the defendants from interfering with the possession of the appellant and from alienating the share of the appellant in the suit properties. In the alternative, a prayer was made for passing a decree for possession. On 23-11-1985, the plaint in both the suits was amended by incorporating the relief of declaration that the power of attorney and sale deeds were null and void. A

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prayer was also incorporated for a money decree for the share of the appellant in the compensation awarded in respect of a tube well on the suit properties.

5. Sudarshan Kumar contested the suit along with other respondents. It is the case of Sudarshan Kumar that he was employed in Muscat and was earning a large income. It is the further case of Sudarshan Kumar that at the relevant time, the appellant was unemployed. From time to time, he remitted amounts to the appellant from his own earnings. Sudarshan Kumar had negotiated for purchasing the suit properties. According to his case, the suit properties were to be purchased only in his name. His contention is that while getting the sale deeds executed on 12-8-1976 and 19-10-1976, the appellant got his name incorporated as a purchaser along with Sudarshan Kumar. According to the case of Sudarshan Kumar, the appellant was a benamidar. In short, the contention of Sudarshan Kumar is that he is the sole owner of the suit properties. His further contention is that by writing a letter to him on 15-4-1980, the appellant accepted his sole ownership and that is how the appellant voluntarily executed the power of attorney dated 23-3-1980 which was duly registered under the Registration Act, 1908 under which Sudarshan Kumar was appointed as his attorney in respect of the suit properties. Therefore, the contention of Sudarshan Kumar is that the sale deeds are legal and valid. Apart from these contentions on merits, it was contended by Sudarshan Kumar that the prayers for declaration incorporated subsequently by way of amendment in relation to the two sale deeds and the power of attorney were barred by limitation. It was contended that even the prayer made for grant of his share in the compensation in respect of tube well was barred.

6. The trial court dismissed the suits filed by the appellant. The trial court held that the suit lands were intended to be purchased only by Sudarshan Kumar and that is how the original sale deeds were in possession of Sudarshan Kumar. The trial court accepted the contention that he was the exclusive owner and the appellant was the benamidar. The trial court upheld the contention of Sudarshan Kumar regarding legality and validity of the power of attorney and both the sale deeds which were the subject-matter of challenge. The trial court held that as Sudarshan Kumar was the only owner of the suit properties, the appellant was disentitled to any relief. The trial court also held that the prayer for grant of a share in compensation in respect of the tube well was barred by provisions of Rule 2 of Order 2 of the Civil Procedure Code, 1908.

7. Being aggrieved by the judgment of the trial court, the appellant preferred two appeals before the District Court. The appeals were partly allowed. The District Court held that Sudarshan Kumar did not step into witness box and except for the bald statement made by the attorney of Sudarshan Kumar in his evidence, nothing was placed on record to show that the entire sale consideration for acquiring suit properties was paid by him. The District Court held that as the case of Sudarshan Kumar was that the money was transmitted from a foreign country to the appellant, it was easily possible for Sudarshan Kumar to adduce documentary evidence to show that money was transferred to the appellant as alleged in his written statement. Therefore, the District Court accepted that both the appellant and Sudarshan Kumar were the joint owners of the suit properties.

8. The District Court also held that the sons of Sudarshan Kumar and the wife of Sudarshan Kumar had a notice that the appellant had one half-share in the suit properties as there was a recital to that effect in the sale deeds executed by Sudarshan Kumar. It was further held that Sudarshan Kumar, his sons and his wife failed to adduce any evidence to show that the price was paid as mentioned in the impugned sale deeds. The District Court observed that while executing the sale deed in favour of his wife, Sudarshan Kumar described his wife as the daughter of one Mehar Chand and that she has not been described as his wife. The District Court held that the sale deeds dated 10-4-1981 were without consideration. Therefore, the District Court decreed the suit by granting joint possession by setting aside the sale deeds dated 10-4-1981. However, the prayer for compensation in respect of the tube well was rejected.

9. The respondents filed separate second appeals before the High Court which have been allowed by the impugned judgment and order[1]. The High Court upheld the finding of the District Court that Sudarshan Kumar failed to adduce evidence to prove that he remitted money from foreign country to the appellant. Therefore, the High Court held that the appellant and Sudarshan Kumar were the joint owners of the suit properties. The High Court held that the power of attorney was valid. The High Court further held that the suits for declaration of invalidity of the sale deeds were barred by limitation as the said prayers were belatedly incorporated on 23-11-1985. The High Court held that the sale consideration mentioned in the sale deeds executed on 10-4-1981 of Rs 5500 and Rs 6875, respectively, was not exorbitant and, therefore, the amounts were not out of reach of the sons of Sudarshan Kumar and wife of Sudarshan Kumar. As the High Court held the appellant to be the owner of half-share in the suit properties and as the power of attorney was held to be valid, by the impugned judgment and order[1], it directed Sudarshan Kumar to pay the share of the appellant in the consideration shown under the sale deeds dated 10-4-1981 with 12% interest from the date of execution of the sale deeds. The said judgment and order[1] has been impugned in these appeals.

Submissions of the appellant

10. Shri Neeraj Kumar Jain, learned Senior Counsel appearing for the appellant submitted that even the High Court accepted that there was no evidence adduced to show that the purchasers under the sale deeds dated 10-4-1981 had paid consideration to Sudarshan Kumar. He submitted that finding of the High Court that the consideration amounts were not out of reach of the purchasers is without any basis as it was not the case of the Sudarshan Kumar that his wife and minor sons had any source of income at the relevant time.

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11. The learned Senior Counsel further submitted that even in the unamended plaints, there were specific assertions made that the sale deeds were null and void as the same were without consideration. He pointed out that the unamended plaints contained a specific contention that the transactions of sale were sham transactions. It was specifically pleaded that the market value of the suit properties was more than Rs 30,000 and there was no occasion to sell the suit properties at the price shown in the sale deeds. He pointed out that it was pleaded in the unamended plaints that the minor sons of Sudarshan Kumar and his wife had no source of earning. He submitted that as the sale deeds were without consideration, the same were void. He pointed out that the suit for injunction was based on the title pleaded by the appellant as a joint owner of the suit properties and therefore, the appellant continues to be the owner of his share in the suit properties as the sale deeds are void and sham. He urged that it was not necessary to amend the plaint and to seek a specific declaration regarding the invalidity of the power of attorney and sale deeds. He pointed out that the High Court has committed a manifest error while recording a finding on bar of limitation. He invited our attention to SCC OnLine P&H para 28 of the impugned judgment which proceeds on the footing that the appellant had challenged the legality and validity of sale deeds dated 12-3-1976 and 19-10-1976. He urged that the specific challenge was to two sale deeds dated 10-4-1981. He submitted that the High Court has erroneously disturbed the decree passed by the District Court.

Submissions of the respondents

12. The learned Senior Counsel Shri Surjeet Singh representing the respondents invited our attention to the letter dated 5-4-1980 (Ext. D-3) addressed by the appellant to Sudarshan Kumar. He pointed out that in the said letter, the appellant accepted that the suit lands were purchased out of the amounts remitted by Sudarshan Kumar and in fact, the appellant agreed to transfer the suit properties in the name of Sudarshan Kumar. He would, therefore, submit that the appellant has no right, title and interest in the suit properties. He submitted that in the suits filed in May 1983, the appellant did not pray for any declaration regarding the sale deeds and the power of attorney. He pointed out that only in November 1985, the plaint was amended to incorporate the prayers for declaration as regards the power of attorney dated 28-3-1980 and the sale deeds dated 10-4-1981. He would, therefore, submit that the prayers for declaration were barred by limitation. The learned Senior Counsel submitted that without getting a declaration regarding the invalidity or nullity of sale deeds, the appellant cannot get any relief. He submitted that the appellant did not discharge initial burden on him by stepping into witness box. He would, therefore, submit that no interference is called for with the impugned judgment and order.

13. After the judgment in these appeals was reserved on 11-11-2021[2], the respondents have filed written submissions on 16-11-2021 contending that the issue whether the purchasers under the sale deeds were the bona fide purchasers

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was redundant. He urged that the contention that the constituted attorney of Sudarshan Kumar was not a competent witness was not raised by the appellant.

Consideration of submissions and reasons a

14. We have given our careful consideration to the submissions. The case made out by the respondents in their written statement was that Sudarshan Kumar, who was employed abroad, remitted large amounts to the appellant, his younger brother, who was unemployed at that time. The case of the respondents was that Sudarshan Kumar paid the entire consideration for acquiring the suit properties under the sale deeds of 1976. The contention of the respondents is that instead of purchasing suit properties only in the name of Sudarshan Kumar, the appellant incorporated his name in the sale deeds along with Sudarshan Kumar. It is an admitted position that the said Sudarshan Kumar did not step into the witness box. Moreover, there is a finding recorded by the District Court that no evidence was adduced by Sudarshan Kumar to prove that certain amounts were transmitted by him from a foreign country to the appellant. This finding has not been disturbed by the High Court. The modified decree passed by the High Court by the impugned judgment and order proceeds on the basis of the finding that the appellant and Sudarshan Kumar were the joint owners of the suit properties as Sudarshan Kumar failed to establish his claim that he was the sole owner of the suit properties. The respondents have not chosen to challenge the impugned judgment and order and therefore, the finding that the appellant and Sudarshan Kumar were the joint owners of the suit properties has become final. Hence, reliance placed by the respondents on the letter at Ext. D-3 will not help them.

15. A copy of the unamended plaint in one of the two suits is placed on record along with the counter-affidavit. In Para 3 of the unamended plaint, there is a specific pleading that both the sale deeds of 10-4-1981 were null and void as the same were without consideration. In the plaint, it is specifically pleaded that suit properties which were worth more than Rs 30,000 were shown to have been sold at a throwaway price. The prayer for injunction was made in the unamended plaint on the basis of the title claimed by the appellant as a joint owner of the suit properties along with Sudarshan Kumar.

16. Admittedly, there is no evidence adduced on record by Sudarshan Kumar that his minor sons had any source of income at the relevant time and that they paid him consideration as mentioned in the sale deed. Similarly, no evidence was adduced to show that Sudarshan Kumar's wife had any source of income and that she paid consideration mentioned in the sale deed. An issue was specifically framed by the trial court on the validity of the sale deeds. There is a specific finding recorded by the District Court that there was no evidence adduced to show that Sudarshan Kumar's wife and minor children paid consideration as shown in the sale deeds. In fact, before the District Court, it was pleaded that Sudarshan Kumar's wife had brought some money from her parents. The District Court in para 11 of the judgment held that no evidence was adduced to prove the said contention. Therefore, there is a categorical finding recorded in the same paragraph by the District Court that Sudarshan Kumar, by taking advantage of the power of attorney, transferred the suit lands to his own minor sons and his wife without any consideration.

17. The High Court has not disturbed the finding recorded by the District Court regarding the failure of the respondents to adduce evidence regarding the payment of consideration under the sale deeds dated 10-4-1981. The High Court in SCC OnLine P&H para 29 merely observed that the sale consideration of Rs 5500 and Rs 6875 was not exorbitant and was not out of reach of Sudarshan Kumar's sons and wife. Perhaps, the High Court has ignored that it was considering a case of sale deeds of the year 1981 and that the purchasers under one of two sale deeds were minor sons of Sudarshan Kumar and it was not even pleaded that they had any source of income. The same is the case with the sale deed executed by Sudarshan Kumar in favour of his wife. Thus, undisputed factual position is that the respondents failed to adduce any evidence to prove that the minor sons had any source of income and that they had paid the consideration payable under the sale deed. They did not adduce any evidence to show that Sudarshan Kumar's wife was earning anything and that she had actually paid the consideration as mentioned in the sale deed.

18. Section 54 of the Transfer of Property Act, 1882 (for short "the TP Act") reads thus:

> "**54.** ***"Sale" defined***.—"Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.
>
> **Sale how made**.—Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.
>
> In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.
>
> Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.
>
> **Contract for sale**.—A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.
>
> It does not, of itself, create any interest in or charge on such property."

Hence, a sale of an immovable property has to be for a price. The price may be payable in future. It may be partly paid and the remaining part can be made payable in future. The payment of price is an essential part of a sale covered by Section 54 of the TP Act. If a sale deed in respect of an immovable property is executed without payment of price and if it does not provide for the payment of price at a future date, it is not a sale at all in the eye of the law. It is of no legal effect. Therefore, such a sale will be void. It will not effect the transfer of the immovable property.

19. Now, coming back to the case in hand, both the sale deeds record that the consideration has been paid. That is the specific case of the respondents. It is the specific case made out in the plaints as originally filed that the sale deeds are void as the same are without consideration. It is pleaded that the same are sham as the purchasers who were minor sons and wife of Sudarshan Kumar had no earning capacity. No evidence was adduced by Sudarshan Kumar about the payment of the price mentioned in the sale deeds as well as the earning capacity at the relevant time, of his wife and minor sons. Hence, the sale deeds will have to be held as void being executed without consideration. Hence, the sale deeds did not affect in any manner one half-share of the appellant in the suit properties. In fact, such a transaction made by Sudarshan Kumar of selling the suit properties on the basis of the power of attorney of the appellant to his own wife and minor sons is a sham transaction. Thus, the sale deeds of 10-4-1981 will not confer any right, title and interest on Sudarshan Kumar's wife and children as the sale deeds will have to be ignored being void. It was not necessary for the appellant to specifically claim a declaration as regards the sale deeds by way of amendment to the plaint. The reason being that there were specific pleadings in the plaints as originally filed that the sale deeds were void. A document which is void need not be challenged by claiming a declaration as the said plea can be set up and proved even in collateral proceedings.

20. Hence, the issue of bar of limitation of the prayers for declaration incorporated by way of an amendment does not arise at all. The additional submissions made by the respondents on 16-11-2021 have no relevance at all.

21. As no title was transferred under the said sale deeds, the appellant continues to have undivided half-share in the suit properties. That is how the District Court passed the decree holding that the appellant is entitled to joint possession of the suit properties along with Sudarshan Kumar. Therefore, for the reasons recorded above, by setting aside the impugned judgment and order[1] of the High Court, the decree passed by the District Court deserves to be restored.

22. Accordingly, the appeals are allowed. The impugned judgment[1] of the High Court is set aside and common judgment and order dated 21-5-1988 passed by the Additional District Judge, Ropar, Punjab in civil appeal bearing No. 31/256/23-7-1986 and civil appeal bearing No. 34/257/23-7-1986 is hereby restored. There will be no order as to costs.

Appeals allowed

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[2025] 9 S.C.R. 825 : 2025 INSC 1105

Shanti Devi (Since Deceased) Through LRs. Goran
v.
Jagan Devi & Ors.

(Civil Appeal No. 11795 of 2025)

12 September 2025

[J.B. Pardiwala* and R. Mahadevan, JJ.]

Issue for Consideration

Whether the plaintiff's suit was time-barred or not. Whether it is Article 65 or Article 59 of the Schedule to the Limitation Act, 1963, which would apply to the present facts in hand.

Headnotes†

Limitation Act, 1963 – Art.65 or Art.59 – The plaintiffs instituted civil suit for permanent injunction restraining the defendant from interfering with their peaceful possession – In the alternative, the plaintiffs prayed that they be put in joint possession along with the defendant and the sale deed dated 14.06.1973 be declared as fraudulent, concocted and thereby, void – Suit was dismissed – In first appeal, the suit of the plaintiffs came to be decreed – The High Court *vide* its impugned judgment and order dismissed the appeal thereby affirming the judgment and order passed by the First Appellate court decreeing the suit in favour of the plaintiffs – However, insofar as the issue of limitation was concerned, the High Court differed with the First Appellate Court and came to the conclusion that it is Art.59 of the Limitation Act, 1963 and not Art.63 that would be applicable to the facts of the matter – Correctness:

Held: 1. As per the *dictum* in *Prem Singh*, this Court, in order to ascertain whether Art.65 of the Limitation Act, 1963 would apply to the present factual scenario, has to first determine whether the fraud was alleged as regards the contents of the sale deed dated 14.06.1973 or the character of such sale deed – Both the First Appellate Court as well as the High Court have arrived at the finding that the plaintiff had never executed the said sale

* Author

deed in the first place as it was proved that it was not her thumb impression that was affixed therein – Therefore, this finding goes to the character of the sale deed and thereby, renders it void/*void ab initio* – Hence, as per this decision, there remained no reason for the plaintiff to seek for its cancellation – The original sale deed also was not produced before the Trial Court by the defendants in order to rebut the doubt cast upon the veracity of the said sale deed – Consequently, Art. 59 of the Limitation Act, 1963 would find no application to the case in hand. [Para 31]

2. The averment of the plaintiff in the plaint, that she had not received the sale consideration, had not been otherwise proven as false – In such circumstances as well, *i.e.*, in the absence of the sale consideration being tendered, the sale deed would be void and the plaintiff would not be required to seek its cancellation. Therefore, Art.59 of the Limitation Act, 1963 could not be said to be applicable to the present facts. [Para 38]

3. The High Court could be said to have committed an error insofar as observing that it is Art.59 and not Art. 65 of the Schedule to the Limitation Act, 1963, which would apply to the case in hand – However, irrespective of the question of which Article of the Limitation Act, 1963 would be applicable to the suit instituted by the present plaintiff, the suit could be said to have been filed within limitation – Therefore, apart from clarifying the correct position of law, there is no infirmity in the ultimate conclusion that the High Court arrived at as far as the maintainability of the suit on the aspect of limitation is concerned. [Para 40]

Case Law Cited

Prem Singh v. Birbal **[2006] Supp. 1 SCR 692 : (2006) 5 SCC 353;** *Hussain Ahmed Choudhury v. Habibur Rahman,* **2025 SCC OnLine SC 892 – relied on.**

State of Maharashtra v. Pravin Jethalal Kamdar **[2000] 2 SCR 134 : 2000 SCC OnLine SC 522;** *Bhim Singhji v. Union of India* **[1985] Supp. 1 SCR 862 : (1981) 1 SCC 166;** *Kewal Krishnan v. Rajesh Kumar and Others* **[2021] 11 SCR 588 : (2022) 18 SCC 489 – referred to.**

List of Acts

Limitation Act, 1963.

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List of Keywords

Article 65 of Limitation Act, 1963; Article 59 of the Limitation Act, 1963; Permanent injunction; Absence of the sale consideration; Sale deed; Possession of property.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 11795 of 2025

From the Judgment and Order dated 22.02.2018 of the High Court of Punjab & Haryana at Chandigarh in RSA No. 2930 of 1996

Appearances for Parties

Advs. for the Appellant:
R. Bala Subarmanyam, Sr. Adv., Himanshu Sharma, Arun Kumar, Varun Sharma, Ms. Kamlesh, Kunal Garg.

Advs. for the Respondents:
Arjun Singh Bhati, Tanmay Nagar, Shamli Verma, Mohit Yadav.

Judgment / Order of the Supreme Court

Judgment

J.B. Pardiwala, J.

1. Leave granted.

2. This appeal arises from the judgment and order passed by the High Court of Punjab & Haryana dated 22.02.2018 in the Regular Second Appeal No. 2930 of 1996 by which the second appeal filed by the appellant-herein (original defendant) against the judgment and decree dated 07.10.1996 arising from Civil Appeal No. 149 of 1991 passed by the First Appellate court, came to be dismissed.

FACTUAL MATRIX

3. The facts giving rise to this appeal may be summarized as under.

4. For the sake of convenience, the appellant-herein shall be referred to as the original defendant and the respondents-herein shall be referred to as the original plaintiffs.

5. The plaintiffs instituted Civil Suit No. 782 of 1984 in the court of Senior Sub Judge, Gurgaon for permanent injunction restraining the defendant from interfering with their peaceful possession to the extent of one-third share in the agricultural land admeasuring 31 kanals 4 marlas situated within the revenue estate of village Bisar Akbarpur, Tehsil Nuh, District Gurgaon. In the alternative, the plaintiffs prayed that they be put in joint possession along with the defendant and the sale deed dated 14.06.1973 purported to have been executed by Ram Saran s/o Bhambar and the plaintiff in favor of the defendant be declared as fraudulent, concocted and thereby, void insofar as the share of the plaintiff is concerned.

6. The plaint of Civil Suit No. 782 of 1984 reads thus:

> *"1. That the plaintiff is the lawful owner and in possession to the extent of 1/3rd share in agricultural land bearing Rect. No.40 Killa No. 1/2 (2-0), 9/2 (2-12), 10 (8-0), 11 (8-0), 12/1 (2-12) 20 (8-0), total measuring 31 Kanals 4 marlas, besides other lands situated in the revenue estate of Village Bisar Akbarpur Tehsil Nuh, Distt. Gurgaon. The fard jamabandi for the years 1973-74 and 1978-79 are attached herein.*
>
> *2. That the defendant wrongly claims herself to be the purchaser of the suit land referred to above from one Ram Saran s/o Bhambar on the basis of a fraudulent and concocted sale deed alleged to have been executed on 14.06.1973. The alleged sale deed dated 14.6.73 is total fraudulent, illegal and void and cannot defeat the legal rights and share of the plaintiff in the suit land on the following grounds:-*
>
>> *(a) That the plaintiff never executed on registered sale deed dated 14.6. 73 or of any other date in favor of the defendant and she is still the co-owner in possession to the extent of her share in the land.*
>>
>> *(b) That it seems that the defendant must have got executed and registered the alleged sale deed in her favor by making some impersonation in collusion with the other vendor and witnesses and must have played a fraud on the Sub-Registrar to derive wrongful gain for her personal benefit.*

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> *(c) That the plaintiff never got any sale consideration of the alleged sale deed and she came to know about this fraudulent transaction only when he came to the village mourn the death of Ram Saran and heard that her land is going to be sold by the defendant without any right in it.*
>
> *(d) That the alleged sale deed if made by any other person by making impersonation or otherwise, the same does not effect the rights of the plaintiff in the land in suit.*

3. That the plaintiff is owner in possession her 1/3rd share in the land and is entitled to file suit for permanent injunction against the defendant restraining her from interfering with the possession and ownership of the plaintiff in the suit land in any manner. In the alternative, if it is found and held that that defendant is in possession of the whole land then the plaintiff is entitled to a decree for joint possession to the extent of 1/3rd share in the land in suit.

4. That the cause of action for the suit arose on or about 4.2.1984 when the plaintiff came to know about the fraudulent transaction and the defendant attempted to sell away to the property of the plaintiff and denied to admit the claim of the plaintiff. Hence this suit.

5. That the suit property is situated within the territorial jurisdiction of this Hon'ble Court, hence this Hon'ble Court has got jurisdiction to try this suit.

6. That the value of the suit for the purpose of court fees and jurisdiction is assessed at Rs.200/- and for relief of possession is also Rs. 100/-. A court fees of Rs.25/- is paid.

7. That the plaintiff, therefore, prays that a decree for permanent injunction be passed in favor of the plaintiff and against the defendant to the effect that the plaintiff is co-owner in possession to the extent of 1/2 share (sic) (1/3 rd share) in the land in suit described in para no.1 of the plaint restraining the defendant from interfering or dealing with it in any manner. In the alternative a decree for joint possession be passed in favor of the plaintiff and

> *<u>against the defendant in respect of suit land mentioned in para 1 of the plaint declaring the alleged sale deed dated 14.6.73 to be fraudulent and void qua the share of the plaintiff.</u> The costs of the suit be also awarded. Any such other relief which the Ld. Court may deem just and proper be also granted to the plaintiff."*
>
> (Emphasis supplied)

7. The written statement filed on behalf of the defendant reads thus:

> *"<u>Pre Objections</u>*
>
> *1. That the suit is not maintainable in the present form. The plaintiff has got no right, interest or title in the land in dispute or any part of it.*
>
> *2. That the plaintiff has got no locus standi nor any cause of action to file the present suit.*
>
> *3. That the suit for permanent injunction in the alternative for joint possession is not maintainable. It is mandatory to seek declaration*
>
> *4. That the plaintiff is estopped from filing the present suit by acts, conduct, omission, acquiescence, latches and admission.*
>
> *5. That the suit is barred by time.*
>
> *<u>On Merits</u>*
>
> *1. That Para no.1 of the plaint is wrong and denied. It is wrong and denied that the plaintiff is owner or in possession of the suit land to the extent of 1/3rd share or she has got any right, interest or title in the land in dispute or any part of it.*
>
> *2. That para no.2 of the plaint alongwith its sub-paras 2(a.) to (d) are wrong and denied. The plaintiff alongwith the brother Ram Saran sold the land in dispute in favour of the defendant vide sale deed dated 14.6.1973 for sale consideration of Rs.15000/-. The contents of the sale deed were read over and explained to the plaintiff. She had appeared before the Sub Registrar and had admitted*

and acknowledged the contents of the sale deed. She was identified by Sehdev Sarpanch of village Kawari. It is wrong and denied that the sale deed dated 14.6.1973 is totally fraudulent, illegal and ineffective, the rights of the plaintiff in the suit land on the grounds mentioned in sub-para 2(a) to 2(d) of the plaint or on another grounds.

2(a) Para 2(a) of the plaint is wrong and denied. It is wrong and denied that the sale deed dated 14.6.1973 was not executed by the plaintiff in favour of the defendant. It is wrong and denied that she is still owner of the land in dispute or any part of it. Mutation on the basis of sale deed dated 14.6.1973 was also got sanctioned by the plaintiff in favour of the defendant.

2(b) Para 2(b) of the plaint is wrong and denied. It is wrong and denied that the sale deed was got registered by false impersonation in collusion with Ram Saran, brother of the plaintiff or any other person. It is wrong and denied that any fraud was played on the Sub Registrar to derive wrongful gain for personal benefit. All these allegations are false to the positive knowledge of the plaintiff.

2(c) Para no.2(c) of the plaint is wrong and denied. It is wrong and denied that the plaintiff did not execute the sale deed or she did not receive the sale consideration. It is further wrong and denied that the sale deed was fraudulent transaction or she came to know about the same on the death of Ram Saran. All these allegations are false. It is unthinkable that her brother Ram Saran did not know the plaintiff.

2(d) Para no.2(d) of the plaint is wrong and denied. It is wrong and denied that the sale deed was not executed by the plaintiff or somebody else falsely impersonated in her place. It is wrong and denied that the plaintiff is owner or in possession of the land in dispute as alleged.

3. That para no.3 of the plaint is wrong and denied. It is wrong and denied that the plaintiff has got any right, interest or title in the suit land or she is owner or in possession of the same or any part of it. It is further wrong and denied that she is entitled to sue for possession in the alternative.

4. That para no.4 of the plaint is wrong and denied. No cause of action ever accrued to the plaintiff. Cause of action if any is bogus, fictitious and imaginary one.

5&6. Paras no.5 and 6 of the plaint are legal.

7. That para no.7 of the plaint is wrong and denied. It is, therefore, humbly prayed that the suit of the plaintiff may kindly be dismissed with costs. Since the suit of the plaint is false, frivolous and vexatious, therefore, the plaintiff be burdened with special costs U/s 35-A C.P.C."

8. The Trial Court framed the following issues:

"1. Whether the sale deed dated 14.6.1973 is illegal, fraudulent and ineffective on the grounds mentioned in the para no.2 of the plaint? OPP

2. Whether the plaintiff is in joint possession of the suit property? OPP.

3. Whether the suit is not maintainable? OPD

4. Whether the plaintiff has no locus standi and cause of action to file the suit? OPD

5. Whether the plaintiff is estopped from filing the present suit by her own act and conduct? OPD.

6. Whether the suit is time barred? OPD

7. Relief."

9. All the above referred issues framed by the Trial Court came to be answered against the plaintiffs. The suit ultimately came to be dismissed *vide* the judgement and decree dated 14.10.1991.

10. The plaintiffs being dissatisfied with the judgment and decree passed by the Trial Court preferred First Appeal before the district court. The First Appeal came to be registered as Civil Appeal No. 149 of 1991. The First Appeal came to be allowed. The suit of the plaintiffs came to be decreed. On the question of limitation, the First Appellate Court observed as thus:

"Lastly the question of limitation has been raised in the present proceedings. As per the defendant the present suit

should have been filed within three years of the sanction of mutation. He mainly reliance on 1996 (1) PLR 482 The State of Punjab Vs. Babu Singh which lays down that illegal or void order have to be got set aside from the court of competent jurisdiction and limitation for the same is three years from the date of passing of the order. On the other hand, the counsel for plaintiff-appellant has relied upon Article 65 in order to assert that the period of limitation shall be 12 years for getting the relief of possession from the date when the possession of the defendant would be deemed to be adverse to that of the plaintiff. Accordingly he argued that even if it is presumed that the defendant came into adverse possession from the date of execution of the present sale deed even then the plaintiff was entitled to get the relief of possession within the period of 12 years and the suit was filed within that period. Merely because it was filed after about 11 years cannot deprive the plaintiff of the relief. The said arguments of the plaintiff appellant is convincing. She has claimed relief of joint possession. It has already been held that the transaction in question was void and Risali had never executed the sale deed in question. So under these circumstances the plaintiff could have maintained action to obtain possession of the property within the period of 12 years from the date of knowledge. So even if the knowledge party is ignored still the suit has been filed within 12 years from the date of sale and the same is maintainable."

(Emphasis supplied)

11. The defendants being dissatisfied with the judgment and decree passed by the First Appellate court preferred Second Appeal No. 2930 of 1996 in the High Court.

12. The High Court *vide* its impugned judgment and order dismissed the appeal thereby affirming the judgment and order passed by the First Appellate court decreeing the suit in favour of the plaintiffs. However, insofar as the issue of limitation was concerned, the High Court differed with the First Appellate Court and came to the conclusion that it is Article 59 of the Limitation Act, 1963 and not Article 63 that would be applicable to the facts of the matter.

13. The High court while dismissing the Second Appeal held as under:

> *"I have heard the learned counsel for the parties, appraised the judgments and decrees as well as record of both the Courts below and of the view that there is no force and merit in the submissions of Mr. Keshav Pratap Singh.*
>
> *In my view, limitation would not come in the way of the plaintiff-respondents, for, the suit can be filed from the date of the knowledge as per the provisions of Article 59 of the Limitation Act, which reads thus:-*

59.	*To cancel or set aside an instrument or decree or for the rescission of a contract*	*Three years*	*When the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded first becomes known to him.*

> *The defendant for the best known reasons has not examined any expert in his evidence to counter and rebut the testimony of PW4. Appellant-defendant Shanti Devi (since deceased) represented through legal representatives made a statement that she was present at the time of execution and registration of the sale deed and one Rasali was also present to whom she knew very well. Rasali had also put her thumb impressions on the sale deed in her presence but in cross-examination, she stated that she was not in a position to identify Rasali Devi. If at all, Rasali was known to Shanti Devi, she could have been very bold to identify Rasali. Endorsement made by Sub-Registrar showed that her husband Bagdawat had appeared on her behalf before the Sub Registrar and the aforementioned document did not carry the thumb impression/signatures of Shanti Devi. The other witness to the sale deed, i.e., Budhu, an attesting witness of the document was none else but the real brother of Shanti Devi, obviously he was expected to make a favourable deposition. He also admitted that sale deed*

was thumb marked by Shanti Devi, whereas, as noticed above, it was not Bagdawat, husband of Shanti Devi, for the reasons best known had not stepped into witness box. The second witness, Sahdev, Sarpanch had died before the statement of Budhu could be recorded. Shanti Devi admitted that Sahdev was well acquainted with his brother Budhu. Thus, defendant failed to prove that there was any impartial witness. Things do not end here. The plaintiffs had moved an application for directing the defendant to produce the original sale deed and answer was that the original had been misplaced. Defendant had admitted that prior to sale deed, there was an agreement to sell but the same has also not seen the light of day. On the contrary, expert compared the disputed thumb impressions found on the Special Power of Attorney Ex.P2 and thumb impressions put by Rasali on her statement recorded by the Court on 20.03.1984. Special Power of Attorney Ex.P2 had been proved through the testimony of PW3, who stated that executant had put her thumb impressions on the said document after it was read over and explained. The defendant failed to put any cross-examination to the aforementioned witness. It is settled law that in case, statement made in examination-in-chief is not subjected to cross-examination, the same would be admitted.

The defendant in the evidence did not dispute that Rasali had not appeared before the Court on 20.03.1984. The handwriting expert also compared the thumb impressions on two affidavits executed by Rasali, i.e., on 27.02.1984 and 28.02.1984. Both the affidavits were duly attested by Oath Commissioner and identified by K.S. Jain, Advocate. The expert also examined the thumb impressions on the plaint and vakalantnama to form an opinion that they were not of the same person, therefore, there was no occasion for the Lower Appellate Court to discard the report of expert. In my view, evidence brought on record by the plaintiffs un-clinchly proved that Rasali had never executed disputed sale deed.

There is another aspect of the matter, mutation Ex.DE was affected on the basis of the sale deed which also carried

> *a presumption of truth under Section 44 of Punjab Land Revenue Act, unless the same is rebutted. No evidence has been led to rebut the same. Even from perusal of Ex.D3, it was not proved that Rasali at the time of attestation and sanction was there. Defendant miserably failed to prove that document actually executed by Rasali. There is no force in the submission of Mr. Keshav Pratap Singh that improvement made by the defendant was in the knowledge of the plaintiffs, and therefore, suit was barred by law of limitation but fact of the matter is that no such improvement had been proved, therefore, the pleading was beyond evidence. The suit could not be said to be barred by law of limitation as relief of declaration qua joint possession was sought as every owner is owner of each and every inch of land until the same is partitioned.*
>
> *As an upshot of my findings, I do not find any illegality and perversity in the findings under challenge which are based upon the appreciation of oral and documentary evidence, much less no substantial question of law arises for adjudication of the present appeal.*
>
> *No other argument has been raised. Resultantly, the appeal stands dismissed."*
>
> (Emphasis supplied)

14. In such circumstances referred to above, the legal heirs of the original defendant are here before us with the present appeal.

15. Upon a perusal of the facts of the case in hand, this Court *vide* order dated 03.02.2025, confined itself to the question whether the plaintiff's suit was time-barred or not.

SUBMISSIONS ON BEHALF OF THE APPELLANT/ ORIGINAL DEFENDANT

16. The learned counsel appearing for the appellant vehemently submitted that the High court committed a serious error in dismissing the second appeal thereby affirming the judgment and decree passed by the First Appellate court in favor of the plaintiffs. The counsel would submit that the suit itself was barred by limitation as the same had

been filed on 28.02.1984 i.e., after a delay of more than 11 years from the date of the execution of the sale deed dated 14.06.1973.

17. It was argued that the Trial Court rightly dismissed the suit being barred by limitation. The First Appellate court wrongly invoked Article 65 of the Limitation Act, 1963 to bring the suit within the period of limitation. According to the learned counsel, it is Article 56 of the Limitation Act, 1963 that governs the period of limitation in the present case. It was also argued that the original plaintiff, namely, Rasali failed to enter the witness box in the presence of the defendant. Moreover, Sibba s/o Lal Singh, in whose favour the plaintiff had executed a power of attorney to pursue the case, never entered the witness box.

18. In the last, the learned counsel appearing for the defendant submitted that heavy burden of proof is cast upon a person impugning the transaction to show that the same is sham or fraudulent one. According to the learned counsel a distinction should be borne in mind in regard to the nominal nature of the transaction which is no transaction in the eye of law at all and the nature and character of a transaction as reflected in a deed of conveyance. In other words, according to the learned counsel appearing for the defendant, the initial burden of proving the transaction as bogus or sham was on the plaintiffs and they could be said to have miserably failed to lead any evidence in that regard. In such circumstances, the onus could not be said to have shifted upon the defendant to establish or prove the valid execution of the sale deed. The registered document and the registration of the sale deed reinforced the valid execution of the sale deed. He would submit that a registered document carries with it a presumption that it was validly executed. It is for the party challenging the genuineness of the transaction to rebut such presumption.

19. In such circumstances referred to above, the learned counsel prayed that there being merit in his appeal, the same may be allowed and the impugned judgment and order passed by the High Court be set aside and the impugned judgment and order passed by the Trial Court dismissing the suit, be affirmed.

SUBMISSIONS ON BEHALF OF THE RESPONDENTS/ORIGINAL PLAINTIFFS

20. On the other hand, the learned counsel appearing for the respondents-herein submitted that no error not to speak of any error of law could

be said to have been committed by the High Court in passing the impugned judgment and order. It was argued that there are concurrent findings recorded by the First Appellate court and the High Court respectively that the plaintiff was not a party to the sale deed of 1973 i.e., the sale deed in question. In other words, the plaintiff had not put her thumb impression on the sale deed.

21. It was argued that it is settled law that when an instrument of sale of an immovable property is not executed by the owner, then such a sale deed is *void ab initio* and is considered a nullity *qua* the owner. In such a case, the owner is not required to seek cancellation of such an instrument or seek a declaration that such an instrument is void. This is the reason why the plaintiff had not sought the cancellation of the sale deed dated 14.06.1973 in the present case and therefore, there arises no question of application of Article 59 of the Schedule to the Limitation Act, 1963. The counsel has placed reliance on several decisions to emphasize that when the instrument is void/*void ab initio* and not voidable, it would be Article 65 which would apply to a suit for possession based on title filed by the plaintiffs.

22. In the last, it was argued that since the alleged possession of the defendant over the suit property can at best be considered to have been adverse to the plaintiff from the date of execution of the sale deed dated 14.06.1973, the suit having been filed on 28.02.1984, i.e., within 12 years of the execution of the impugned sale deed, cannot be said to be barred by limitation as per Article 65.

23. In such circumstances referred to above, the learned counsel prayed that there being no merit in this appeal the same may be dismissed.

ANALYSIS

24. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is whether the High Court committed any error in passing the impugned judgment and order?

25. The crux of the issue seems to be whether it is Article 65 or Article 59 of the Schedule to the Limitation Act, 1963, which would apply to the present facts in hand. The aforesaid Articles are reproduced as under:

Shanti Devi (Since Deceased) Through LRs. Goran v. Jagan Devi & Ors.

59.	*To cancel or set aside an instrument or decree or for the recission of a contract*	*Three years*	*When the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded first become known to him.*
65.	*For possession of immovable property or any interest therein based on title*	*Twelve years*	*When the possession of the defendant becomes adverse to the plaintiff.*

26. The counsel for the plaintiff would submit that it is Article 65 which must be applied to the present suit for possession since the sale deed dated 14.06.1973 was found to be fraudulent and therefore, void. Insofar as the question whether the aforesaid sale deed was void, the First Appellate Court observed as thus:

> *"[…] In my view, the evidence led by the plaintiff leaves no room for doubt that Smt. Rasali never executed the disputed sale deed. According the finding on issue no. 1 given by the trial court was incorrect and is reversed.*
>
> *-xxx-*
>
> *[…] But here, the said mutation was based on void transaction, as Smt. Risali had never executed the sale deed in question. So the question of estoppels against the plaintiff does not arise in the present proceedings."*

27. The High Court has also expressed its agreement with the aforesaid finding of the First Appellate Court and observed that:

> "*In my view, evidence brought on record by the plaintiffs un-clinchly proved that Rasali had never executed the disputed sale deed.*"

28. In ***State of Maharashtra v. Pravin Jethalal Kamdar*** reported in **2000 SCC OnLine SC 522**, this Court held that as far as void and *non-est* documents are concerned, it would be enough for the

plaintiff to file a *simpliciter* suit for possession to which Article 65 of the Limitation Act, 1963 would apply. Therein, Section 27(1) of the Urban Land (Ceiling and Regulation) Act, 1976 which came into force w.e.f. 17.02.1976 imposed a restriction on the transfer of any urban or urbanisable land with a building or part of such building, which was within the ceiling limit. In other words, Section 27(1) sought to affect the right of a person to dispose of his urban property within the ceiling limit. Under the Act, the competent authority of the State of Maharashtra had to grant permission if such a person wanted to sell the property to a prospective purchaser. However, when such a permission was asked for in the facts of the aforesaid case, the same was denied by the competent authority and it instead exercised the option to buy the same on behalf of the State *vide* its order dated 26.05.1976. Pursuant to such order, a sale deed dated 23.08.1976 was executed between the plaintiff and the State for the same sale consideration that would have been paid by the prospective purchaser. Subsequently, the decision of this Court in ***Bhim Singhji v. Union of India*** reported in **(1981) 1 SCC 186** held Section 27(1), insofar as the restriction it placed as mentioned above, to be invalid. In this background, it was opined as follows:

i. ***First,*** the contention of the State that it is Article 58 of the Limitation Act, 1963 that would apply, was rejected. It was held that the suit is primarily one for possession of property based upon title. It was observed that owing to the decision in ***Bhim Singhji*** *(supra)*, the order dated 26.05.1976 along with the sale deed dated 23.08.1976 became *void ab intio* and without jurisdiction. Therefore, it was not necessary for the plaintiff to claim any separate declaration that they are void. The plea about their invalidity could be raised in the course of any proceedings. Therefore, it is Article 65, which deals with a suit for possession based on title, that would apply from the date on the which the possession of the defendant State became adverse to the plaintiff.

ii. ***Secondly***, though the plaintiff sought a declaration that the order dated 26.05.1976 and the sale deed dated 23.08.1976 were void, yet it was held that the same would be of no consequence insofar as the question of limitation is concerned. The fact would still remain that the possession of the property was taken by the defendants *via* void documents. Therefore, such documents could be ignored and a suit for possession *simpliciter* for which the period of limitation prescribed under Article 65, i.e., 12 years, could be filed. In the course of such proceedings, it could be contended by the plaintiff that the documents are a nullity.

The relevant observations are reproduced hereinbelow:

"*4. Article 58 of the Limitation Act, 1963, prescribes limitation of three years from the date when the right to sue first accrues to obtain a declaration. Under Article 65, the period of limitation prescribed for filing a suit for possession of immovable property or any interest therein based on title is 12 years from the date when possession of the defendants becomes adverse to the plaintiff. <u>The contention urged on behalf of the State Government was that Article 58 of the Limitation Act was applicable as the plaintiff had sought declaration about the invalidity of the order dated 26-5-1976 and sale deed dated 23-8-1976 and that the period of limitation of three years had to be computed from 26-5-1976 and, therefore, the suit filed on 22-8-1988 was hopelessly barred by time. This contention was rejected by the High Court as also by the trial court. The contention urged on behalf of the plaintiff and which has been accepted is that the suit is basically for possession of the property based upon title and the sale deed dated 23-8-1976 and the order dated 26-5-1976 being void ab initio and without jurisdiction, a plea about its invalidity can be raised in any proceedings and it is not necessary to claim any declaration and thus Article 65 which deals with suit for possession based on title would be applicable from the date, the possession of the defendant becomes adverse to the plaintiff. The High Court held that in view of the order and the sale deed being null and void and without jurisdiction, the same have no existence in the eye of the law and the plea about invalidity of these documents can be raised in any proceedings and no separate declaration is necessary to be sought. It held that the suit for possession would be governed by Article 65 of the Limitation Act, 1963. It was further held that the suit is within time even from the date</u>*

when the possession of the suit property was taken on the execution of the sale deed on 23-8-1976.

5. As already noticed, in Bhim Singhji case [(1981) 1 SCC 166] Section 27(1) insofar as it imposes a restriction on transfer of any urban or urbanisable land with a building or a portion of such building, which is within the ceiling area, has been held to be invalid. Thus, it has not been and cannot be disputed that the order dated 26-5-1976, was without jurisdiction and a nullity. Consequently, the sale deed executed pursuant to the said order would also be a nullity. It was not necessary to seek a declaration about the invalidity of the said order and the sale deed. The fact of the plaintiff having sought such a declaration is of no consequence. When possession has been taken by the appellants pursuant to void documents, Article 65 of the Limitation Act will apply and the limitation to file the suit would be 12 years. When these documents are null and void, ignoring them a suit for possession simpliciter could be filed and in the course of the suit it could be contended that these documents are a nullity. In Ajudh Raj v. Moti [(1991) 3 SCC 136] this Court said that if the order has been passed without jurisdiction, the same can be ignored as a nullity, that is, non-existent in the eye of the law and it is not necessary to set it aside; and such a suit will be governed by Article 65 of the Limitation Act. The contention that the suit was time-barred has no merit. The suit has been rightly held to have been filed within the period prescribed by the Limitation Act."

(Emphasis supplied)

29. This Court in ***Prem Singh v. Birbal*** reported in **(2006) 5 SCC 353**, discussed the position of law as to when Article 59 of the Limitation Act, 1963 would apply and opined as follows:

i. ***First,*** that Article 59 of the Limitation Act, 1963 would only encompass within its fold fraudulent transactions which are 'voidable' transactions and not those that are 'void'. In other words, Article 59 would apply only where an instrument is *prima facie* valid and not to those instruments which are presumptively invalid.

ii. ***Secondly,*** that when the document in question is *void ab initio*/or void, a decree for setting aside the same would not be necessary since such a transaction would be *non-est* in the eyes of law, owing to it being a nullity.

iii. ***Thirdly,*** a fine distinction was drawn between fraudulent misrepresentation as regards the 'character of the document' and fraudulent misrepresentation as regards the 'contents of a document'. It is only in the former situation that the instrument would be void and, in the latter, it would remain voidable. To put it simply, Article 59 would not govern the period of limitation in respect of a void transaction.

iv. ***Lastly,*** that if a deed was executed by the plaintiff when he was a minor *and it was thereby void,* he had two options to file a suit to get the property conveyed thereunder i.e., he could either file the suit within 12 years of the deed or within 3 years of attaining majority.

The relevant observations are reproduced as under:

> "*13. Article 59 of the Limitation Act applies specially when a relief is claimed on the ground of fraud or mistake. It only encompasses within its fold fraudulent transactions which are voidable transactions.*
>
> *-xxx-*
>
> *16. When a document is valid, no question arises of its cancellation. When a document is void ab initio, a decree for setting aside the same would not be necessary as the same is non est in the eye of the law, as it would be a nullity.*
>
> *17. Once, however, a suit is filed by a plaintiff for cancellation of a transaction, it would be governed by Article 59. Even if Article 59 is not attracted, the residuary article would be.*
>
> *18. Article 59 would be attracted when coercion, undue influence, misappropriation or fraud which the plaintiff asserts is required to be proved. Article 59 would apply to the case of such instruments. It would, therefore, apply where a document is prima facie valid. It would not apply*

only to instruments which are presumptively invalid. (See Unni v. Kunchi Amma [ILR (1891) 14 Mad 26] and Sheo Shankar Gir v. Ram Shewak Chowdhri [ILR (1897) 24 Cal 77] .)

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21. Respondent 1 has not alleged that fraudulent misrepresentation was made to him as regards the character of the document. According to him, there had been a fraudulent misrepresentation as regards its contents.

22. In Ningawwa v. Byrappa [(1968) 2 SCR 797 : AIR 1968 SC 956] this Court held that the fraudulent misrepresentation as regards character of a document is void but fraudulent misrepresentation as regards contents of a document is voidable stating: (SCR p. 801 C-D)

> *"The legal position will be different if there is a fraudulent misrepresentation not merely as to the contents of the document but as to its character. The authorities make a clear distinction between fraudulent misrepresentation as to the character of the document and fraudulent misrepresentation as to the contents thereof. With reference to the former, it has been held that the transaction is void, while in the case of the latter, it is merely voidable."*

In that case, a fraud was found to have been played and it was held that as the suit was instituted within a few days after the appellant therein came to know of the fraud practised on her, the same was void. It was, however, held: (SCR p. 803 B-E)

> *"Article 91 of the Limitation Act provides that a suit to set aside an instrument not otherwise provided for (and no other provision of the Act applies to the circumstances of the case) shall be subject to a three years' limitation which begins to run when the facts entitling the plaintiff to have the instrument cancelled or set aside are known to him. In the present case, the trial court has found, upon examination of the evidence, that at the very time of the execution of*

the gift deed, Ext. 45 the appellant knew that her husband prevailed upon her to convey Surveys Plots Nos. 407/1 and 409/1 of Tadavalga village to him by undue influence. The finding of the trial court is based upon the admission of the appellant herself in the course of her evidence. In view of this finding of the trial court it is manifest that the suit of the appellant is barred under Article 91 of the Limitation Act so far as Plots Nos. 407/1 and 409/1 of Tadavalga village are concerned."

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28. If a deed was executed by the plaintiff when he was a minor and it was void, he had two options to file a suit to get the property purportedly conveyed thereunder. He could either file the suit within 12 years of the deed or within 3 years of attaining majority. Here, the plaintiff did not either sue within 12 years of the deed or within 3 years of attaining majority. Therefore, the suit was rightly held to be barred by limitation by the trial court."

(Emphasis supplied)

30. In the decision of this Court in ***Hussain Ahmed Choudhury v. Habibur Rahman*** reported in **2025 SCC OnLine SC 892**, where one of us, J.B. Pardiwala J., was a member of the Bench, it was reiterated that a person who is not a party to an instrument would not be obliged in law to seek its cancellation. The reason being that such an instrument would neither be likely to affect his title nor be binding on him. However, such a plaintiff must at least seek a declaration that the said instrument is not binding on him or that is invalid insofar as he is concerned. The relevant observations are reproduced hereinbelow:

"*30. As observed aforesaid, a plaintiff who is not a party to a decree or a document, is not obligated to sue for its cancellation. This is because such an instrument would neither be likely to affect the title of the plaintiff nor be binding on him. We have to our advantage two very old erudite judgments of the Madras High Court and one of the Privy Council on the subject.*

31. In Unni v. Kunchi Amma reported in 1890 SCC OnLine Mad 5, the legal position has been thus explained:

> *"If a person not having authority to execute a deed or having such authority under certain circumstances which did not exist, executes a deed, it is not necessary for persons who are not bound by it, to sue to set it aside for it cannot be used against them. They may treat it as nonexistent and sue for their right as if it did not exist."*
>
> *(Emphasis supplied in original)*

32. The same principle has been distinctly laid down by the Privy Council in Bijoy Gopal Mukerji v. Krishna Mahishi Debi, reported in 1907 SCC OnLine PC 1, where the jural basis underlying such transactions was pointed out. In that case, the reversioner sued for a declaration that a lease granted by the widow of the last male owner was not binding on him and also for khas possession. It was objected that the omission to set aside the lease by a suit instituted within the time limit prescribed by Article 91 of the Indian Limitation Act, 1877 was fatal to the suit. The following observations which are equally applicable to the case at hand, are apposite:

> *"A Hindu widow is not a tenant for life, but is owner of her husband's property subject to certain restrictions on alienation and subject to its devolving upon her husband's heirs upon her death. But she may alienate it subject to certain conditions being complied with. Her alienation is not, therefore, absolutely void, but it is prima facie voidable at the election of the reversionary heir. He may think fit to affirm it, or he may at his pleasure treat it as a nullity without the intervention of any Court, and he shows his election to do the latter by commencing an action to recover possession of the property. There is, in fact, nothing for the Court either to set aside or cancel as a condition precedent to the right of action of the reversionary heir. It is true that the appellants prayed by their plaint for a declaration that the ijara was inoperative as against*

> *them, as leading up to their prayer for delivery to them of khas possession. But it was not necessary for them to do so, and they might have merely claimed possession, leaving it to the defendants to plead and (if they could) prove the circumstances, which they relied on, for showing that the ijara of any derivative dealings with the property were not in fact voidable, but were binding on the reversionary heirs."*

33. <u>In fact, it is logically impossible for a person who is not a party to a document or to a decree to ask for its cancellation.</u> This is clearly explained by Wadsworth, J., in the decision rendered in Vellayya Konar (Died) v. Ramaswami Konar, reported in 1939 SCC OnLine Mad 149, thus:

> *<u>"When, the plaintiff seeks to establish a title in himself and cannot establish that title without removing an insuperable obstruction such as a decree to which he has been a party or a deed to which he has been a party, then quite clearly he must get that decree or deed cancelled or declared void 'in toto', and his suit is in substance a suit for the cancellation of the decree or deed even though it be framed as a suit for declaration. But when he is seeking to establish a title and finds himself threatened by a decree or a transaction between third parties, he Is not in a position to get that decree or that deed cancelled 'in toto'. That is a thing which can only be done by parties to the decree or deed or their representatives. His proper remedy therefore in order to clear the way with a view to establish his title, is to get a declaration that the decree or deed is invalid so far as he himself is concerned and he must therefore sue for such a declaration and not for the cancellation of the decree or deed."</u>*

(Emphasis supplied in original)

34. Therefore, filing a suit for cancellation of a sale deed and seeking a declaration that a particular document is

> *inoperative as against the plaintiff are two distinct, separate suits. The plaintiff in the present case, not being the executant of the sale deed dated 05.05.1997 executed in favour of the respondent no. 1 (original defendant no. 14), was therefore, not obligated to sue for its cancellation under Section 31 of the Act, 1963.*"
>
> (Emphasis supplied)

31. As per the dictum in ***Prem Singh*** *(supra)*, this Court, in order to ascertain whether Article 65 of the Limitation Act, 1963 would apply to the present factual scenario, has to first determine whether the fraud was alleged as regards the contents of the sale deed dated 14.06.1973 or the character of such sale deed. Both the First Appellate Court as well as the High Court have arrived at the finding that the plaintiff had never executed the said sale deed in the first place as it was proved that it was not her thumb impression that was affixed therein. Therefore, this finding goes to the character of the sale deed and thereby, renders it void/*void ab initio*. Hence, as per this decision, there remained no reason for the plaintiff to seek for its cancellation. The original sale deed also was not produced before the Trial Court by the defendants in order to rebut the doubt cast upon the veracity of the said sale deed. Consequently, Article 59 of the Limitation Act, 1963 would find no application to the case in hand.

32. In ***Hussain Ahmed Choudhury*** *(supra),* it was clearly opined that a plaintiff who is not a party to the instrument in question need not seek its cancellation. We are not oblivious to the fact that in a situation where the plaintiff was not a party to the instrument, the said decision laid down a requirement that a declaration must be sought to the effect that the said instrument was not binding on the plaintiff. However, the said decision clarified that whether the plaintiff has sought such a declaration or not could be culled out from a holistic reading of the plaint along with the relief(s) sought. In cases where the character of the sale deed is assailed as being fraudulent, this requirement is implicitly satisfied since the very averment that the sale deed was fraudulent or a sham and bogus transaction by itself indicates that the plaintiff did not intend to be bound by it. Therefore, this requirement too, could be said to have been satisfied by the plaintiff in the present case.

33. Further, as per ***State of Maharashtra*** *(supra)*, it would be of no consequence even the plaintiff in one of his prayers, seeks a declaration that the sale deed is a nullity or invalid insofar as he is concerned, since such an instrument would anyway be void owing to it being fraudulent. Therefore, the period of limitation for a suit for possession based on title would continue to be governed by Article 65. In other words, the addition of such a prayer would not influence the period of limitation within which such a suit must be filed.

34. We may look at the matter from one another angle. Apart from the aspect of fraud, the decision of this Court in ***Kewal Krishnan v. Rajesh Kumar and Others*** reported in **(2022) 18 SCC 489**, while looking into whether the defendants had paid any sale consideration to the plaintiff while purchasing the plaintiff's share in the property, held as follows:

    i. ***First***, that the sale of an immovable property would have to be for a price and such a payment of price is essential, even if it is payable in the future. If a sale deed is executed without the payment of price, it is not a sale at all in the eyes of law, specifically under Section 54 of the Transfer of Property Act, 1882. *Such a sale without consideration would be void and would not affect the transfer of the immovable property.*

    ii. ***Secondly,*** that, in the said case, the defendants could not rebut the allegation of the plaintiff that no sale consideration was paid as no evidence was adduced to indicate - (a) the actual payment of the price mentioned in the sale deeds and, (b) that the defendants had any earning capacity at the time of the transaction such that the sale consideration could have been paid. As such the sale deed being void for want of valid consideration, could not be said to have affected the one-half share of the plaintiff in the suit properties nor have conferred any right of title on the defendants. In fact, it was held that the sale deeds were a sham and must be ignored.

    iii. ***Lastly,*** it was reiterated that a document that is void need not be challenged by seeking a declaration as the said pleas can be set up and proved even in collateral proceedings.

The relevant observations are thus:

> "*18. Section 54 of the Transfer of Property Act, 1882 (for short "the TP Act") reads thus:*

> *"**54. "Sale" defined**.—"Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.*
>
> ***Sale how made**.—Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.*
>
> *In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.*
>
> *Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.*
>
> ***Contract for sale**.—A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.*
>
> *It does not, of itself, create any interest in or charge on such property."*

Hence, a sale of an immovable property has to be for a price. The price may be payable in future. It may be partly paid and the remaining part can be made payable in future. The payment of price is an essential part of a sale covered by Section 54 of the TP Act. If a sale deed in respect of an immovable property is executed without payment of price and if it does not provide for the payment of price at a future date, it is not a sale at all in the eye of the law. It is of no legal effect. Therefore, such a sale will be void. It will not effect the transfer of the immovable property.

19. Now, coming back to the case in hand, both the sale deeds record that the consideration has been paid. That is the specific case of the respondents. It is the specific case made out in the plaints as originally filed that the sale deeds are void as the same are without consideration. It *is pleaded that the same are sham as the purchasers who were minor sons and wife of Sudarshan Kumar had no earning capacity. No evidence was adduced by Sudarshan Kumar about the payment of the price mentioned in the sale deeds as well as the earning capacity at the relevant time, of his wife and minor sons. Hence, the sale deeds will have to be held as void being executed without consideration. Hence, the sale deeds did not affect in any manner one half-share of the appellant in the suit properties. In fact, such a transaction made by Sudarshan Kumar of selling the suit properties on the basis of the power of attorney of the appellant to his own wife and minor sons is a sham transaction. Thus, the sale deeds of 10-4-1981 will not confer any right, title and interest on Sudarshan Kumar's wife and children as the sale deeds will have to be ignored being void. It was not necessary for the appellant to specifically claim a declaration as regards the sale deeds by way of amendment to the plaint. The reason being that there were specific pleadings in the plaints as originally filed that the sale deeds were void. A document which is void need not be challenged by claiming a declaration as the said plea can be set up and proved even in collateral proceedings.*

20. Hence, the issue of bar of limitation of the prayers for declaration incorporated by way of an amendment does not arise at all. The additional submissions made by the respondents on 16-11-2021 have no relevance at all.

21. As no title was transferred under the said sale deeds, the appellant continues to have undivided half-share in the suit properties. That is how the District Court passed the decree holding that the appellant is entitled to joint possession of the suit properties along with Sudarshan Kumar. Therefore, for the reasons recorded above, by setting aside the impugned judgment and order [Rajesh Kumar v. Kewal Krishan, 2015 SCC OnLine P&H 20782] of the High Court, the decree passed by the District Court deserves to be restored."

(Emphasis supplied)

35. As far as the facts of the present matter are concerned, the plaintiff specifically averred that she never obtained any sale consideration from the defendant. On this aspect, the plaint reads as follows:

> "(c) *That the plaintiff never got any sale consideration of the alleged sale deed and she came to know about this fraudulent transaction only when she came to the village mourn the death of Ram Saran and heard that her land is going to be sold by the defendant without any right in it*"

36. Admittedly, the sale consideration is Rs. 15,000/- as per the sale deed. The sale deed indicated that, out of the total sale consideration, the plaintiff and the other vendor i.e., Ram Saran, had already allegedly received Rs. 9000/- from the defendant and that the remaining amount of Rs. 6000/- would be received at the time of the execution of the sale deed, in front of the Registrar. The relevant portion of the sale deed reads thus:

> *"[…] now we with our own sweet will have sold the above land measuring 31 kanal 4 marla, along with all the rights to Smt. Shanti wife of Bagdawat son of Harnath, resident of Akbarpur, for Rs. 15000/-. Possession has been delivered to the vendee. Out of the total sale consideration, we have already received Rs. 9000/- from the vendee and remaining amount of Rs. 6000/- will be received in front of the Sub Registrar. Expenses of the stamp papers have been borne by the vendee itself […]"*

37. The endorsement made by the Sub Registrar at the time of the execution of the sale deed, reads thus:

> "*That the contents of the sale deed have been read over and understood to Ram Saran 2/3rd share, Risali 1/3rd share, and Bhadgawat husband of vendee. They have verified the same and the vendors have received Rs. 6000/- from the husband of the vendee in the presence of the sub-registrar. Both the parties have been identified by Mahadev Singh Sarpanch, and witness no. 2 Budhu.[…]*"

38. Concurrent findings of both the First Appellate Court and the High Court indicated that the husband of the defendant i.e., one Bagdawat, who had allegedly given the remaining sale consideration of Rs. 6,000/- during the time of execution of the sale deed, had

not stepped into the witness box. Furthermore, one of the attesting witnesses to the execution of the sale deed i.e., the Sarpanch had also died before his deposition could be recorded. One Budhu, who was the second attesting witness, was the brother of the defendant and both the Courts had doubted his testimony as being partial to the defendant. All in all, there was no witness who could substantiate the case of the defendant that there was part-payment of the sale consideration, i.e., Rs. 6,000/- during the time of execution of the sale deed. Furthermore, no evidence was adduced by the defendant to prove that even the initial amount of Rs. 9,000/- which was purportedly paid before the execution of the sale deed was actually received by the plaintiff. Therefore, the averment of the plaintiff in the plaint, that she had not received the sale consideration, had not been otherwise proven as false. In such circumstances as well, i.e., in the absence of the sale consideration being tendered, the sale deed would be void and the plaintiff would not be required to seek its cancellation. Therefore, Article 59 of the Limitation Act, 1963 could not be said to be applicable to the present facts.

39. The First Appellate Court had rightly observed that the plaintiff had claimed the relief of joint possession. It had also arrived at the finding that the transaction in question was void. To put it simply, in the eyes of the law, the plaintiff could not be said to have executed the sale deed. Therefore, the plaintiff could indeed have maintained an action to obtain possession of the property on the basis of her title and filed the same within the period of 12 years from the date of knowledge that the possession of the defendant was adverse to that of the plaintiff. Even if the date of execution of the sale deed, i.e., 14.06.1973 is considered, the suit having been filed on 28.02.1984, i.e., almost 11 years later, could be said to be well within limitation as stipulated under Article 65.

40. In the overall view of the matter, we have reached the conclusion that the High Court could be said to have committed an error insofar as observing that it is Article 59 and not Article 65 of the Schedule to the Limitation Act, 1963, which would apply to the case in hand. However, irrespective of the question of which Article of the Limitation Act, 1963 would be applicable to the suit instituted by the present plaintiff, the suit could be said to have been filed within limitation. Therefore, apart from clarifying the correct position of law, we find

no infirmity in the ultimate conclusion that the High Court arrived at as far as the maintainability of the suit on the aspect of limitation is concerned.

41. Therefore, this appeal fails and is hereby, dismissed.

Result of the case: Appeal dismissed.

†*Headnotes prepared by:* Ankit Gyan

1964 SCC OnLine SC 120 : (1964) 6 SCR 727 : AIR 1965 SC 430

In the Supreme Court of India
(BEFORE K. SUBBA RAO AND J.R. MUDHOLKAR, JJ.)

K.J. NATHAN ... Appellant;

Versus

S.V. MARUTHI RAO AND OTHER ... Respondent.

Civil Appeal No. 407 of 1962[*], decided on February 11, 1964

Advocates who appeared in this case:

R. Ramamurthi Aiyar, T.S. Rangarajan and R. Gopalakrishnan, Advocates, for the Appellant;

V.S. Venkataraman, M.R. Krishna Pallai and M.S.K. Iyengar, Advocates, for Respondents No. 3.

The Judgment of the Court was delivered by

K. SUBBA RAO, J.— This appeal on a certificate issued by the High Court of Judicature at Madras is preferred against the judgment and decree of the said High Court modifying those of the Subordinate Judge, Tanjore, in a suit filed by the appellant to enforce a mortgage by deposit of title deeds.

2. The facts are as follows : The first defendant borrowed from the plaintiff from time to time on seven promissory notes. The plaintiff, alleging that the first defendant had created a mortgage by deposit of title deeds in his favour, in respect of his half share in the properties specified in B-Schedule, instituted OS No. 45 of 1951 in the Court of the Subordinate Judge, Tanjore, for enforcing the said mortgage against the said properties. The suit was for recovery of a sum of Rs 20,435-15-0, made up of principal amount of Rs 16,500 and interest thereon. To that suit six persons were made defendants : Defendant 1 was the mortgagor; Defendant 2 was the subsequent purchaser of several of the items of the suit properties subject to plaintiff's mortgage; Defendant 3 was the subsequent mortgagee; Defendant 4 was the subsequent purchaser of one of the plaint-schedule properties; and Defendants 5 and 6 were sister and brother of the 1st defendant. The plaintiff also alleged that in a partition effected between the 1st defendant and his brother properties described in the C Schedule annexed to the plaint were allotted to the 1st defendant. He, therefore, asked in the alternative that the C Schedule properties should be sold for the realization of the amount due to him from the 1st defendant.

3. As the only contesting party before us is the 3rd defendant (3rd respondent herein), it is not necessary to notice the defences raised by

defendants other than the 3rd defendant. The 3rd defendant alleged that the 1st defendant had executed a security bond in his favour for a sum of Rs 15,000 on October 10, 1947 and that, being a bona fide purchaser for value, he had priority over the plaintiff's security, even if it were true. He put the plaintiff to strict proof of the fact that the sum claimed in the plaint under several promissory notes was owing to him and also of the fact that the 1st defendant effected a mortgage of the suit properties by deposit of title deeds in favour of the plaintiff.

4. The learned Subordinate Judge held that the suit loans were true, that the mortgage by deposit of title deeds was also true, but the plaintiff had a valid mortgage only of Items 1 and 4 of the C Schedule in respect of a sum of Rs 9157-5-0 with interest at 6 per cent per annum thereon. On that finding he gave a decree in favour of the plaintiff against Defendants 1 to 3 for the said amount with a charge over Items 1 and 4 of the C Schedule properties; and he also gave a decree in favour of the plaintiff for a sum of Rs 7565-2-0 with further interest at 6 per cent. per annum from July 5, 1947, against the 1st defendant personally. The plaintiff preferred an appeal against the decree of the Subordinate Judge; insofar as it went against him, and the 3rd defendant filed cross-objections in respect of that part of the decree which went against him. A Division Bench of the Madras High Court, which heard the appeal and the cross-objections, held that the 1st defendant did not effect a mortgage by deposit of title deeds on May 10, 1947, in favour of the plaintiff for the entire suit claim, but that he effected such a mortgage in favour of the plaintiff on January 25, 1947, for a sum of Rs 3000 in respect of two of the plaint-schedule items described in Ex. A-8. On that finding, the High Court modified the judgment and decree of the Subordinate Judge by restricting the mortgage decree given to the plaintiff the amounts covered by the first three promissory notes and interest thereon and to one half of the properties described in Ex. A-8 and by giving a money decree against the 1st defendant for the entire balance of the decree amount. The plaintiff has preferred the present appeal against the decree of the High Court.

5. Learned counsel for the appellant contends, (*1*) that the finding of both the lower courts that no mortgage by deposit of title deeds was effected for the entire plaint claim was vitiated by the fact that they had ignored Ex. A-19, a registered agreement entered into between the plaintiff and the 1st defendant on July 5, 1947, wherein the said fact was clearly and unambiguously recorded; and (2) that, even if such a mortgage was not effected on May 10, 1947, Ex. A-19 proprio vigore effected such a mortgage to come into effect at any rate from the date of the execution of the agreement.

6. Learned counsel for the contesting 3rd respondent argues that the

definite case of the plaintiff was that such a mortgage was effected only on May 10, 1947, and that both the courts below on a consideration if the oral and documentary evidence concurrently found that no such transaction was effected on that date and that, therefore, this Court should not interfere with such a finding of fact. He further contends that in Ex. A-19 the parties only recorded that a mortgage by deposit of title deeds was effected on May 10, 1959 and that, of that fact was not true, Ex. A-19 could not be of any help to the plaintiff. If there was no mortgage on May 10, 1947, the argument proceeds, Ex A-19 by its own force could not create a mortgage by deposit of title deeds on July 5, 1947, as in terms it only referred to a mortgage alleged to have been effected on May 10, 1947. That apart, it is argued that as a mortgage by deposit of title deeds could only be effected at Madras and that, as one of the important ingredients of such a mortgage is that the delivery of the said title deeds to the creditor should have been given at Madras, no such mortgage could have been effected in law in the present case, as the delivery of the title deeds was given by the bank to the representative of the plaintiff at Kumbakonam.

7. Before we advert to the arguments advanced in the case it would be convenient at this stage to notice the relevant aspects of the law pertaining to mortgage by deposit of title deeds.

8. Section 58(*f*) of the Transfer of Property Act defines a mortgage by deposit of title deeds thus:

> "Where a person in any of the following towns, namely, the towns of Calcutta, Madras and Bombay … delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title deeds."

Under this definition the essential requisites of a mortgage deposit of title deeds are, (*i*) debt, (*ii*) deposit of title deeds, and (*iii*) an intention that the deeds shall be security for the debt. Though such a mortgage is often described as an equitable mortgage, there is an essential distinction between an equitable mortgage as understood in English law and the mortgage by deposit of title deeds recognised under the Transfer of Property Act in India. In England an equitable mortgage can be created either, (*1*) by actual deposit of title deeds, in which case parol evidence is admissible to show the meaning of the deposit and the extent of the security created, or (*2*) if there be no deposit of title deeds, then by a memorandum in writing, purporting to create a security for money advanced : see *White and Tudor's Leading Cases in Equity*, 9th Edn. Vol. 2, p. 77. In either case it does not operate as an actual conveyance though it is enforceable in equity; whereas under the Transfer of Property Act a mortgage by deposit of title deeds is one of the modes of creating a legal mortgage whereunder there will be transfer of interest in the property mortgaged to the mortgagee. This distinction will have to be borne in mind in appreciating the scope of the English decisions cited at the Bar. This distinction is also the basis for the view that for the purpose of priority it stood on the same footing as a mortgage by deed. Indeed a proviso has been added to Section 48 of the Registration Act by Amending Act 21 of 1929. It says:

> "Provided that a mortgage by deposit of title deeds as defined in Section 58 of the Transfer of Property Act, 1882, shall take effect against any mortgage deed subsequently executed and registered which relates to the same property."

Therefore, under the law of India a mortgage by deposit of title deeds, though it is limited to specific cities, is on a par with any other legal mortgage. The text-books and the cases cited at the Bar give some valuable guides for ascertaining the intention of parties and also the nature of delivery of the documents of title requisite for constituting such a mortgage. Fisher in his book on *The Law of Mortgage*, 2nd Edn., p. 32, suggests how the intention to create such a security could be established. He says:

> "The intent to create such a security may be established by written documents, alone or coupled with parol evidence; by parol evidence only that the deposit was made by way of security; or by the mere inference of an agreement drawn from the very fact of the deposit."

In *Norris* v. *Wilkinson*[1] the Master of the Rolls in the context of that case where documents were delivered to the Attorney of the creditor for the purpose of enabling the Attorney to draw a mortgage which it was alleged that the debtor had agreed to give, made the following observations:

> "It is clear, that these deeds, if voluntarily delivered at all, were not delivered by way of deposit, in the sense in which that word has been used in the cases : i e. as a present and immediate security; but were delivered only for the purpose of enabling the Attorney to draw the mortgage, which, it is alleged, Wilkinson the father had agreed to give."

The learned Master of the Rolls distinguished the cases cited before him thus:

> "Now in all the cases, that have been referred to, the deeds were delivered by way of deposit. Such deposit was indeed held to imply an obligation to execute a legal conveyance, whenever it should be required. But the primary intention was to execute an immediate pledge; with an implied engagement to do all, that might be necessary to render the pledge effectual for its purpose."

These passages indicate that an intention to create a mortgage deed in the future is not inconsistent with the intention to create in present a mortgage by deposit of title deed s. Both may co-exist. In *Keys* v. *Williams*[2] it was held that an agreement to grant a mortgage for money already advanced and a deposit of deeds for the purpose of preparing mortgage was, in itself, an equitable mortgage by deposit. Though the facts of the case do not appear in the report, this decision indicates that the fact that deposit of title deeds was given for the purpose of preparing a mortgage does not in itself without more exclude the inference to create equitable mortgage if the requisite conditions for creating thereof are satisfied. The decision in *Whitbread*, *Ex Parte*[3] throws some light on the legal requirements of delivery of title deed s. There, the petitioner claimed a lien, as an equitable mortgage, by deposit in 1808 of the lease of a public house as a collateral security for £1000, lent to the lessee on his promissory note, and a subsequent" advance of £100 made in January 1810. One of the points mooted was whether the subsequent advance of £100 was also charged on the property covered by the document. The learned Chancellor in that context made the following observation:

> "If the original bargain did not look to future advances, no subsequent advance can be a charge, unless the subsequent transaction is equivalent to the original transaction. If it is equivalent to a re-delivery of the deed, receiving it back as a security for both sums, that will do; as it cannot depend upon that mere form but I shall require them to swear expressly, that when the sum of £100 was advanced, it was upon the security of the deposit."

The said observations emphasize the substance of the transaction rather than the form. It implies that a debtor, who has already effected a mortgage by deposit of titledeeds in respect of an earlier advance, need not go through the formality of receiving back the said documents from the creditor and formally redelivering them to the creditor as security for further advances taken by him. It would comply with the requirements of law if there was clear evidence that the documents already deposited with the creditor would also be charged by way of deposit of title deeds in respect of the further advances. The doctrine accepted by this decision may for convenience of reference, be described as the doctrine of constructive delivery. Learned counsel for the respondent attempted to confine the scope of this decision to a case of further advances on the basis of documents already deposited with the creditor in respect of earlier advances. It is true that the principle was enunciated in the context of the said facts, but it is of wider application. In our view, the same principle will have to be invoked wherever documents of title have already been in the possession of creditor at the time when the debtor seeks to create a mortgage by deposit of title deeds. In *In re Beetham Ex Parte*

Broderick[4] the facts were — A, being indebted to a banking company in respect of an overdrawn account, wrote to the directors promising to give them, when required, security over his reversionary interest in one-fifth share of a farm, to come into possession on the death of the life tenant; but no formal security was ever executed in accordance with this promise. After the death of the life tenant the deeds of the farm came into the possession of A's brother, the manager of the bank, for the purpose of paying the succession duty. As regards A's share therein the brother claimed to hold them for the banking company with the consent of A. as security for the overdrawn account. There was no memorandum of the deposit in the bank books, nor was the usual printed form of deposit of title deeds by way of security made use of with reference to the transaction. A subsequently became bankrupt. The Queen's Bench held that the banking company had no valid equitable mortgage on the bankrupt's share in the farm and that it could not hold the rents as against his trustee in bankruptcy. On appeal, the court of appeal confirmed the said decision of the Queen's Bench. It is contended that this decision negatives the doctrine of constructive deposit, for it is said that though the manager of the bank with the consent of A. held the title deeds as security for the bank, the Court did not accept that fact for holding there was an equitable mortgage. In our view, this decision does not lay down any such proposition. The main reason for the aforesaid conclusion of the court of appeall is found in the judgment of Lord Esher, MR at pp. 768-69 of the said report. After considering the facts of the case, the Master of the Rolls proceeded to state:

> "If this be so, there was nothing but the oral promise of the bankrupt to give the bank security, and that is not enough to satisfy the statute of Frauds. In order to take the case out of the statute it must he shown that there has been performance or part-performance of the oral promise....
>
> * * *
>
> But nothing more was done with the deeds; they were left in precisely the same position. Nothing was done, except that the one brother said something, and the other said something in reply. Was this such a part performance of the original oral promise as will take the case out of the statute?"

His Lordship concluded:

> "I take that proposition to amount to this — that where there is a mere oral promise to do something, and nothing takes place afterwards but the speaking of more words by the parties — when nothing more is done in fact — there is no part-performance which can exclude the application of the Statute of Frauds."

The entire judgment was based upon the doctrine of part-performance and the court of appeal held that the facts established did not constitute part performance of the oral agreement. The doctrine of constructive deposit was neither raised nor touched upon in that case.

9. Now let us consider some of the Indian decisions cited at the Bar. In *Dayal Jairaj* v. *Jivraj Ratansi*[5] the plaintiff had advanced to the 1st defendant Rs 38,000, and had agreed to advance Rs 27,000 more the whole of Rs 65,000 to be secured by a mortgage of the 1st defendant's immovable property. The 1st defendant had deposited with the plaintiff the title deeds of his immovable property, for the purpose of enabling him to get a mortgage deed prepared and had agreed to execute such mortgage deed on payment to him by the plaintiff the balance of the amount of Rs 65,000. The title deeds were afterwards returned by the plaintiff to the 1st defendant for the purpose of enabling him to clear up certain doubts as to his title to some of the premises comprised in the deeds, but the said deeds were neither subsequently returned by the 1st defendant, nor were others deposited in lieu thereof. The balance of the Rs 65,000 was not paid by the plaintiff to the 1st defendant. The Court held that there was an equitable mortgage of the said property to secure the sum of Rs 38,000. The fact that the title deeds were deposited for the purpose of executing a mortgage deed, which did not fructify, did not in any way preclude the Court from holding on the facts of the case that a mortgage by deposit of title deeds was created in respect of the amount that had already been paid to the debtor. The Court relied upon the principle enunciated by earlier English decisions based upon the fact whether amounts were lent before or after the deposit of title deed s. In *Jaitha Bhima* v. *Haji Abdul Vyad Oosman*[6] the facts were these : The plaintiff consented to lend Rs 10,000 to the defendant. The latter deposited with him on April 2, 1883, the title deeds of a certain property. On receiving them the plaintiff told the defendant that he would take them to his attorney, have a deed drawn and then advance the money. The defendant applied to the plaintiff for the money before the deed was prepared, but the plaintiff refused, saying he would not advance the money until he was satisfied by his attorney, and the deed had been prepared. At the time the deeds were handed over to the plaintiff, there was no existing debt due by the defendant to the plaintiff. On April 6, 1885, the mortgage deed was executed, and on the same day the money was advanced by the plaintiff to the defendant. The mortgage-deed was not registered. The plaintiff filed a suit for a declaration that he was entitled to an equitable mortgage upon the said property and for the sale thereof. The Court held that on the facts no equitable mortgage was created. From the aforesaid narration of facts it would be obvious that the plaintiff lent the money immediately before the execution of the

document indicating thereby that it was paid under that document. Farran J., who delivered the judgment, relied upon the following passage from *Seton on Decrees*, p. 1131:

> "If deeds be delivered to enable a legal mortgage for securing an existing debt to be prepared, there is an equitable mortgage until the legal mortgage is completed; *secus* if to secure a fresh loan yet to be made."

Then the learned Judge cited the following passage from the judgment in *Key* v. *Williams*[2]:

> "Certainly, if before the money was advanced, the deeds had been deposited with a view to prepare a future mortgage, such transaction could not be considered as an equitable mortgage by deposit; but it is otherwise where there is a present advance, and the deeds are deposited under a promise to forbear suing, although they may be deposited only for the purpose of preparing a mortgage deed. In such case the deeds are given in as part of the security, and become pledged from the very nature of the transaction."

These two passages also indicate that the fact that title deeds were deposited for the purpose of preparing a future mortgage is in itself not decisive of the question whether such a mortgage was effected or not. A Division Bench of the Bombay High Court in *Behram Bashid Irani* v. *Sorabji Rustomji Elavia*[7] held that in that case there was no evidence whatever of intention to connect the deposit of title deeds with the debt. The plaintiff therein deposited with the defendant in Bombay title deeds of his property situated at Nasik and borrowed a sum from the defendant. He also executed a document but that was held to be inadmissible for want of registration. There was no other evidence to show under what circumstances the documents were deposited. Beaman, J made the following observations:

> "The doctrine thus created, amounted at that time to very much what the law now is, as I have just expressed it, although the learned Chancellor, I think, lent strongly to the supposed legal presumption arising from the fact of indebtedness and the contemporaneous or subsequent deposit of title deed. Then for the better part of a century, the courts in England virtually adopted this presumption as a presumption of law and the need of proving intention almost disappeared. Latterly, however, the legal doctrine in England veered in the opposite direction and the courts began to insist more and more strongly upon the proof of intention as a question of fact, and that has been embodied in our own statute law and that is the law we have to administer."

This decision only negatives the presumption of law, but does not exclude the presumption of fact of a mortgage arising under certain circumstances from the very deposit of title deeds. An elaborate discussion of the subject is found in *V.E.R.M.A.R. Chettyar Firm* v. *Ma Joo Teen*[8]. The main question decided in that case was, what did the terms "documents of title" and "title deeds" denote? The Court held that they denoted such a document or documents as show a prima facie or apparent title in the depositor to the property or to some interest therein. But what is relevant for the present purpose is that the learned Chief Justice, who spoke for the Court, after considering the leading judgments on the subject, observed:

> "If the form of the documents of title that have been delivered to the creditor is such that from the deposit of such documents alone the Court would be entitled to conclude that the documents were deposited with the intention of creating a security for the repayment of the debt, prima-facie a mortgage by deposit of title deeds would be proved; although, of course, such an inference would not be irrebuttable, and would not be drawn if the weight of the evidence as a whole told against it."

The learned Chief Justice accepted the principle that if title deeds, as defined by him were deposited and the money was lent, prima facie an inference of a mortgage could be drawn though, such an inference could be displaced by other evidence. It is not necessary to pursue the matter further.

10. The foregoing discussion may be summarized thus : Under the Transfer of Property Act a mortgage by deposit of title deeds is one of the forms of mortgages whereunder there is a transfer of interest in specific immovable property for the purpose of securing payment of money advanced or to be advanced by way of loan. Therefore, such a mortgage of property takes effect against a mortgage deed subsequently executed and registered in respect of the same property. The three requisites for such a mortgage are, (*i*) debt, (*ii*) deposit of title deed; and (*iii*) an intention that the deeds shall be security for the debt. Whether there is an intention that the deeds shall be security for the debt is a question of fact in each case. The said fact will have to be decided just like any other fact on presumptions and on oral, documentary or circumstantial evidence. There is no presumption of law that the mere deposit of title deeds constitutes a mortgage, for no such presumption has been laid down either in the Evidence Act or in the Transfer of Property Act. But a court may presume under Section 114 of the Evidence Act that under certain circumstances a loan and a deposit of title deeds constitute a mortgage. But that is really an inference as to the existence of one fact from the existence of some other fact or facts. Nor the fact that at the time the title deeds were deposited there was an intention to execute a mortgage deed in itself negatives, or is inconsistent with, the intention to create a mortgage by deposit of title

deeds to be in force till the mortgage deed was executed. The decisions of English courts making a distinction between the debt preceding the deposit and that following it can at best be only a guide; but the said distinction itself cannot be considered to be a rule of law for application under all circumstances. Physical delivery of documents by the debtor to the creditor is not the only mode of deposit. There may be a constructive deposit. A court will have to ascertain in each case whether in substance there is a delivery of title deeds by the debtor to the creditor. If the creditor was already in possession of the titledeeds, it would be hypertechnical to insist upon the formality of the creditor delivering the title deeds to the debtor and the debtor redelivering them to the creditor. What would be necessary in those circumstances is whether the parties agreed to treat the documents in the possession of the creditor or his agent as delivery to him for the purpose of the transaction.

11. With this background we shall now proceed to consider the questions that arise for consideration on the facts of the present case.

12. The first question is whether there was a mortgage by deposit of title deeds of the B Schedule properties on May 10, 1947. To put in other words, whether on that date there was a loan and whether the first defendant delivered to the appellant the documents of title of B Schedule properties with the intent to create a security thereon.

13. Learned Subordinate Judge and, on appeal, the High Court held on the evidence there was no such deposit of title deeds with the requisite intention on May 10, 1947. Learned counsel for the respondent pressed on us to follow the usual practice of this Court of not interfering with concurrent findings of fact. But the question whether on facts found a transaction is a mortgage by deposit of title deeds is a mixed question of fact and law. That apart, both the courts in coming to the conclusion which they did missed the importance of the impact of the terms of Ex. A-19 on the question raised. We, therefore, propose to consider the evidence on the said question afresh, along with Ex. A-19.

14. In para 5 of the plaint, after giving the particulars of the promissory notes executed by the first defendant in favour of the plaintiff, it is stated:

> "On 10th May, 1947, the first defendant deposited with the plaintiff at Madras other title deeds and papers relating to his half share in items specified in 'B' schedule hereunder with intent to create a security over the same in respect of advances made and to be made by the plaintiff. The first defendant has further executed a memorandum of agreement, dated 5th July 1947, in which the equitable mortgage thus created and the amount borrowed by him till then were acknowledged and he has undertaken to repay the said

sum of Rs 16,500 with interest at 6 per cent. per annum and to obtain a return of the title deeds and documents deposited by him with the plaintiff. This memorandum of agreement has been duly registered and the same is herewith produced. The plaintiff prays that its contents may be read as part and parcel of this plaint".

There is, therefore, a clear averment in the plaint that an equitable mortgage was created on May 10, 1947, and that was acknowledged by the agreement dated July 5, 1947. The 1st defendant did not file any written statement denying the said allegations. The 3rd defendant, the only contesting defendant, filed a written statement wherein he put the plaintiff to strict proof of the fact that the sums claimed in the plaint were due to him from the 1st defendant and of the fact that the first defendant effected a mortgage in his favour by deposit of title deeds. Before we consider the oral evidence, we shall briefly notice the documentary evidence in the case.

15. Exhibit A-1 dated January 25, 1947, Ex. A-9 dated February 13, 1947, Ex. A-12 dated March 2, 1947, Ex. A-14 dated April 7, 1947, Ex. A-15 dated April 13, 1947, Ex. A-17 dated May 10, 1947, and Ex. A-18 dated July 4, 1947 are the promissory notes executed by the 1st defendant in favour of the plaintiff. The total of the amounts covered by the said promissory notes is Rs 16,500. It is not disputed that the promissory notes were genuine and that the said amounts were lent by the plaintiff to the 1st defendant on the dates the promissory notes bear. On January 26, 1947 i.e. a day after the first promissory note was executed, a list of title deeds of the properties belonging to the 1st defendant in Tanjore was given to the plaintiff as collateral security and by way of equitable mortgage for the loan of Rs 1,500 borrowed under Ex. A-1. On April 7, 1947, the 1st defendant executed an unregistered agreement in favour of the plaintiff whereunder, as the plaintiff agreed to lend to the 1st defendant a sum of Rs 15,000 to discharge his earlier indebtedness and also his indebtedness to the Kumbakonam Bank and to enable him to do business, the 1st defendant agreed to execute a first mortgage of the Tanjore properties as well as of the properties mortgaged to the Kumbakonam Bank. He also undertook to bring all the title deeds from the Kumbakonam Bank and hand them over to the plaintiff for preparing the mortgage deed. This agreement shows that the 1st defendant was willing to execute a mortgage deed of his properties to the plaintiff and with that object undertook to bring the title deeds and hand them over to the plaintiff for preparing the mortgage deed. Pursuant to this agreement, the plaintiff on the same day advanced to the 1st defendant a sum of Rs 3000 under a promissory note of the same date. On April 13, 1947, the plaintiff lent another sum of Rs 3000 under a promissory note to the 1st defendant. The 1st defendant did not bring the title deeds, but by a letter dated

April 27, 1947, (Ex. B-2), he authorized the Managing Director of the Kumbakonam Bank to hand over the title deeds and the mortgage deed duly discharged to the plaintiff or his representative on his paying the amount due by him to the Bank. On May 5, 1947, the plaintiff wrote a letter, Ex. B-1, to the Kumbakonam Bank informing it that one S. Narayana, Ayyar of Madras would discharge the mortgage amount due to the Bank from the 1st defendant and authorizing the Bank to deliver to the said Narayana Ayyar the cancelled mortgage deed and the relative title deeds. The said Narayana Ayyar took the letter, Ex. B-1, the Bank, paid the amount due to it from the 1st defendant and took the title deeds on behalf of the 1st defendant and sent them on to the plaintiff at Madras by registered post. On May 10, 1947, the 1st defendant executed another promissory note, Ex. A-17, for a sum of Rs 7100 in favour of the plaintiff in regard to the amount paid by Narayana Ayyar to the Bank. On July 4, 1947, the 1st defendant executed another promissory note, Ex. A-18, in favour of the plaintiff for a sum of Rs 400. The total of the amounts advanced up to that date by the plaintiff to the 1st defendant was Rs 16,500. Ex. A-19 dated July 5, 1947, is a registered memorandum of agreement executed between the plaintiff and the 1st defendant. Though it was executed on July 5, 1947, it was presented for registration on October 31, 1947 and was eventually registered on June 22, 1948. It is not disputed that the said agreement was executed on July 5, 1947. Under Section 47 of the Registration Act the said document would have legal effect from the date of execution i.e. July 5, 1947. Under that document the 1st defendant, after acknowledging that between January 25, 1947, and July 4, 1947, he had received from the plaintiff a sum of Rs 16,500 under various promissory notes executed in favour of the plaintiff, proceeded to state:

> "The borrower hereby acknowledges having deposited with the lender at Madras on 25th January, 1947 the title deeds relating to the borrower's undivided half share in Items 17 to 20 mentioned in the B schedule here under and also having deposited with the lender on 10th May 1947 the title deeds and other papers relating to the borrower undivided half share in Items 1 to 16 mentioned in B schedule hereunder with interest to create a security over the deposit of title deeds."

This acknowledgment is couched in clear and unambiguous terms. The 1st defendant acknowledges in express terms that a mortgage by deposit of title deeds was effected on May 10, 1947. If there was no oral evidence adduced in this case, the said documentary evidence prima facie would establish that the 1st defendant borrowed a sum of Rs 16,500 from time to time from the plaintiff and effected a mortgage by deposit of title deeds on May 10, 1947, as security for the repayment of the said amount. Exhibit A-19 contains a clear admission by the 1st defendant that he effected a mortgage by deposit, of title deeds in favour of the plaintiff. As the mortgage deed in favour of the 3rd defendant was executed subsequent to Ex. A-19, he is bound by that admission, unless there is sufficient evidence on the record to explain away the said admission. The 1st defendant, who could explain the circumstances under which Ex. A-19 was executed was not examined as a witness in this case. But it is said that the evidence of PWs 1, 2 and 3 displaces the evidentiary value of the recitals of the said document. PW 1 is the plaintiff. He says in his examination-in-chief:

> "On 10th May 1947 Defendant 1 and Narayana Ayyar met my lawyer at Madras and I was sent for. Exhibit A-17 is the pro-note executed for Rs 7100 for the payment made to the bank. Defendant 1 then personally handed over the documents to me by way of deposit of title deeds as security for the advance made and to be made. Defendant 1 did not execute any mortgage. In July 1947, Defendant 1 asked for Rs 400 to buy stamps for the mortgage. I paid Rs 400 under Exhibit A-18. On 5th July 1947 the memorandum, Exhibit A-19, was executed in my lawyer's house. My lawyer attested the document as well as Narayana Ayyar. They saw Defendant 1 sign the document."

If this evidence is accepted, the plaintiff's case will be established to the hilt. But in the cross-examination he deposed:

> "On 5th July 1947, the agreement about executing a simple mortgage was changed into one of equitable mortgage. Defendant 1 suggested it and I was advised to accept and I accepted."

Reliance is placed upon this statement to show that the idea of effecting an equitable mortgage dawned on the parties only on July 5, 1947, and, therefore the case that such a mortgage was effected on May 10, 1947, must be untrue. We do not see any inconsistency between the statement made by the plaintiff in the examination-in-chief and that made in the cross-examination. What he stated in the cross-examination is that though it was agreed earlier that a formal mortgage deed should be executed, on July 5, 1947, the parties, for one reason or other, were content to have a deed of equitable mortgage. It is too much to expect this witness to bear in mind the subtle distinction between the execution of an equitable mortgage on July 5, 1947, and the acknowledgment of an equitable mortgage that had already been effected. In his statement he emphasized more on the document than on the contents of the document. So understood this evidence does not run counter to the express recitals found in Ex. A-19. There is also nothing unusual that on the advice of the advocate the formalities of actual delivery were complied with in the presence of the advocate. But one need not scrutinize the version of this witness meticulously in that regard, if in law a constructive delivery would be as good as a physical delivery. We, therefore, do not see in the evidence of PW 1 anything to discountenance the admission made by the 1st defendant in Ex. A-19.

16. PW 2, the advocate, also says in his evidence that he gave the title deeds to the 1st defendant and asked him to hand them over to PW 1 and to state that these and documents already deposited would be security for the loans advanced till that date. There would be nothing unusual if an advocate, who knew the techicalities of a mortagage by deposit of title deeds, advised his client to conform to the formalities. Even if the parties accepted constructive delivery, the evidence given by this witness is more an embellishment than a conscious effort to depart from the truth. As to what happened on July 4, 1947, this witness says that on that date the 1st defendant and Narayana Ayyar came to him and suggested that the memorandum may be registered instead of executing a simple mortgage as that would be cheaper. There is nothing unusual in this conduct of the parties either. If there was a mortgage by deposit of title deeds at an earlier stage, even though there was at that time an agreement to execute a formal document later on, there would be nothing out of the way in the parties for their own reasons giving up the idea of executing a formal document and being satisfied with a memorandum acknowledging the earlier form of security. In the cross-examination this witness stated that till July 4, 1947, the idea was only to make a simple mortgage over the half-share covered by all the title deeds given to PW 1. This statement only means that till that date the parties had no idea of executing a document acknowledging the earlier mortgage by deposit of title deeds, for they wanted a formal document. This answer is in no way inconsistent with the statement of the advocate at the earlier stage that there was a mortgage by deposit of title deeds on May 10, 1947. So too, Narayana Ayyar, as PW 3, supports the evidence of PWs 1 and 2. He too in his cross-examination says that it was only on July 4, 1947, the idea of executing an equitable mortgage was suggested by the 1st defendant and that on May 10, 1947, he did not suggest to the 1st defendant to execute any document. Here again, his statement in the cross-examination would not be inconsistent with that made by him in the examination-in-chief, if the former statement was understood to relate to Ex. A-19. This witness only meant to say that the idea of executing Ex. A-19 dawned on the parties only on July 4, 1947. The evidence of these three witnesses is consistent with the admission made by the first defendant in Ex. A-19. The evidentiary value of the recitals in Ex. A-19 is in no way displaced by the evidence of the said witnesses : indeed, it supports the recitals therein in toto. In the circumstances, we hold that

on May 10, 1947, the 1st defendant deposited the title deeds with the plaintiff physically as security for the amounts advanced by the plaintiff to the 1st defendant up to that date. Even if the evidence of the witnesses as regards the handing over of the documents physically by the 1st defendant to the plaintiff was an embellishment of what took place on that date and that there was only constructive delivery, we think that such delivery satisfied the condition laid down by Section 58 (*f*) of the Transfer of Property Act.

17. Even so, it is contended by learned counsel for the respondent that the delivery of the title deeds was to the appellant's representative, Narayana Ayyar, at Kumbakonam and, therefore, the mortgage by deposit of title deed s, even if true, must be deemed to have been effected at Kumbakonam and that under the law such a mortgage could not be effected at Kumbakonam as it was not one of the places mentioned in Section 58(*f*) of the Transfer of Property Act. But Narayana Ayyar, as PW 3, stated in his evidence that he had authority to take the title deeds on behalf of the 1st defendant and that, after having taken delivery of them on his behalf, he sent them to the plaintiff at Madras by registered post. But whether Narayana Ayyar received the title deeds from the Bank as agent of the 1st defendant or as that of the plaintiff, it would not affect the question to be decided in the present case. We shall assume that Narayana Ayyar was the agent of the plaintiff. But mere delivery of title deeds without the intention to create a mortgage by deposit of title deeds would not constitute such a mortgage. On May 5, 1947, when the title deeds were received by the plaintiff through his agent, Narayana Ayyar, at Kumbakonam, they were received only for the purpose of preparing the mortgage deed. The plaintiff had the physical possession of the title deeds at Madras on May 10, 1947. On that date the possession of the title deeds by the plaintiff was as agent of the 1st defendant. He was not holding the said documents in his own right on the basis of his title or interest therein. The agent's possession was the possession of the 1st defendant, the principal. On May 10, 1947, the creditor and the debtor i.e. the plaintiff and the 1st defendant, met in the house of PW 2 and the 1st defendant agreed to deposit the said title deeds already in the physical possession of the plaintiff as his agent in order to hold them thereafter as security for the moneys advanced. From May 10, 1947, the plaintiff ceased to hold the title deeds as agent of the 1st defendant but hold them only as a mortgagee. If the plaintiff physically handed over the title deeds to the 1st defendant and the 1st defendant immediately handed over the same to the plaintiff with intention to mortgage them, it is conceded that a valid mortgage was created. To insist upon such a formality is to ignore the substance for the form. When the principal tells the agent “from today you hold my title deeds as security”, in substance there is

a physical delivery. For convenience of reference such a delivery can be described as constructive delivery of title deeds. The law recognizes such a constructive delivery. We, therefore, hold that, even on the assumption that the form of physical delivery had not been gone through — though we hold that it was so effected on May 10, 1947 — there was constructive delivery of the title deeds coupled with the intention to create a mortgage by deposit of title deeds.

18. The last argument of learned counsel for the appellant is that even if there was no mortgage by deposit of title deeds on May 10, 1947, under Ex. A-19 such a mortgage was created at any rate from July 5, 1947. It is true that the document in express terms says that the documents of title were deposited on May 10, 1947, with intention to create a mortgage by deposit of title deeds. Assuming it was not so done on that date, can such an intention be inferred from the document as on July 5, 1947? Admittedly on July 5, 1947, the title deeds were in the possession of the plaintiff. If on that date the 1st defendant had expressed his intention that from that date he would consider the title deeds as security for the loans already advanced to him, all the necessary conditions of a mortgage by deposit of title deeds would be present, namely, (*i*) debt, (*ii*) constructive delivery; and (*iii*) intention. The fact that he had such an intention from an earlier date could not make any difference in law, as the intention expressed was a continuing one. On July 5, 1947, according to the 1st defendant, the mortgage by deposit of title deeds was in existence and, therefore, on that date the said three necessary ingredients of a mortgage by deposit of title deeds were present. We, therefore, hold that even if there was no mortgage by deposit of title deeds on May 10, 1947, it was effected on July 5, 1947.

19. If the mortgage by deposit of title deeds was effected on May 10, 1947, or on July 5, 1947, the legal position would be the same, as the mortgage deed in favour of the 3rd defendant was executed only on October 10, 1947. Though Ex. A-19 was registered on June 22, 1948, under Section 47 of the Registration Act the agreement would take effect from July 5, 1947.

20. It is not disputed that in the partition that was effected between the 1st defendant and his brother the properties specified in 'C' schedule were allotted to the share of the 1st defendant. If so, the plaintiff would be entitled to have a mortgage decree in respect of the said properties. In the result there will be a preliminary decree in favour of the plaintiff for the recovery of the sum of Rs 20,434-15 with interest at 6 percent per annum thereon till the said amount is paid. The period of redemption will be three months from today and in default the 'C' schedule properties will be sold for the realization of the same. Liberty is reserved to the plaintiff to apply for personal decree

against the 1st defendant in case there is any deficiency after the hypotheca has been sold. The decree of the Subordinate Judge and of the High Court are set aside and there will he a decree in the said terms. The 1st and 3rd defendants will pay the cost of the plaintiff throughout.

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[*] Appeal from the Judgment and Decree dated 31st January, 1957 of the Madras High Court in Appeal No. 969 of 1952.

[1] (1806) 33 ER 73, 76

[2] (1838) 51 Revised Reports, 339

[3] (1812) 34 ER 496

[4] [L.R.] 18 Q.B.D. 380

[5] ILR (1875) 1 Bom 237

[6] ILR (1886) 10 Bom 634

[7] ILR (1914) 38 Bom 372, 374

[8] ILR (1933) 11 Rang 239, 253

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2J

(2024) 13 Supreme Court Cases 553

(BEFORE BELA M. TRIVEDI AND DIPANKAR DATTA, JJ.)

P. KISHORE KUMAR .. Appellant;

Versus

VITTAL K. PATKAR .. Respondent.

Civil Appeal No. 7210 of 2011†, decided on November 20, 2023

A. **Contract and Specific Relief — Specific Relief Act, 1963 — Ss. 34 and 38 — Suit for declaration of title and permanent injunction — Entitlement to relief — Both plaintiffs and defendants claimed right on property on basis of respective sale deeds — Plaintiffs failed to prove ownership, while sale deed of defendants was more reliable and supported by government orders — Held, plaintiffs not entitled to any relief**

— Land comprised in Sy. No. X devolved upon plaintiff's predecessor-in-interest *K* vide a family settlement deed — 15 acres out of said land was sold by *S* to vendor of plaintiff i.e. *Y* (plaintiff's vendor) vide a registered sale deed — Plaintiff's vendor applied under S. 9-A of the 1954 Act and sought occupancy rights in respect of 15 acres of Sy. No. X — According to plaintiff, claim of plaintiff's vendor succeeded before Special Deputy Commissioner of Inams — Commissioner passed an Order dt. 25-11-1958 while deciding this application — It is interpretation of Commissioner's order which forms fulcrum of present dispute — While plaintiff alleged that claim of plaintiff's vendor was accepted, thus making plaintiff lawful owner with better title appellant defendant in his written statement alleged that Commissioner's order granted occupancy rights under S. 9 of the 1954 Act in favour of his predecessor-in-interest i.e. *K*, Inamdar, from whom defendant purchased 5 acres and 28 guntas, thus vesting him with better title

— Upon applications being made by other tenants for occupancy rights in Sy. No. X, Land Tribunal conferred occupancy rights on defendant's predecessor-in-interest, with respect to an extent of 21 acres in Sy. No. X — An endorsement to same effect was also led in evidence by defendant — Sale deeds were thereafter executed for same parcel of land by both sides — While plaintiff's vendor sold an extent of 15 acres to plaintiff vide registered sale deed dated 12-11-1987, defendant purchased 5 acres and 28 guntas comprised in Sy. No. X vide registered sale deeds dated 20-6-1984 from his respective vendors — Portions of Sy. No. X being sold to two different parties, a dispute between two parties became imminent and, in fact, triggered suit instituted by plaintiff, inter alia, praying for declaration of title and permanent injunction with respect to Schedules "A" and "B" property, against defendant

† Arising from the Judgment and Order in *Vittal K. Patkar* v. *P. Kishore Kumar*, 2010 SCC OnLine Kar 2690 (Karnataka High Court, Regular Second Appeal No. 1333 of 2009, dt. 29-11-2010) **[Reversed]**

— A bare perusal of Ss. 9 and 9-A of the 1954 Act reveals that while S. 9 allows an Inamdar to make an application for occupancy rights, a tenant is afforded an opportunity for same under S. 9-A of the Act subject to condition that he was a tenant in respect of subject land immediately prior to date of vesting — Therefore, it is only a tenant or an Inamdar, who could have made such an application

— In the case before Commissioner, plaintiff's vendor was one of applicants while defendant's predecessor-in-interest was one of respondent Inamdars — Commissioner lucidly stated that claimants were not tenants at time of vesting and, therefore, claims of, inter alia, plaintiff's vendor, were ordered to be rejected — It was further said that their respective survey numbers were to be registered in favour of Inamdars under S. 9 — This can have only one possible meaning, that claim of plaintiff's vendor for occupancy right as a tenant was rejected, and that of defendant's predecessor-in-interest was acknowledged — Plaintiff's vendor having failed to satisfy condition of being vested with tenancy rights as on date stipulated by S. 9-A and such order having remained unchallenged for all times

— Revenue entries containing name of plaintiff and plaintiff's vendor relied on by plaintiff to contend that Commissioner's order vested plaintiff's vendor with occupancy rights, and it is only in accordance with such order did Revenue Authorities enter plaintiff's vendor's name in records cannot be accepted — Revenue records are not documents of title — Further in present case, Commissioner's order distinctly denying rights of occupancy to plaintiff's vendor is evidence that renders these revenue entries unworthy of acceptance — Plaintiff's vendor having been denied right of title in land by Commissioner's order, could not have conveyed same to her vendee

— In contrast, sale deed executed in favour of defendant unequivocally and categorically recites that vendor purchased land from *K* in whose favour occupancy rights were granted vide Commissioner's order — A comparative study of two sale deeds leaves none in doubt that defendant's sale deeds, supported by Commissioner's order, weigh heavier in scales of justice as compared to plaintiff's sale deed, which is only supported by revenue documents

— In present case having led in evidence only revenue documents which are essentially fiscal in nature, it can be easily held that plaintiff has been unable to assert his case to a high degree of probability — It is, therefore, not enough that plaintiff led in evidence records of rights for a number of years in an attempt to establish his title; such records would not counter proof of occupancy rights furnished by defendant, in a test of probative value

— Possession can be regarded as a better title against all, except true and lawful owner — Therefore, multitude of revenue documents put to use to contend that plaintiff was cultivating suit property would not adequately meet demands of proof made by law — Only credible document of title led as evidence in present case was in favour of defendant's predecessor-in-interest; hence, it must follow that it is only defendant who can be declared lawful owner of 'B' schedule property

— Thus, trial court erred in decreeing suit by placing on a higher probative pedestal revenue entries — First appellate court rightly overturned findings of trial court and dismissed suit — Commissioner's order was correctly interpreted to determine as to in whom occupancy rights vested in respect of 'B' schedule property

— Tenancy and Land Laws — Mysore (Personal and Miscellaneous) Inams Abolition Act, 1954 (1 of 1955), Ss. 9 and 9-A

B. **Property Law — Ownership and Title — Entries in revenue records — Contention that plaintiff has established his title by a preponderance of probabilities — Sustainability — When plaintiff failed to produce a single document of title in respect of suit property, contention to establish title by a preponderance of probabilities cannot be sustained — In a dispute with respect to determination of title, merely pointing out lacunae in defendant's title would not suffice — Having instituted suit for declaration, burden of proof rested on shoulders of plaintiff to reasonably establish probability of better title, which the plaintiff in present case, has manifestly failed to do**

— Tenancy and Land Laws — Record-of-rights/Revenue records/Mutation — Revenue/Mutation Proceedings/Records — Evidence Act, 1872, S. 35

C. **Property Law — Ownership and Title — Entries in revenue records — Contention that plaintiff was only expected to prove his title to a high degree of probability and not beyond reasonable doubt — Sustainability — Having led in evidence only revenue documents which are essentially fiscal in nature, plaintiff has been unable to assert his case to a high degree of probability — It is, therefore, not enough that plaintiff led in evidence records of rights for a number of years in an attempt to establish his title; such records would not counter proof of occupancy rights furnished by defendant, in a test of probative value**

— Tenancy and Land Laws — Record-of-rights/Revenue records/Mutation — Revenue/Mutation Proceedings/Records — Evidence Act, 1872, S. 35

D. **Civil Procedure Code, 1908 — S. 100 — Second appeal — Scope — Second appellate court is not expected to conduct a "third trial on facts" or be "one more dice in gamble" — Decision rendered by first appellate court, not being in violation of settled position of law, ought not to have been interfered with — In present case question framed by High Court could be regarded as one of law, if it all, but did not merit label of a substantial question of law so as to warrant interference with first appellate decree under S. 100 CPC**

E. **Property Law — Ownership and Title — Entries in revenue record — Value of — Revenue record neither creates nor extinguishes title, nor does it have any presumptive value on title — All it does is entitle person in whose favour mutation is done to pay land revenue in question — Mere mutation of records would not divest owners of a land of their right, title and interest in land**

— Tenancy and Land Laws — Record-of-rights/Revenue records/Mutation — Revenue/Mutation Proceedings/Records — Evidence Act, 1872, S. 35

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The issue for determination before the Supreme Court was: whether in a suit for declaration of title and permanent injunction when both the plaintiffs and the defendants claimed right on property on basis of respective sale deeds and the plaintiffs failed to prove ownership, while sale deed of the defendants was more reliable and supported by government orders, the plaintiffs were entitled to any relief or not?

Allowing the appeal, the Supreme Court

Held :

Interference in second appeal under Section 100 CPC ought not to be made unless the appeal involves a substantial question of law as distinguished from a mere question of law. (Para 17)

Nazir Mohamed v. *J. Kamala*, (2020) 19 SCC 57, *followed*

A bare perusal of Sections 9 and 9-A of the 1954 Act reveals that while Section 9 allows an Inamdar to make an application for occupancy rights, a tenant is afforded an opportunity for the same under Section 9-A of the 1954 Act subject to the condition that he was a tenant in respect of the subject land immediately prior to the date of vesting. Therefore, it is only a tenant or an Inamdar, who could have made such an application. (Para 19)

In the case before the Commissioner, the plaintiff's vendor was one of the applicants while the defendant's predecessor-in-interest was one of the respondent Inamdars. The Commissioner lucidly stated that the claimants were not tenants at the time of vesting and, therefore, the claims of, inter alia, the plaintiff's vendor, were ordered to be rejected. It was further said that their respective survey numbers were to be registered in favour of the Inamdars under Section 9 of the 1954 Act. This can have only one possible meaning that the claim of the plaintiff's vendor for occupancy right as a tenant was rejected, and that of the defendant's predecessor-in-interest was acknowledged. The plaintiff's vendor having failed to satisfy the condition of being vested with tenancy rights as on the date stipulated by Section 9-A of the 1954 Act and such order having remained unchallenged for all times. (Para 20)

The plaintiff sought to rely on revenue entries containing the name of the plaintiff and the plaintiff's vendor to contend that the Commissioner's order vested the plaintiff's vendor with occupancy rights, and it is only in accordance with such order did the Revenue Authorities enter the plaintiff's vendor's name in the records. However, such a contention cannot be accepted. (Para 21)

It is trite law that revenue records are not documents of title. (Para 22)

Revenue records neither create nor extinguish title, nor does it have any presumptive value on title. All it does is entitle the person in whose favour mutation is done to pay the land revenue in question. (Para 23)

Mere mutation of records would not divest the owners of a land of their right, title and interest in the land. (Paras 24 to 26)

Sawarni v. *Inder Kaur*, (1996) 6 SCC 223; *Balwant Singh* v. *Daulat Singh*, (1997) 7 SCC 137; *Jitendra Singh* v. *State of M.P.*, 2021 SCC OnLine SC 802; *Sita Ram Bhau Patil* v. *Ramchandra Nago Patil*, (1977) 2 SCC 49, *followed*

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In the present case, the Commissioner's order distinctly denying the rights of occupancy to the plaintiff's vendor is evidence that renders these revenue entries unworthy of acceptance. (Para 27)

No one can confer a better title than what he himself has. In the present case, the plaintiff's vendor having been denied the right of title in the land by the Commissioner's order, could not have conveyed the same to her vendee. (Para 29)

In contrast, when the sale deed dated 20-6-1984 executed in favour of the defendant is examined, there is an unequivocal and categorical recital that the vendor purchased the land from *K*, in whose favour occupancy rights were granted vide the Commissioner's order. A comparative study of the two sale deeds leaves none in doubt that the defendant's sale deeds, supported by the Commissioner's order, weigh heavier in the scales of justice as compared to the plaintiff's sale deed, which is only supported by revenue documents. (Para 30)

The contention advanced on behalf of the plaintiff that through the record of rights the plaintiff has established his title by a preponderance of probabilities is not sustainable. As noted above, the plaintiff failed to produce a single document of title in respect of the suit property. In a dispute with respect to determination of title, merely pointing out the lacunae in the defendant's title would not suffice. Having instituted the suit for declaration, the burden of proof rested on the shoulders of the plaintiff to reasonably establish the probability of better title, which the plaintiff in the present case, has manifestly failed to do. (Paras 33 to 35)

The contention of the plaintiff that he was only expected to prove his title to a high degree of probability and not beyond reasonable doubt was also rejected. Having led in evidence only revenue documents which are essentially fiscal in nature, it can be easily held that in the present case, the plaintiff has been unable to assert his case to a high degree of probability. It is, therefore, not enough that the plaintiff led in evidence records of rights for a number of years in an attempt to establish his title; such records would not counter the proof of occupancy rights furnished by the defendant, in a test of probative value. (Para 36)

Possession can be regarded as a better title against all, except the true and lawful owner. Therefore, the multitude of revenue documents put to use to contend that the plaintiff was cultivating the suit property would not adequately meet the demands of proof made by law. The only credible document of title led as evidence in the present case was in favour of the defendant's predecessor-in-interest; hence, it must follow that it is only the defendant who can be declared the lawful owner of the 'B' schedule property. (Para 37)

Thus, the trial court had erred in decreeing the suit by placing on a higher probative pedestal the revenue entries. The first appellate court rightly overturned the findings of the trial court and dismissed the suit. The Commissioner's order was correctly interpreted to determine as to in whom occupancy rights vested in respect of the 'B' schedule property. (Para 38)

Union of India v. *Vasavi Coop. Housing Society Ltd.*, (2014) 2 SCC 269 : (2014) 2 SCC (Civ) 66; *Jagdish Prasad Patel* v. *Shivnath*, (2019) 6 SCC 82 : (2019) 3 SCC (Civ) 112; *Somnath Burman* v. *S.P. Raju*, (1969) 3 SCC 129, *followed*

R.V.E. Venkatachala Gounder v. *Arulmigu Viswesaraswami & V.P. Temple*, (2003) 8 SCC 752, *distinguished on facts*

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The first appellate court having examined the facts in extenso, the High Court ought not to have interfered with the findings rendered therein by virtue of being, in second appeal, a court of law. A second appellate court is not expected to conduct a *a* "third trial on facts" or be "one more dice in the gamble". The decision rendered by the first appellate court, not being in violation of the settled position of law, ought not to have been interfered with. In the present case the question framed by the High Court in second appeal could be regarded as one of law, if it all, but did not merit the label of a substantial question of law so as to warrant interference with the first appellate decree under Section 100 CPC. (Para 39) *b*

Gurdev Kaur v. *Kaki*, (2007) 1 SCC 546, *followed*

The impugned judgment and decree passed by the High Court are, accordingly, set aside. The plaintiff's suit shall stand dismissed. (Para 42)

Vittal K. Patkar v. *P. Kishore Kumar*, 2010 SCC OnLine Kar 2690, *reversed*

RM-D/70618/SV *c*

Advocates who appeared in this case :

A. Diwakara, Senior Advocate [Ms A. Sumathi (Advocate-on-Record) and Vishweshwar, Advocates], for the Appellant;

S.N. Bhat, Senior Advocate [Anand Sanjay M. Nuli, Dharam Singh, Nanda Kr. K.B. and Shiva Swaroop (for M/s Nuli & Nuli) (Advocate-on-Record), Advocates], for the Respondent. *d*

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2.	(2020) 19 SCC 57, *Nazir Mohamed* v. *J. Kamala*	562*f-g*, 563*b-c*
3.	(2019) 6 SCC 82 : (2019) 3 SCC (Civ) 112, *Jagdish Prasad Patel* v. *Shivnath*	566*c-d*
4.	(2014) 2 SCC 269 : (2014) 2 SCC (Civ) 66, *Union of India* v. *Vasavi Coop. Housing Society Ltd.*	566*b-c*
5.	2010 SCC OnLine Kar 2690, *Vittal K. Patkar* v. *P. Kishore Kumar* **(reversed)**	558*g*, 561*g* *e*
6.	(2007) 1 SCC 546, *Gurdev Kaur* v. *Kaki*	567*d*
7.	(2003) 8 SCC 752, *R.V.E. Venkatachala Gounder* v. *Arulmigu Viswesaraswami & V.P. Temple*	566*f-g*
8.	(1997) 7 SCC 137, *Balwant Singh* v. *Daulat Singh*	564*f*
9.	(1996) 6 SCC 223, *Sawarni* v. *Inder Kaur*	564*e*
10.	(1977) 2 SCC 49, *Sita Ram Bhau Patil* v. *Ramchandra Nago Patil*	565*a*
11.	(1969) 3 SCC 129, *Somnath Burman* v. *S.P. Raju*	567*a* *f*

The Judgment of the Court was delivered by

DIPANKAR DATTA, J.—

The appeal

1. This civil appeal arises from the judgment and decree dated 29-11-2010[1] *g* rendered by the Karnataka High Court, whereby an appeal under Section 100 of the Civil Procedure Code, 1908 ("CPC" hereafter) was allowed, resulting in restoration of the decree passed by the trial court and setting aside of the first appellate decree dismissing the suit of the respondent-plaintiff ("the plaintiff" hereafter).

h

1 *Vittal K. Patkar* v. *P. Kishore Kumar*, 2010 SCC OnLine Kar 2690

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Brief resume of facts

2. The factual matrix of the case, insofar as is relevant for the purpose of a decision on this appeal, is set out hereinbelow.

3. The pleaded case in the plaint is that land comprised in Sy. No. 3, measuring 187 acres 38 guntas, in Navarathna Agrahara, Hobli, Devanhalli Taluk, Bangalore, devolved upon the plaintiff's predecessor-in-interest, K. Muniyappa alias K. Shamaiah vide a Family Settlement Deed dated 30-7-1953. 15 acres out of the said land was sold by K. Shamaiah to the vendor of the plaintiff i.e. Smt Akula Yogamba ("the plaintiff's vendor" hereafter) vide registered sale deed dated 14-2-1958.

4. The Mysore (Personal & Miscellaneous) Inam Abolition Act, 1954 ("the Act" hereafter), enacted for abolition of Inams in the State of Mysore, came into force on 15-3-1955. By virtue of the Act, all rights, title and interests in the land, hitherto vested in the Inamdars, ceased and came to be vested absolutely in the State of Mysore. However, the Act provided for an opportunity to the Inamdars to make an application under Section 9 thereof to register as an occupant of the land.

5. The plaintiff's vendor applied under Section 9-A of the Act and sought occupancy rights in respect of 15 acres of Sy. No. 3. According to the plaintiff, the claim of the plaintiff's vendor succeeded before the Special Deputy Commissioner of Inams ("the Commissioner" hereafter). The Commissioner passed an Order dated 25-11-1958 ("the Commissioner's order" hereafter) while deciding this application, which reads as follows:

> "Order sheet
>
> In the Order of Special Case No. 51/1958-59

Sl. No.	*Order of proceedings with signature of Presiding Officer*	*Signature of parties or pleaders when necessary*
	The persons noted below have purchased the lands noted against them after the date of vesting from jodidars	
1.	Shri Keralavarma S. No. 13_33-00	
2.	Shri Lokaranjan, S. No. 13_20-00	
3.	Smt Akula Yogama S. No. 3_15_00	
4.	Shri Venkata Rao S. No. 3_1-4	
5.	Shri M. Raja Rao S. No._Dry 3-26, 6-00	
6.	S. No. 3_12-00	
7.	Hence, the claim of the applicants may be rejected and Khata under Section 9 of the Act in the name of the jodidar may be made. Sd/- Special Deputy Commissioner for Abolition of Inams, Kolar District, Kolar	
	25-11-1958 Order	

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ORDER

The claimants were not tenants at the time of vesting. Therefore, claims of Shri Keralvarma, Yogamba, Bheemavarapu Venkata Rau, Shri Ranga Rao are ordered to be rejected. These numbers are separately registered in favour of the Inamdars under Section 9. 13/33, 13/20 are registered in favour of the Inamdar Shri K. Srinivasamurthy under Sections 9 and 3/15, 3/1-2, 2/3-36, 16/2-6, 3/12 are ordered to be registered as occupant.

Dictated, transcript edited by me and then pronounced in open court.

(sign)
Special Deputy Commissioner
for Abolition of Inams, Bangalore"

6. It is the interpretation of the Commissioner's order which forms the fulcrum of the present dispute.

7. While the plaintiff alleged that the claim of the plaintiff's vendor was accepted, thus making the plaintiff the lawful owner with the better title, the appellant-defendant ("the defendant" hereafter) in his written statement alleged that the Commissioner's order granted occupancy rights under Section 9 in favour of his predecessor-in-interest i.e. K. Srinivasa Murty, the Inamdar, from whom the defendant purchased 5 acres and 28 guntas, thus vesting him with the better title.

8. Amendments made to the 1979 Act vested the powers of the Special Deputy Commissioner with the Land Tribunal. Upon applications being made by other tenants for occupancy rights in Sy. No. 3, the Land Tribunal, vide Order dated 20-9-1982, conferred occupancy rights on the defendant's predecessor-in-interest, with respect to an extent of 21 acres in Sy. No. 3. An endorsement to the same effect was also led in evidence by the defendant.

9. Sale deeds were thereafter executed for the same parcel of land by both sides. While the plaintiff's vendor sold an extent of 15 acres to the plaintiff vide registered sale deed dated 12-11-1987, the defendant purchased 5 acres and 28 guntas comprised in Sy. No. 3 vide registered sale deeds dated 20-6-1984 from his respective vendors.

10. Portions of Sy. No. 3 being sold to two different parties, a dispute between the two parties became imminent and, in fact, triggered OS 506/1995 ("the suit" hereafter) instituted by the plaintiff, *inter alia*, praying for declaration of title and permanent injunction with respect to Schedules "A" and "B" property, against the defendant. The prayers in the plaint are reproduced hereinbelow for the sake of clarity:

"(*a*) Declaring that the plaintiff is the absolute owner of the schedule property? (sic)

(*b*) For permanent injunction restraining the defendant or his henchmen, person from in any way interfering with the plaintiff's lawful peaceful possession in both A and B schedule property.

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(*c*) And for the costs and such other reliefs as this Hon'ble Court deems fit to grant in the circumstances of the case, in the interest of justice and equity."

The property schedules are extracted hereinbelow:

"*Schedule-A*

15 Acres of land situated in Sy. No. 93, Old No. 3 in Navarathna Agrahara, Jala Hobli Devanahalli Taluk, Bangalore District**

Schedule-B

All the piece and parcel of the 5.28 guntas of land in Re. S. No. 93, Old No. 3, situated at Eastern side of by passing mud road situated in Navarathna Agrahara, Jala Hobli Devanahalli Taluk, Bangalore**"

11. The learned Civil Judge ("the trial court" hereafter) after extensive examination of revenue records adduced by the plaintiff, and the Commissioner's order, held that the ownership of the suit property vested in the plaintiff's vendor. In arriving at such a conclusion, the court was predominantly persuaded by Ext. P-8 (record-of-rights), which recorded that vide Order dated 24-3-1959 passed by the Special Deputy Commissioner, Inam Abolition, occupancy rights had been conferred on the plaintiff's vendor. However, no order or endorsement of the said date was actually exhibited before the trial court. The decree passed by the trial court is quoted below for facility of understanding:

"After contest, it is ordered and decreed that the suit of the plaintiff is hereby decreed. It is declared that the plaintiff is the absolute owner of the B schedule property and the defendant or any persons claiming through him are hereby permanently restrained from interfering with the peaceful possession and enjoyment of the plaintiff over the suit Schedules A and B properties."

12. Aggrieved by the decree, the defendant carried it in an appeal under Section 96 CPC before the learned District Judge. The first appellate court overturned the findings of the trial court, on the premise that revenue records alone could not aid the plaintiff in establishing his title, especially in the glaring absence of any Inam grant in favour of the plaintiff's vendor. It was noted by the appellate court that though the plaintiff referred to the Order dated 24-3-1959, the same was not led in evidence.

13. A second appeal carried by the plaintiff before the High Court succeeded vide the judgment and order[1] impugned herein. The High Court framed the following question of law for decision which, according to it, was a substantial question of law:

"Whether the lower appellate court had erred in law in not considering Ext. P-1 to Ext. P-29 and the admissions made by the defendant (DW 1)?"

1 *Vittal K. Patkar* v. *P. Kishore Kumar*, 2010 SCC OnLine Kar 2690

The High Court interpreted the Commissioner's order to be in favour of the plaintiff's vendor, such interpretation being bolstered solely by the revenue records exhibited by the plaintiff. Though it was noted that the grant of occupancy rights in favour of the plaintiff's vendor under Section 9-A was contrary to the provisions of the Act, it was observed that the decision having attained finality could not be challenged after such extensive passage of time before a civil court. The plaintiff was, therefore, held to have established the better title, resulting in upholding of the decree passed by the trial court.

Contentions of the parties

14. The learned Senior Counsel for the defendant, Mr A. Diwakara, highlighted the dissatisfaction recorded by the High Court with the evidence adduced by the plaintiff, and stressed that in view of the same, the Court could not have held the plaintiff to establish a better title than the defendant, more so when the Court itself recorded the fact that the grant of occupancy rights in favour of the plaintiff's vendor under Section 9-A of the Act was contrary to its import. It was argued by him that the plaintiff's vendor being a purchaser, could not have applied as an "occupant" under the provisions of the Act, such application being restricted only to tenants. The Commissioner's order categorically recorded that the plaintiff's vendor was not a tenant at the time of vesting of the land; therefore, the order could not, by any stretch of imagination, be interpreted to vest occupancy rights in the plaintiff's vendor.

15. Per contra, Mr S.N. Bhat, learned Senior Counsel for the plaintiff, argued that the plaintiff's vendor had made an application for occupancy rights in 15 acres of Sy. No. 3, and the Commissioner, while noting that the vendor was not a tenant at the time of vesting, went on to record that occupancy registration under Section 9-A be done. He strenuously advanced the record of rights for the year 1983 in the name of the plaintiff's vendor, along with subsequent revenue entries in the name of the plaintiff, to argue that it was the plaintiff, and his vendor before him, who were being treated as the rightful owners by the Revenue Authorities, such authorities having rightly interpreted the Commissioner's order to mean that ownership vested in the plaintiff's vendor.

Analysis

16. This Court in *Nazir Mohamed* v. *J. Kamala*[2] has crisply analysed numerous decisions rendered by this Court on Section 100 CPC and summarised the law as follows: (SCC pp. 68-69, paras 30 & 33)

> "*30*. Where no such question of law, nor even a mixed question of law and fact was urged before the trial court or the first appellate court, as in this case, a second appeal cannot be entertained....
>
> * * *
>
> *33.2*. The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question,

2 (2020) 19 SCC 57

answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue.

33.3. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law."

17. Although it is true that *Nazir Mohamed*[2] is a decision of recent origin and the High Court cannot be said to have the benefit of perusal thereof, there can be little doubt that the law on what would constitute a "substantial question of law" within the meaning of Section 100 CPC has not changed over the years and the jurisdiction continues to be limited in the sense that interference ought not to be made unless the appeal involves a substantial question of law as distinguished from a mere question of law.

18. We have held earlier that much would depend on the Commissioner's order, the true interpretation of which was fiercely contested by the Senior Counsel on either side. However, before embarking on the process of determining if the question of ownership of the suit property was rightly decided by the High Court, an examination of Sections 9 and 9-A of the Act is considered imperative:

"**9.** ***Lands and buildings to vest in the Inamdar.***—(1) Every Inamdar shall, with effect on and from the date of vesting, be entitled to be registered as an occupant of all lands other than:

(*i*) communal lands, waste lands, gomal lands, forest lands, tank beds, mines, quarries, rivers, streams, tanks and irrigation works;

(*ii*) lands in respect of which any person is entitled to be registered under Sections 4, 5, 6, 7 or 8; and

(*iii*) lands upon which have been erected buildings owned by any person other than the Inamdar.

(2) Every building situated within the limits of the inam which was owned immediately before the date of vesting by the Inamdar shall, with effect on and from such date, vest in the Inamdar.

Explanation.—In this section "inamdar" means an Inamdar other than a holder of a minor inam referred to in Section 7.

9-A. ***Other tenants of Inamdar.***—*Every tenant of the Inamdar, other than the tenants entitled to be registered as occupants under Sections 4, 5 and 6, shall, with effect on and from the date of vesting and subject to the provisions of Chapter III-A, be entitled to continue as a tenant of the land in respect of which he was a tenant immediately before the date of vesting.*" (emphasis supplied)

2 *Nazir Mohamed* v. *J. Kamala*, (2020) 19 SCC 57

19. A bare perusal of the aforesaid provisions reveals that while Section 9 allows an Inamdar to make an application for occupancy rights, a tenant is afforded an opportunity for the same under Section 9-A of the Act subject to the condition that he was a tenant in respect of the subject land immediately prior to the date of vesting. Therefore, it is only a tenant or an Inamdar, who could have made such an application.

20. Let us now examine the Commissioner's order. In the case before the Commissioner, the plaintiff's vendor was one of the applicants while the defendant's predecessor-in-interest was one of the respondent Inamdars. The Commissioner lucidly stated that the claimants were not tenants at the time of vesting and, therefore, the claims of, inter alia, the plaintiff's vendor, were ordered to be rejected. It was further said that their respective survey numbers were to be registered in favour of the Inamdars under Section 9. This, in our view, can have only one possible meaning, that the claim of the plaintiff's vendor for occupancy right as a tenant was rejected, and that of the defendant's predecessor-in-interest was acknowledged. The plaintiff's vendor having failed to satisfy the condition of being vested with tenancy rights as on the date stipulated by Section 9-A and such order having remained unchallenged for all times, we are unable to agree with the argument advanced on behalf of the plaintiff.

21. Mr S.N. Bhat for the plaintiff sought to rely on Ext. P-8 and the other revenue entries containing the name of the plaintiff and the plaintiff's vendor to argue that the Commissioner's order vested the plaintiff's vendor with occupancy rights, and it is only in accordance with such order did the Revenue Authorities enter the plaintiff's vendor's name in the records. However, we are also unable to agree with such an argument.

22. It is trite law that revenue records are not documents of title.

23. This Court in *Sawarni* v. *Inder Kaur*[3] held that mutation in revenue records neither creates nor extinguishes title, nor does it have any presumptive value on title. All it does is entitle the person in whose favour mutation is done to pay the land revenue in question.

24. This was further affirmed in *Balwant Singh* v. *Daulat Singh*[4] wherein this Court held that mere mutation of records would not divest the owners of a land of their right, title and interest in the land.

25. In *Jitendra Singh* v. *State of M.P.*[5], this Court after considering a catena of judgments, reiterated the principle of law as follows: (SCC OnLine SC para 6)

> "*6*. … mutation entry does not confer any right, title or interest in favour of the person and the mutation entry in the revenue record is only for the fiscal purpose."

3 (1996) 6 SCC 223
4 (1997) 7 SCC 137
5 2021 SCC OnLine SC 802

26. We may also profitably refer to the decision of this Court in *Sita Ram Bhau Patil* v. *Ramchandra Nago Patil*[6] wherein it was held that there exists no universal principle that whatever will appear in the record of rights will be presumed to be correct, when there exists evidence to the contrary.

27. In the present case, the Commissioner's order distinctly denying the rights of occupancy to the plaintiff's vendor is evidence that renders these revenue entries unworthy of acceptance.

28. An examination of the sale deed executed in favour of the plaintiff, also tilts the balance against him. The deed simply states that the plaintiff's vendor traces her title not to a grant in her favour by the Government, but through a sale deed executed in her favour. Further, there is a categorical recital in the deed that the property is neither Inam land nor tenanted land, and that there is no legal impediment to the sale of such property. Some element of mischief being present is clear inasmuch as a relevant fact was concealed i.e. the plaintiff's vendor had indeed applied for occupancy rights under the Act but had failed to secure them. Such an application would never have been necessary, had the property not been Inam or tenanted land, thus laying bare the deficiency in the plaintiff's title. The High Court, while observing that there existed a lawfully registered sale deed in favour of the plaintiff, failed to identify this inherent defect in the title claimed by the plaintiff.

29. It is settled law that a vendor cannot transfer a title to the vendee better than he himself possesses, the principle arising from the maxim *nemo dat quod non habet* i.e. "no one can confer a better title than what he himself has". In the present case, the plaintiff's vendor having been denied the right of title in the land by the Commissioner's order, could not have conveyed the same to her vendee.

30. In contrast, when the sale deed dated 20-6-1984 executed in favour of the defendant is examined, there is an unequivocal and categorical recital that the vendor purchased the land from Shri K. Srinivasa Murthy, in whose favour occupancy rights were granted vide the Commissioner's order. A comparative study of the two sale deeds leaves none in doubt that the defendant's sale deeds, supported by the Commissioner's order, weigh heavier in the scales of justice as compared to the plaintiff's sale deed, which is only supported by revenue documents.

31. The deficiencies in the plaintiff's case are further revealed by the deposition of the plaintiff, wherein he has admitted that he had not seen the Commissioner's order, and that he "was not told that Smt Akula Yogamba is merely a tenant and that, she had no right over the land". The doctrine of caveat emptor tasks a vendee with the duty to diligently investigate the title he is purchasing, but the plaintiff in the present case has evidently shirked such duty for which the law cannot come to his rescue.

32. It is also curious to note that the plaintiff has placed on record endorsements issued by the Commissioner in favour of four other tenants, but has failed to produce one in his own vendor's name. We cannot help but take

6 (1977) 2 SCC 49

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an adverse view of the same against the plaintiff, since it only goes towards making denser the cloud which has been cast on the plaintiff's title.

33. The contention advanced on behalf of the plaintiff that through the record of rights the plaintiff has established his title by a preponderance of probabilities is not sustainable. As noted above, the plaintiff failed to produce a single document of title in respect of the suit property. In a dispute with respect to determination of title, merely pointing out the lacunae in the defendant's title would not suffice. Having instituted the suit for declaration, the burden of proof rested on the shoulders of the plaintiff to reasonably establish the probability of better title, which the plaintiff in the present case, has manifestly failed to do.

34. This Court in *Union of India* v. *Vasavi Coop. Housing Society Ltd.*[7], held as under: (SCC p. 275, para 15)

> "*15.* It is trite law that, in a suit for declaration of title, the burden always lies on the plaintiff to make out and establish a clear case for granting such a declaration and the weakness, if any, of the case set up by the defendants would not be a ground to grant relief to the plaintiff."

35. This decision was affirmed, and further elaborated upon, in *Jagdish Prasad Patel* v. *Shivnath*[8], wherein this Court has succinctly summarised the law on burden of proof in suits for declaration of title as follows: (SCC pp. 101-102, para 44)

> "*44.* In the suit for declaration of title and possession, the respondent-plaintiffs could succeed only on the strength of their own title and not on the weakness of the case of the appellant-defendants. The burden is on the respondent-plaintiffs to establish their title to the suit properties to show that they are entitled for a decree for declaration. The respondent-plaintiffs have neither produced the title document i.e. patta-lease which the respondent-plaintiffs are relying upon nor proved their right by adducing any other evidence. As noted above, the revenue entries relied on by them are also held to be not genuine. In any event, revenue entries for few khataunis are not proof of title; but are mere statements for revenue purpose. They cannot confer any right or title on the party relying on them for proving their title."

36. Mr S.N. Bhat placed reliance on the decision of this Court in *R.V.E. Venkatachala Gounder* v. *Arulmigu Viswesaraswami & V.P. Temple*[9] to contend that the plaintiff was only expected to prove his title to a high degree of probability and not beyond reasonable doubt. The principle of law argued by the learned Senior Counsel is not one we wish to dispute, the same having been well-settled through numerous decisions of this Court. However, having led in evidence only revenue documents which are essentially fiscal in nature, we have no hesitation in holding that in the present case, the plaintiff has been unable to assert his case to a high degree of probability. It is, therefore, not

7 (2014) 2 SCC 269 : (2014) 2 SCC (Civ) 66
8 (2019) 6 SCC 82 : (2019) 3 SCC (Civ) 112
9 (2003) 8 SCC 752

enough that the plaintiff led in evidence records of rights for a number of years in an attempt to establish his title; such records would not counter the proof of occupancy rights furnished by the defendant, in a test of probative value.

37. This Court in *Somnath Burman* v. *S.P. Raju*[10] held that possession can be regarded as a better title against all, except the true and lawful owner. Therefore, the multitude of revenue documents put to use to argue that the plaintiff was cultivating the suit property would not adequately meet the demands of proof made by law. The only credible document of title led as evidence in the present case was in favour of the defendant's predecessor-in-interest; hence, it must follow that it is only the defendant who can be declared the lawful owner of the 'B' schedule property.

38. In the light of the discussions made above, we hold that the trial court erred in decreeing the suit by placing on a higher probative pedestal the revenue entries. In our considered opinion, the first appellate court rightly overturned the findings of the trial court and dismissed the suit. The Commissioner's order was correctly interpreted to determine as to in whom occupancy rights vested in respect of the 'B' schedule property.

39. The first appellate court having examined the facts in extenso, the High Court ought not to have interfered with the findings rendered therein by virtue of being, in second appeal, a court of law. As was astutely said by this Court in *Gurdev Kaur* v. *Kaki*[11], a second appellate court is not expected to conduct a "third trial on facts" or be "one more dice in the gamble". The decision rendered by the first appellate court, not being in violation of the settled position of law, ought not to have been interfered with. With utmost respect to the High Court, we are constrained to observe that the question framed by it could be regarded as one of law, if it all, but did not merit the label of a substantial question of law so as to warrant interference with the first appellate decree under Section 100 CPC.

40. That apart, the High Court was remiss in reversing the findings of facts rightly arrived at by the first appellate court. The decision to adopt the trial court's approach of interpreting the Commissioner's order within the framework of the revenue records that were exhibited was yet another aspect in which the High Court fell in error. An attempt ought to have been made by the High Court to harmoniously read the Commissioner's order with the provisions of the Act and to interpret the same so as to render it in consonance with the law, the failure of which leads to the inescapable conclusion that the same is indefensible.

41. The sequitur of this discussion, with respect, is that the High Court while rendering the judgment and order under challenge proceeded on an erroneous approach and contrary to settled law. The plaintiff having failed to meet the burden of proof imposed on him by law, his suit against the defendant must fail.

10 (1969) 3 SCC 129
11 (2007) 1 SCC 546

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42. The impugned judgment and decree are, accordingly, set aside. The civil appeal stands allowed and the decree passed by the trial court, extracted hereinabove, is set aside with the result that the plaintiff's suit shall stand dismissed. There shall be no order as to costs.

43. We, however, make it clear that any observation made in this judgment may not prejudice the plaintiff's right, if any, in respect of "A" schedule property; if in future his right is put to jeopardy and the appropriate forum is approached to protect such right, such forum shall proceed to decide the lis on its own merits.

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REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1565 of 2025

(@SPECIAL LEAVE PETITION (C) NO. 11557/2019)

THE COSMOS CO. OPERATIVE BANK LTD. … APPELLANT(S)

VERSUS

CENTRAL BANK OF INDIA & ORS. … RESPONDENT(S)

J U D G M E N T

J.B. PARDIWALA, J.:

For the convenience of exposition, this judgment is divided into the following parts: -

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1. Leave granted.

2. This appeal arises from the judgment and order passed by the High Court of Judicature at Bombay (Civil Appellate Jurisdiction) dated 12.12.2018 in Writ Petition No.11324 of 2015, by which the writ petition filed by the appellant herein seeking to challenge the order passed by the (Debt Recovery Appellate Tribunal) (for short, the "**DRAT**") dated 28.08.2015 in Appeal No. 41 of 2007 came to be rejected thereby affirming the order passed by the DRAT.

A. <u>FACTUAL MATRIX</u>

3. The facts giving rise to this appeal may be summarised as under: -

(a) We take notice of the fact that the respondent nos. 2, 3 and 4 respectively, are the original borrowers. However, the respondent No.4 has passed away and therefore his name came to be deleted from the array of parties vide order dated 4.12.2020.

(b) The original borrowers on the strength of one unregistered agreement of sale availed loan facility from the Central Bank of India i.e. the respondent No. 1 to the tune of Rs.30,00,000/- approximately. What was offered by way of security was a flat which the original borrowers proposed to purchase from the developer and all that they had on the day and date when they went before the bank to avail the loan was an unregistered agreement of sale.

(c) It is not in dispute that the Central Bank on the strength of an unregistered agreement of sale sanctioned the loan creating a charge over the flat.

(d) Since the borrowers defaulted in the repayment of the loan, the Central Bank initiated proceedings for the recovery of the requisite amount before the Debt Recovery Tribunal-I, Mumbai (in short "the DRT"). The DRT Mumbai adjudicated the Original Application No. 74 of 2002 and held the borrowers jointly and severally liable to pay an amount of ₹43,15,405.56 paisa with interest thereon @15% per annum from the date of filing of the O.A. till its payment.

(e) The relevant observations made by the DRT, Mumbai in Para 8 reads thus: -

> *"8. In application affidavit of the applicant state that the Defendant No. 2 with intention to create mortgage deposited title deeds of her flat No. C-28, Sahyadari Apartment, L.T. Road, Borivali West, Bombay-400092 as security of the loan. sanctioned to Defendant No. l. To prove this fact the Applicant's side rely on Exh. 53, which is an unregistered memorandum. It being unregistered document itself is not sufficient to create the mortgage. The applicants state further on 04.02.1993, the Defendant No. 2 again attended Applicants office and re-deposited the title deeds of her flat on the enhanced, revised loan. The applicant's case about mortgage is based on the title deeds, the documents produced by Defendants to create the mortgage. That was primary evidence. It was not produced. Memorandum, Exh. 53 affidavit and pleading of applicant cannot take place. The applicant do not state or explain why that primary, basic evidence is not brought before the Tribunal. Unless these documents are on record, it cannot be assessed/ascertained whether those documents were sufficient to create mortgage or not. In all the circumstances, I hold the applicant failed in proving the Defendant No. 2 mortgaged her flat as a security of the loan given by the Applicants."*

(f) The operative part of the order passed by the DRT reads thus: -

"A) The Defendant No. 2 and 3 shall jointly and severally pay the amount of Rs. 43,15,405.56 ps (Rupees Forty Three Lacs Fifteen Thousand Four Hundred Five and Paise Fifty Six only) to the Applicant with interest thereon @ 15% p.a. from the date of filing of this application till the payment.
B) The defendant No. 2 shall pay the Applicant, the amount of Rs. 5,70,787.21 ps. (Rupees Five Lacs Seventy Thousand Seven Hundred Eight Seven and Paise Twenty One Only) as dues of Overdraft Accounts, Rs. 4,08,157.25 ps. (Rupees Four Lacs Eight Hundred One Hundred Fifty Seven and Paise Twenty Five only) as due of Short Term Loan Account, Rs. 2,25,498.45 ps. (Rupees Two Lacs Twenty Five Thousand Four Hundred Ninety Eight and Paise Forty Five only) as dues of Working Capital Loan with interest thereon @ 15% p.a.
C) The Applicant will be entitled to recover this amount from the hypothecation created by the defendants as mentioned in the application of the defendants fail to pay the above amount."

D) The defendants No. 2 & 3 shall pay cost of this Application to the applicant and to bear their own costs".

(g) The Central Bank of India had to file an appeal before the DRAT because of the observations made by the DRT in its order as contained in para 8 referred to above.

(h) The order passed by the DRAT, allowing the appeal filed by the Central Bank reads thus: -

"1. This appeal has been filed by the plaintiffs /appellant herein being aggrieved by the order dated 30/11/2006 passed by the learned Presiding Officer, DRT-I, Mumbai in O.A. No. 74 of 2002, whereby the learned Presiding Officer directed the defendant nos. 2 and 3 to jointly and severally pay the amount of Rs.43,15,405.56 ps. to the applicant with interest thereon @15% p.a. from the date of filing of the application till its payment. Further directed the defendant No. 2 to pay the amount of Rs.5,70,787.21 ps. as dues of Overdraft Accounts, Rs. 4,08,157.25 ps. as dues of Short Term Loan Account and Rs.2,25,498.45 ps. as dues of Working Capital Loan with interest thereon @15% p.a.

2. The ld. counsel for the appellant raised two grounds namely the description made by the defendant no.1 is not correct one and second ground is that the original title deeds have not been produced before this court. Hence he prayed that the appeal has to be allowed against the defendant no.1 alone. The suit has been dismissed against the defendant no.1. Anyhow the suit against the defendant nos. 2 and 3 has been decreed.

3. The contention of the ld. counsel for the appellant is that the defendant no.1 is real borrower and is sued in his personal capacity as proprietor of M/s. Ajanta Industries which is evident from Para No. 2. Hence he prayed that the appeal has to be allowed.

4. The contention of the respondent is that the mortgage has not been proved before the DRT. Hence the suit has been rightly dismissed. Thereafter respondent no. 4 has advanced the loan to the respondent no. 1 and thereafter the property is sold to the third person. Hence he prayed that the appeal has to be dismissed.

5. From the perusal it is seen that it has been mentioned that the respondent no.1 was sued in his personal and individual capacity as proprietor of M/s. Ajanta Industries as clearly set out in Para No.2. Hence as per Order 30 Rule 10 he has been properly described, hence the finding in this regard given by the DRT has to be set aside and in turn is set aside.

6. The next contention is that the original documents have not been produced before the trial court is not in dispute. Now it has been produced before this court which pertains to the mortgaged property and original agreement are now brought on record and is taken on record. It is pertinent to note that the original title deeds are with the appellants and mortgage is not denied by the guarantor. It is also clear that respondent no.4 do not have title deeds pertaining to the property and their alleged mortgage is very much subsequent to the mortgage of appellants. Hence, I am of the view that it can be accepted that the appellant bank has valid and subsisting mortgage in its favour and in turn mortgage is admitted and finding given by the DRT in this regard has to be set aside and the O.A. against the defendant no.1 also decreed and allowed as all parties are properly sued and joined.

7. The appeal is allowed.

8. Subsequent to sale by respondent no. 4 in favor of third party and amount of deposit is concerned, this point is left open to agitate before the appropriate forum."

(i) While the proceedings before the DRAT were pending in the form of appeal filed by the Central Bank of India, the appellant bank herein had to intervene, and they were also heard on the question as to which bank had the first charge over the security interest created by the original borrowers.

(j) The appellant bank herein being dissatisfied with the order passed by the DRAT referred to above challenged the same by filing a writ petition before the High Court. The High court proceeded on the footing that the DRAT was right in recording a finding that the mortgage of the flat in question created in favour of the appellant bank herein was subsequent in point of time and besides the same, the appellant bank had no valid title deeds with them at the time of sanctioning the loan in favour of the original borrowers.

(k) In short, the finding of fact recorded by the High Court in its impugned judgment is that the flat was mortgaged with the Central Bank of India on 31.10.1989, whereas the mortgage claimed by the appellant Bank herein was of October, 1998.

(l) The High Court observing as aforesaid, rejected the writ petition filed by the appellant herein. The relevant observations made by the High Court in its impugned judgment read thus: -

> *"6. By the impugned order, therefore, the DRAT had arrived at a clear finding of fact that the mortgage of the said flat to the Petitioner-Cosmos Bank is 'subsequent' to the mortgage of the Respondent-Central Bank apart from the fact that the Petitioner-Cosmos Bank did not have title deeds pertaining to the said flat. This finding was arrived at by DRAT as the said flat was mortgaged to the Respondent-Central Bank on 31-10-1989, whereas the mortgage claimed by the Petitioner-Cosmos Bank was of October 1998.*
>
> *7. It is brought out in the Affidavit-in-Reply of the Respondent-Central Bank that the Respondent-Central Bank had Initially filed a suit against the borrower/guarantors (Respondents Nos.2 to 4 herein) in this Court on 5 September 1994. By an interim order dated 20-10-1994, this Court had appointed a Court Receiver in respect of the said flat.*

> *8. It would thus be evident that at the time of sanction and grant of the Loan by the Petitioner-Cosmos Bank i.e. sometime in November 1998, the said flat was in custodia legis as the Court Receiver was appointed in the year 1994. In these circumstances, there appears to be substance in this submission of the learned Counsel for the Respondent-Central. Bank that the validity of the mortgage of the said flat in favour of the Petitioner-Cosmos Bank was even otherwise questionable. The suit which was filed in this Court was ultimately transferred to DRT only in the year 2002 and numbered as O.A.No. 74 of 2002. Before this Court, the Petitioner-Cosmos Bank have essentially relied upon the Share Certificate which was as a matter of fact issued by the Society only in the year 1989 (as the Society itself was formed in the year 1986-87) and Agreement for Sale dated 7-12-1978 (which is subsequent to Agreement for Sale dated 09-11-1978 relied upon by the Respondent-Central Bank). Both the Agreements are unregistered. It Is not even pleaded by the Petitioner-Cosmos Bank in the present Petition that the documents of title deeds relied upon by the Respondent-Central Bank were not credible or that the mortgage of the said flat in favour of the Respondent-Central Bank was not valid. In any event, it can be hardly disputed that the mortgage in favour of the Respondent- Central Bank was prior in point of time. In the circumstances, in our view, the DRAT rightly held in the impugned order that the alleged mortgage of the Petitioner-Cosmos Bank was subsequent in point of time to the mortgage of the Respondent-Central Bank.*
>
> *9. In view of the aforesaid discussion, we are unable to find fault with the impugned order of the DRAT. The Petition is, accordingly, dismissed. The Recovery Officer, DRT may now pass appropriate orders as regards the distribution of the sale proceeds of the said flat which has been deposited in the DRT."*

4. In such circumstances referred to above, the appellant bank is here before this Court with the present appeal.

B. SUBMISSIONS OF THE PARTIES

i. <u>Submissions on behalf of the appellant Cosmos Co. Operative Bank</u>.

5. The learned counsel appearing for the appellant bank vehemently submitted that the High Court committed an egregious error in rejecting the writ petition filed by his client and thereby affirming an equally egregious order passed by the DRAT.

6. He would submit that indisputably the first mortgage was created in favour of the Central Bank of India, but the said mortgage was invalid or rather having no force in law. According to him any bank, while sanctioning the loan would ensure that what is being offered by way of security is something valid. In such circumstances, when an unregistered agreement of sale was offered as a title deed, it was of no value as it is a settled law that agreement of sale does not confer any right title or interest. Far from being a registered agreement of sale, in the case on hand, what was offered by way of security to the Central Bank was an unregistered agreement of sale.

7. In the aforesaid context, the learned counsel first invited the attention of this Court to Section 54 of the Transfer of Property Act, 1884 (for short, the "**Act, 1884**") which defines the terms sale. Thereafter he invited the attention of this Court to Section 58 of the Act, 1884 which defines the term "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgage-deed".

8. He laid much emphasis on sub-section (a) of Section 58, which explains what is mortgage. Thereafter, he invited the attention of the Court to Section 100 of the Act, 1884 which explains what is “charge”.

9. The learned counsel thereafter invited the attention of this Court to certain provisions of the Maharashtra Ownership Flats (Regulation of the promotion of construction, sale, management and transfer) Act, 1963 (for short the "**Act 1963**") more particularly Section(s) 4, 4A and 11 therein, respectively.

10. He thereafter invited the attention of this Court to few provisions of the Maharashtra Apartment Ownership Act 1970 (for short the “**Act, 1970**”) more particularly the preamble to the Act and Sections 2, 4 and 5 respectively.

11. To fortify his submissions more particularly the principal contention that the respondent no. 1 Bank cannot be said to have the first charge over the mortgaged property, he relied on few decisions of this Court, which are as under:-

i. ***Suraj Lamp & Industries (P) Ltd. (2) through Director v. State of*** **Haryana and Another** reported in **(2012) 1 SCC 656** more particularly paras 16 and 19 respectively therein.

ii. **Bank of India v. Abhay D. Narottam and Others** reported in **(2005) 11 SCC 520** more particularly the observations made in paras 9 and 11 respectively therein.

iii. ***Anita Enterprises and Anr. v. Belfer Coop. Housing Society Ltd. and Ors.*** reported in **(2008) 1 SCC 285** more particularly the observations made in para 41 therein.

iv. **Dattatreya Shanker Mote and Ors. v. Anand Chintaman Datar and Ors.** reported in **(1974) 2 SCC 799** more particularly the observations made in para 67 therein."

12. In such circumstances referred to above, the learned counsel prayed that there being merit in his appeal, the same may be allowed and the impugned order passed by the High Court may be set aside.

ii. <u>Submissions on behalf of the respondent no.1; Central Bank of India</u>.

13. On the other hand, the learned counsel appearing for the Central Bank of India submitted that no error not to speak of any error of law could be said to have been committed by the High Court in passing the impugned order. He would submit that indisputably the first charge over the mortgaged property is that of the Central Bank.

14. At this stage, we must record that the learned counsel wanted to place few additional documents on record to make good his case that the view taken by the High Court is correct. However, considering the fact that this litigation is pending past almost 10 years, we declined such request.

15. We requested the learned counsel to proceed on the basis of the material on record and make good his case that the impugned order passed by the High Court needs no interference.

16. He would submit that there are concurrent findings recorded by the DRAT and by the High Court in so far as the validity of the mortgage is concerned and also which bank has the first charge over the mortgaged property.

17. In such circumstances, referred to above, the learned counsel would submit that there being no merit in this appeal, the same may be dismissed.

C. ISSUE FOR CONSIDERATION

18. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is whether the High Court committed any error in passing the impugned order.

D. ANALYSIS

i. Relevant Provisions

19. Before adverting to the rival submissions canvassed on either side, we must look into the few provisions of the law relevant for the purpose of deciding the present appeal which are as follows: -

SECTION(S) 58 AND 100 OF THE ACT, 1884.

> *"**58. "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgage-deed" defined.—***
> *(a) A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being arc called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.*
>
> *(b) Simple mortgage.— Where, without delivering possession of the*

mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

(c) Mortgage by conditional sale.— Where the mortgagor ostensibly sells the mortgaged property— on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void, or on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:

Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.

(d) Usufructuary mortgage.— Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage -money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

(e) English mortgage.— Where the mortgagor binds himself to re-pay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

(f) Mortgage by deposit of title-deeds.— Where a person in any of the following towns, namely, the towns of Calcutta, Madras, and Bombay, and in any other town which the State Government concerned may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immoveable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.

(g) Anomalous mortgage.—A mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of this section is called an anomalous mortgage."

*"**100. Charges.—***
Where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge. Nothing in this section applies to the charge of a trustee on the trust property for expenses properly incurred in the execution of his trust, 5 [and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge."

SECTIONS 4, 4A AND 11 RESPECTIVELY OF THE ACT, 1963

"***4. Promoter before accepting advance payment or deposit to enter into agreement and agreement to be registered. –***

(1) Notwithstanding anything contained in any other law, a promoter who intends to construct or constructs a block or building of flats, all or some of which are to be taken or are taken on ownership basis, shall, before, he accepts any sum of money as advance payment or deposit, which shall not be more than 20 per cent. of the sale price enter into a written agreement for sale with each of such persons who are to take or have taken such flats, and the agreement shall be registered under the Registration Act, 1908 (hereinafter in this section referred to as "the Registration Act") and such agreement shall be in the prescribed form."

(lA) The agreement to be prescribed and sub-section (1) shall contain inter alia the particulars as specified in clause (a); and to such agreement there shall be attached the copies of the documents specified in clause (b),-

(a) particulars,-

(i) if the building is to be constructed, the liability of the

promoter to construct it according to the plans and specifications approved by the local authority where such approval is required under any law for the time being in force;

(ii) the date by which the possession of the flat is to be handed over to the purchaser;

(iii) the extent of the carpet area of the flat including the area of the balconies which should be shown separately;

(iv) the price of the flat including the proportionate price of the common areas and facilities which should be shown separately, to be paid by the purchaser of flat; and the intervals at which instalments thereof may be paid;

(v) the precise nature of organisation to be constituted of the persons who have taken or are to take the flats;

(vi) the nature, extent and description of limited common areas and facilities;

(vii) the nature, extent and description of limited common areas and facilities, if any;

(viii) percentage of undivided interest in the common areas and facilities appertaining to the flat agreed to be sold;

(ix) statement of the use of which the flat is intended and restriction of its use, if any;

(x) percentage of undivided interests in the limited common areas and facilities, if any, appertaining to the flat agreed to be sold;

(b) copies of documents,-

(i) the certificate by an Attorney at law or Advocate under clause (a) of sub-section (2) of section 3;

(ii) Property Card or extract of village Forms VI or VII and XII or any other relevant revenue record showing the nature of the title of the promoter to the land on which the flats are constructed or are to be constructed;

(iii) the plans and specifications of the flat as approved by the concerned local authority.

(2) Any agreement for sale entered into under sub-section (1) shall be presented by the promoter or by any other person competent to do so under section 32 of the Registration Act, at the proper registration office for registration, within the time allowed under sections 23 to 26 (both inclusive) to the said Act and execution thereof shall be admitted before the registering officer by the person executing the document or his representative, assign or agent as laid down in sections 34 and 35 of the said Act also within the time aforesaid:

Provided that, where any agreement for sale is entered into, or is purported to be entered into, under sub-section (1), at any time before the commencement of the Maharashtra Ownership Flats (Regulation of the promotion of construction, sale, management and transfer) (Amendment and Validating Provisions) Act, 1983, and such agreement was not presented for registration or was presented for registration but its execution was not admitted before the registration officer by the person concerned, before the commencement of the said Act, then such document may be presented at the proper registration office for registration, and its execution may be admitted, by any of the persons concerned referred to above in this sub-section, on or before the 31st December 1984, and the registering officer shall accept such document for registration, and register it under the Registration Act, as if it were presented, and its execution was admitted, within the time laid down in the Registration Act:

Provided further that, on presenting a document for registration as aforesaid if the person executing such document or his representative, assign or agent does not appear before the registering officer and admit the execution of the document, the registering officer shall cause a summons to be issued under section 36 of the Registration Act requiring the executant to appear at the registration office, either in person or by duly authorised agent, at a time fixed in the summons. If the executant fails to appear in compliance with the summons, the execution on the document shall be deemed to be admitted by him and the registering officer may proceed to register the document accordingly. If the executant appears before the registering officer as required by the summons but denies execution of the document, the registering officer shall, after giving him a reasonable opportunity of being heard, if satisfied that the document has been executed by him, proceed to register the document accordingly.

4A. Effect of non-registration of agreement required to be registered under section 4.-
Where an agreement for sale entered into under sub-section (1) of section 4, whether entered into before or after the commencement of the Maharashtra Ownership Flats (Regulation of the promotion of construction, sale, Management and transfer) (Amendment and Validating Provisions) Act, 1983, remains unregistered for any reason, then notwithstanding anything contained in any law for the time being in force, or in any judgement, decree or order of any Court, it may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1963, or as evidence of part performance of a contract for the purposes of section 53A of the Transfer of Property Act, 1882, or as evidence of any collateral transaction not required to be effected by registered instrument.

xxx xxx xxx

11.Promoter to convey title, etc., and execute documents, according to agreement-
(1) A promoter shall take all necessary steps to complete his title and convey to the organisation of persons, who take flats, which is registered either as a co-operative society or as a company as aforesaid or to an association of flat takers or apartment owners, his right, title and interest in the land and building, and execute all relevant documents therefor in accordance with the agreement executed under section 4 and if no period for the execution of the conveyance is agreed upon, he shall execute the conveyance within the prescribed period and also deliver all documents of title relating to the property which may be in his possession or power.

(2) It shall be the duty of the promoter to file with the Competent Authority, within the prescribed period, a copy of the conveyance executed by him under sub-section (1).

(3) If the promoter fails to execute the conveyance in favour of the Cooperative society formed under section 10 or, as the case may be, the Company or the association of apartment owners, as provided by sub-section (1), within the prescribed period, the members of such Co-operative society or, as the case may be, the Company or the association of apartment owners may, make an application, in writing, to the concerned Competent Authority accompanied by the true copies of the registered agreements for sale, executed with the promoter by each individual member of the society or the Company or the association, who have purchased the

flats and all other relevant documents (including the occupation certificate, if any), for issuing a certificate that such society, or as the case may be, Company or association, is entitled to have an unilateral deemed conveyance, executed in their favour and to have it registered.

(4) The Competent Authority, on receiving such application, within reasonable time and in any case not later than six months, after making such enquiry as deemed necessary and after verifying the authenticity of the documents submitted and after giving the promoter a reasonable opportunity of being heard, on being satisfied that it is a fit case for issuing such certificate, shall issue a certificate to the Sub-Registrar or any other appropriate Registration Officer under the Registration Act, 1908, certifying that it is a fit case for enforcing unilateral execution, of conveyance deed conveying the right, title and interest of the promoter in the land and building in favour of the applicant, as deemed conveyance.

(5) On submission by such society or as the case may be, the Company or the association of apartment owners, to the Sub-Registrar or the concerned appropriate Registration Officer appointed under the Registration Act, 1908, the certificate issued by the Competent Authority alongwith the unilateral instrument of conveyance, the Sub-Registrar or the concerned appropriate registration Officer shall, notwithstanding anything contained in the Registration Act, 1908, issue summons to the promoter to show cause why, such unilateral instrument should not be registered as 'deemed conveyance' and after giving the promoter and the applicants a reasonable opportunity of being heard, may on being satisfied that it was fit case for unilateral conveyance, register that instrument as, 'deemed conveyance'.”

<u>SECTIONS 2, 4 AND 5 RESPECTIVELY OF THE ACT, 1970</u>

“2. Application of the Act. -

This Act applies only to property, the sole owner or all of the owners of which submit the same to the provisions of this Act by duly executing and registering a Declaration as hereinafter provided : Provided that, no property shall be submitted to the provisions of this Act, unless it is used or proposed to be used for residence, office, practice of any profession or for carrying on any occupation, trade or business or for any other type of independent use :

xxx xxx xxx

4. Status of apartments. –
Subject to the provisions of the second proviso to section 2 of this Act, each apartment, together with its undivided interest in the common areas and facilities, appurtenant to such apartment, shall for all purposes constitute heritable and transferable immoveable property within the meaning of any law for the time being in force in the State;

and accordingly, an apartment owner may transfer his apartment and the percentage of undivided interest in the common areas and facilities appurtenant to such apartment by way of sale, mortgage, lease, gift, exchange or in any other manner whatsoever in the same manner, to the same extent and subject to the same rights, privileges, obligations, liabilities, investigations, legal proceedings, remedies and to penalty, forfeiture and punishment as any other immoveable property, or make a bequest of the same under the laws applicable to the transfer and succession of immoveable property.

5. Ownership of apartments. –
(1) Each apartment owner shall be entitled to the exclusive ownership and possession of his apartment in accordance with the Declaration executed and registered as required by section 2 of this Act.

(2) Each apartment owner shall execute a Deed of Apartment in relation to his apartment in the manner prescribed for the purpose.”

20. Without any doubt in our mind, we say that the High Court fell in error more particularly, in view of, what has been observed in para 8 of the impugned order. The law is very well settled as explained by this Court in ***Suraj Lamp*** (supra) that a contract of sale i.e. an agreement of sale does not itself create any interest in or charge on any property. This is evident on plain reading of Section 54 of the Act, 1884 which we have referred to above.

21. In the aforesaid context, the decision of this Court in ***Abhay D. Narottam*** (supra) is also relevant more particularly the observations made in para 11 therein. Paras 9 and 11 read thus: -

> *"9. It is not necessary for us to determine the import of Section 125 of the Companies Act as we are of the opinion that the appeal must be dismissed on a much more basic ground. "Mortgage" has been defined in Section 58(a) of the Transfer of Property Act, 1882 as a transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, etc. Without a transfer of interest there is no question of there being a mortgage. The same principle would apply to a charge under Section 100 of the Transfer of Property Act. Section 100 provides that all the provisions which apply to a simple mortgage shall, so far as may be, apply to such charge. The definition of simple mortgage in Section 58(b) of the Act merely speaks of the procedure and describes that species of mortgage.*
>
> *xxx xxx xxx*
>
> *11. As far as the flat is concerned, it needs no authority to say that a contract for sale of immovable property does not of itself create any interest in or charge over such property. This is provided in Section 54 of the Act and is well-settled law. In this case, the agreement for sale which was deposited by Respondent 2 with the appellant Bank was not an agreement by which Respondent 2 agreed to sell the property to a third party, but an agreement to sell the flat to Respondent 2. No interest was created in favour of Respondent 2 by virtue of this agreement for sale which could have been transferred by way of security to the appellant Bank. There is as such no question of the appellant Bank having any charge over such non-existent interest."*

(Emphasis supplied)

22. The observations referred to above are directly applicable to the facts of the present case.

23. The observations made by this Court in ***Dattatreya Shanker Mote*** (supra), more particularly, in para 67 also assumes significance. Para 67 reads thus: -

> *"67. The contention was that, although a charge may not be described as "a transfer", yet, the result of Section 100 of the Act was to equate it with a simple mortgage which is a transfer because Section 100 says: "all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge". I think that, apart from the qualifying words, "so far as may be", used by Section 100 of the Act, a condition essential to the applicability of Section 48 of the Act is that there must be an actual transfer of property. Furthermore, another condition for invoking Section 48 of the Act is that the previous and the subsequently created rights "cannot all exist or be exercised to their full extent together". In the case before us, this does not appear from facts found. In any case, the prior right of the charge-holders could only obtain priority provided other things are not unequal. This follows from words used indicating that each of the two or more transactions must at least be a "transfer". Furthermore, the conditions of priority as between the holder of a previous charge and a subsequent simple mortgage are completely covered by Section 100 of the Act. The principle underlying Section 48 is one expressed in the maxim of Equity: "Qui prior est tempore potior est jure" (first in time is stronger in right). This principle, applied to ranking between rival equitable claims, is applied by Section 48 to contending claims of otherwise equal legal validity. The effect of Section 100 is that while a charge, which is not a "transfer" of property, gets recognition as a legally enforceable claim, that enforceability is subjected by the proviso to the requirements of a prior notice in order to give it precedence over a legally valid transfer of property. The rights of the appellants charge-holders could only be exercised, on facts found, subject to the priority obtained by the respondent mortgagee's rights. This clear result of the law, as contained in Section 100 of the Act, cannot be defeated by invoking either the terms of or the principles underlying Section 48 of the Act read with the first part only of Section 100 of the Act. If the respondent simple mortgagee Oswal could not have claimed the benefit of the proviso to*

Section 100, the first part of Section 100, read with Section 48 of the Act, could have come to the aid of the appellants. But, on the view adopted by me, this line of reasoning does not help the unfortunate charge-holders at all.”

(Emphasis supplied)

24. The observations made by this Court in ***Anita Enterprises*** (supra) in para 41 are also relevant. The para 41 reads thus: -

“41. It appears to us that the status of a member in a tenant co-partnership housing society is very peculiar. The ownership of the land and building both vests in the society and the member has, for all practical purposes, right of occupation in perpetuity after the full value of the land and building and interest accrued thereon have been paid by him. Although de jure he is not owner of the flat allotted to him, but, in fact, he enjoys almost all the rights which an owner enjoys, which includes right to transfer in case he fulfils the two preconditions, namely, he occupies the property for a period of one year and the transfer is made in favour of a person who is already a member or a person whose application for membership has been accepted by the society or whose appeal under Section 23 of the Societies Act has been allowed by the Registrar or to a person who is deemed to be a member under sub-section (1-A) of Section 23 of the Societies Act. In case any of these two conditions is not fulfilled, a member cannot be said to have any right of transfer. Thus, we reiterate the law laid down by this Court in Sanwarmal [(1990) 2 SCC 288] that a member has more than a mere right to occupy the flat, meaning thereby higher than tenant, which is not so in the case of a tenant within the meaning of Section 5(11) of the Rent Act. This being the position, we have no difficulty in coming to the conclusion that the status of a member in the case of tenant co-partnership housing society cannot be said to be that of a tenant within the meaning of Section 5(11) of the Rent Act, as such there was no relationship of landlord and tenant between the Society and the member.”

(Emphasis supplied)

25. The observations made by this Court in ***Suraj Lamp*** (supra) in paras 16 and 19 are also relevant. The paras 16 and 19 respectively read thus: -

“Scope of an agreement of sale

16. Section 54 of the TP Act makes it clear that a contract of sale, that is, an agreement of sale does not, of itself, create any interest in or charge on such property. This Court in Narandas

Karsondas v. S.A. Kamtam [(1977) 3 SCC 247] observed: (SCC pp. 254-55, paras 32-33 & 37)

> *"32. A contract of sale does not of itself create any interest in, or charge on, the property. This is expressly declared in Section 54 of the Transfer of Property Act. (See Ram Baran Prasad v. Ram Mohit Hazra [AIR 1967 SC 744 : (1967) 1 SCR 293] .) The fiduciary character of the personal obligation created by a contract for sale is recognised in Section 3 of the Specific Relief Act, 1963, and in Section 91 of the Trusts Act. The personal obligation created by a contract of sale is described in Section 40 of the Transfer of Property Act as an obligation arising out of contract and annexed to the ownership of property, but not amounting to an interest or easement therein.*
>
> *33. In India, the word 'transfer' is defined with reference to the word 'convey'. … The word 'conveys' in Section 5 of the Transfer of Property Act is used in the wider sense of conveying ownership.*
>
> ***
>
> *37. … that only on execution of conveyance, ownership passes from one party to another…."*

xxx xxx xxx

19. Any contract of sale (agreement to sell) which is not a registered deed of conveyance (deed of sale) would fall short of the requirements of Sections 54 and 55 of the TP Act and will not confer any title nor transfer any interest in an immovable property (except to the limited right granted under Section 53-A of the TP Act). According to the TP Act, an agreement of sale, whether with possession or without possession, is not a conveyance. Section 54 of the TP Act enacts that sale of immovable property can be made only by a registered instrument and an agreement of sale does not create any interest or charge on its subject-matter."

(Emphasis supplied)

26.*Suraj Lamp* (supra) later came to be referred to and relied upon by this Court in ***Shakeel Ahmed v. Syed Akhlaq Hussain*** reported in **2023 SCC OnLine SC 1526** wherein the Court after referring to its earlier judgment held that the person relying upon the customary documents cannot claim to be the owner of the immovable property and consequently not maintain any claims against a third-party. The relevant paras read as under: -

> *"10. Having considered the submissions at the outset, it is to be emphasized that irrespective of what was decided in the case of Suraj Lamps and Industries (supra) the fact remains that no title could be transferred with respect to immovable properties on the basis of an unregistered Agreement to Sell or on the basis of an unregistered General Power of Attorney. The Registration Act, 1908 clearly provides that a document which requires compulsory registration under the Act, would not confer any right, much less a legally enforceable right to approach a Court of Law on its basis. Even if these documents i.e. the Agreement to Sell and the Power of Attorney were registered, still it could not be said that the respondent would have acquired title over the property in question. At best, on the basis of the registered agreement to sell, he could have claimed relief of specific performance in appropriate proceedings. In this regard, reference may be made to sections 17 and 49 of the Registration Act and section 54 of the Transfer of Property Act, 1882.*
>
> *11. Law is well settled that no right, title or interest in immovable property can be conferred without a registered document. Even the judgment of this Court in the case of Suraj Lamps & Industries (supra) lays down the same proposition. Reference may also be made to the following judgments of this Court:*
>
> *(i). Ameer Minhaj v. Deirdre Elizabeth (Wright) Issar-(2018) 7 SCC 639*
>
> *(ii). Balram Singh v. Kelo Devi Civil Appeal No. 6733 of 2022*
>
> *(iii). Paul Rubber Industries Private Limited v. Amit Chand Mitra SLP(C) No. 15774 of 2022.*
>
> *12. The embargo put on registration of documents would not override the statutory provision so as to confer title on the basis of unregistered documents with respect to immovable property. Once this is the settled position, the respondent could not have maintained the suit for possession and mesne profits against the appellant, who was admittedly*

> *in possession of the property in question whether as an owner or a licensee.*
>
> *13. The argument advanced on behalf of the respondent that the judgment in Suraj Lamps & Industries (supra) would be prospective is also misplaced. The requirement of compulsory registration and effect on non-registration emanates from the statutes, in particular the Registration Act and the Transfer of Property Act. The ratio in Suraj Lamps & Industries (supra) only approves the provisions in the two enactments. Earlier judgments of this Court have taken the same view."*

iii. <u>Concept of Equitable Mortgage</u>.

27. The question whether Central Bank of India i.e., the respondent no. 1 herein had a valid mortgage or not can be looked at from one another angle. It is an undisputed fact that the original borrowers herein whilst availing the loan facility from the respondent no. 1 bank herein had offered the said flat in question as a security, and pursuant to the same had willingly deposited the agreement of sale in respect of the same with the respondent no. 1 bank.

28. Although, indisputably as discussed in the foregoing paragraphs the said agreement to sale can by no means be treated as title deeds to the said flat and as such would not constitute a mortgage in terms of Section 58 of the Act, 1884, yet could it be said that there was no charge created on the said flat at all by the original borrowers? Could it be argued that the failure to deposit the share certificate to the said flat at the time of availing the loan for whatsoever reasons by a necessary implication nullifies the charge that was intended or sought to be created over the said flat in favour of the appellant bank herein, merely because the agreement to sale in itself does not purport any title even though the intention of the parties was to create a charge over the flat? The answer to the same has to be an emphatic “No”.

29. Before we proceed to explain the aforesaid, it would be apposite for us to understand the concept of “Equitable Mortgage”. Under the English Law, broadly there are two kinds of mortgages; **(i)** a legal mortgage and **(ii)** an equitable mortgage. A ‘legal mortgage’ entails creation of a charge by way of conveyance of a proprietary interest over the property or security in favour of the lender in accordance with the formalities set out under the Law of Property Act, 1925. This is typically effectuated through execution of a deed of charge or a mortgage deed simpliciter. While such conveyance need not involve transfer of the title or ownership in itself nor is the conveyance required to be physical or actual and may be symbolic in nature where the borrower or mortgagor continues to retain possession or even title of the mortgaged property; however, the *de jure* effect of such conveyance must be in the nature of vesting the lender with an enforceable right to take possession, to foreclose or to sell the property in the event of default. Thus, the legal effect of the deed of charge or mortgage must convey certain enforceable rights in favour of the lender or mortgagor over the mortgaged property even though the title or ownership may not be transferred.

30. However, there may be instances where the parties agree to mortgage a property as security, but no formal charge or conveyance of any proprietary interest in the said property has taken place, still the same may be recognized as a mortgage. This is popularly understood as an 'equitable mortgage' where although under the law the formalities required for creating a legal charge or mortgage over a property are patently absent, yet the said property would be in equity deemed to have been mortgaged and as such may be apportioned or appropriated by the lender on the strength of mere intention of the parties to create a mortgage. In other words, where under the law no mortgage or charge is said to have been created over a property i.e., no conveyance of a right or interest over the subject property has been effected, yet if the intention of parties to create a mortgage is clear, equity would demand that such intention is not only respected but given some effect to and the said property be deemed to have been mortgaged so as to enable the lender to assert its rights over the same, it is known as an 'equitable mortgage'.

31. The concept or doctrine of 'equitable mortgage' owes its origin to the English case of ***Russel v. Russel*** reported in **[1783] 28 E.R. 1121** wherein the High Court of Chancery speaking through Lord Thurlow held that where there is delivery of title by the borrower to the lender for the purpose of availing a loan, although such deposit may not constitute a valid mortgage, but the courts in granting specific performance to the lender to create a security or lien over the property would effectively be "*supplying the legal formalities necessary to create nothing but a mortgage though one in equity*". He explained that the court in permitting the lender to create a security over the property on the strength of the title deeds lying with it is not per se performance of a contract but rather its execution and hence for all purposes would be a mortgage inter se the borrower and the lender in equity. He lastly elaborated that the further grant of relief to execute such a contract which is not a valid mortgage but nevertheless being converted into one is grounded on it being already being a contract part performed. [See; J.B. White & Tudor in Equitable Mortgage and Leading Cases in Equity, 9th Ed. (Sweet & Maxwell (1928)]

32. Thus, the underlying distinction between a legal mortgage and an equitable mortgage under the English Law is that in the former, there is conveyance or transfer of some proprietary interest in the mortgaged property in accordance with the statute or law whereas in the latter the formalities required for a legal mortgage are not fully satisfied, but the parties' intentions to create a mortgage are clear as result of which it is deemed as a mortgage.

33. The rationale behind the existence of the concept of an ‘equitable mortgage’ was elaborated upon by Sir William Holdsworth in *A History of English Law.* He explained that the evolution of equitable mortgage is based on the principle that a mortgage at its core is essentially nothing more than a ‘security’. It is not intended as a mechanism of transferring either ownership or any vested interest in the strict sense but rather only a means for providing a security. He elaborated how ‘equitable mortgages’ of today’s time is a reflection of the practicalities of the then mercantile system of the time where due to the commercial exigencies and need for quick financial arrangements led the community to resort to the informal practice of extending loans and creating security by mere deposit of titles or a promissory note to repay solely on a ‘mutual understanding’ between the parties, without any actual agreement or memorandum and without following the cumbersome formalities of any transfer of conveyance of proprietary rights as required under a traditional or legal mortgage.

34. The aforesaid may be better understood through the well-known maxim of ‘*Quod fieri debuit pro facto censetur*’ which means that ‘*what ought to have been done is considered as done*’. Edward Henry Turner Snell in his book on *The Principles of Equity* explained that the role of equity in law is only one i.e. to rectify the injustice arising out of the rigidities of the law, to intervene and ensure that substantive justice prevails over mere formalities or hyper technicalities, even when strict legal requirements have not been met. Snell articulated that equity operates as a "court of conscience" tempering the harshness of the law and fulfilling its enduring mission to deliver fairness and justice where the rigid application of legal rules would otherwise result in inequity. In the context of mortgages, take a situation where there is no express document or deed to evince that a charge was created over the subject property and the parties at the time of availing the loan merely agreed that they would create a mortgage in the event of default. In the eyes of law, it would be said that no mortgage has been created whatsoever, yet the understanding between the parties to later create a mortgage at the time whilst advancing the loan shows the *ab initio* intention to create a charge and treat the subject property as a security or a collateral for the sum so advanced. Under the general principle of law, the recourse that would ordinarily be available to the lender in the aforesaid situation would be to seek specific performance of the said agreement (oral or written) to create a mortgage on the strength that there has been part performance of the agreement i.e., loan has been advanced and thus, charge should now be permitted to be created, and thereafter proceed to exercise its rights after the said mortgage is created. But a "court of conscience" would instead of subjecting the lender to the rigmarole of the law, will directly give effect to the true sum and substance of the intention of the parties and thereby give to the very agreement itself the effect of creating a mortgage in 'equity' and enable the lender to exercise its rights as he would be entitled to if the agreement had been performed.

35. Thus, where a borrower willingly parts away with any title deed or a document or a promissory note or an undertaking in respect of a property by depositing it with the lender for the purpose of availing any credit facility and upon such deposit, the loan is so advanced by the lender, fairness, good conscience and justice or in other words 'equity' would demand that some meaningful significance be given to such act or conduct of the parties, as generally such act of depositing documents against loans is more often than not for no other purpose but to create a mortgage. Thus, a “court of conscience” would give effect to the intention of the parties in the form of an ‘equitable mortgage’ even if there is no formal agreement or a shred of document expressly providing that such deposit is for the purpose of creating a charge **OR** if the documents so deposited do not necessarily have the effect of transferring or conveyancing any title or interest in the subject property to the lender.

iv. Nature of an Equitable Mortgage.

36. Having understood the concept of ‘equitable mortgage’, it would now be apposite to understand the ways in which an equitable mortgage may be created and its nature. Under the English Law, the two primary ways for creating an ‘equitable mortgage’ is either **(i) by deposit of the original title deeds to the subject property with the lender** or where the original title deeds are retained by the borrower then **(ii) by way of a memorandum of understanding or an agreement simpliciter recording the intention of the parties to create a charge over the subject property**.

37. In the case on hand, the original borrowers had availed loan facilities from both, the appellant bank and the respondent no. 1 bank herein by deposit of certain documents in respect of the said Flat. For availing the loan facility from the respondent no. 1 bank, the original borrowers deposited two unregistered agreement to sale dated 15.10.1973 and 09.11.1978 respectively in relation to the said Flat all the way back in 1989. Whereas, whilst availing the loan facility from the appellant bank herein in the year 1998 the original borrowers deposited one another unregistered agreement to sale dated 07.12.1978 in respect of the said flat which is subsequent in time along with a share certificate of ownership of the said Flat dated 14.09.1989 that was issued by the concerned cooperative housing society.

38. Indisputably, when the loan was granted to the original borrowers, the share certificate of ownership being the sole document for conveyance of title had not been issued by the concerned housing society. In such a scenario, could it be said that in order to create a mortgage by deposit of title deeds, the respondent no. 1 bank was required to take or collect all documents and deeds of title to the said Flat in its possession, more particularly when the title deed or share certificate of ownership was not in existence at that time?

39. The High Court of Chancery in ***Robberts v. Croft*** reported in **44 E.R. 887** and a catena of other decisions have emphatically answered the aforesaid question in a negative. It has been held that *"[...] It is not necessary, to create an equitable mortgage, that all the title deeds, or even all the material title deeds, should be deposited. It is sufficient if the deeds deposited are material evidence of title."*

40. In fact, the English Courts have gone to the extent of saying that the title deeds are not the only documents a deposit of which may create an equitable charge upon the subject property, and that even a promissory note or an agreement for purchase of the subject property can create an equitable mortgage. [See; ***Ex parte Warner***, reported in **[1812] 19 Ves Jr 202**; ***Lacon v. Allen*** reported in **[1856] 3 Drew. 579**]. Samuel Miller in *The Law of Equitable Mortgages* explained the aforesaid with a illustration that take a case where the owner has lost an important deed or where the deeds which have been deposited while purporting title to the property contain no reference to any other material deeds, or a situation where there exists no possible way for the lender to ascertain whether any other deeds or documents are actually outstanding, should the lender be deprived of the benefit of the deposit of the other documents even if the intention of parties to create a mortgage is clear? In his opinion, the principle underlying the doctrine of 'equitable mortgages' is premised to mitigate these very hardships or technicalities that often emerge in transactions of such nature from coming in the way of creation and enforcement of mortgages. He added, to hold otherwise, would be nothing but an unfaithful dilution of the doctrine of equitable mortgages and by extension the concept of 'equity' based justice. This is because for deciding a question of an equitable mortgage, the court is not required to look for deposit of a <u>valid legal title</u>, because no passing or transfer of title is involved in the first place in equitable mortgage unlike a legal mortgage, rather what the courts look for is a transaction in the nature of a contract whereby the interests of the borrower embraced in the subject property may be later subjected and made liable for the debt.

41. Even though, the High Court of Chancery speaking through Lord Eldon in the case of ***In Re: Rice*** reported in **[1819] 36 E.R. 632** argued against the idea of extending the doctrine of 'equitable mortgage' to instances of deposit of 'part-deeds' to discourage the act of scrupulous borrowers of obtaining loans from multiple creditors by dividing and depositing different deeds with each of them, the position under the English Law has continued to remain the same i.e., part deposits of title would be sufficient to create an equitable mortgage and that there is neither any requirement that the mortgagee or the lender should be required to acquire every title deed, nor is there any requirement that the documents so deposited show a good title to the vested property. [See; ***Robberts*** (supra). What is required is that the deeds or documents so deposited materially evinces the intention of the parties to create a charge over the subject property and the mortgagor assures itself that he has acquired all available titles or documents.

42. The Court of Chancery speaking through Lord Eldon in ***Knight v. Knight*** reported in **(1840) 3 Beav 148** held that "*equity looks to the intent rather than the form*". Thus, even if the document that was deposited with the lender falls short, it would still be enforceable in equity provided the intention of the parties to do so is as clear as a noon day. In the case at hand, even though what was deposited with the respondent no. 1 bank herein was nothing but an unregistered agreement to sale having no legal effect of conveyance or transfer of the said flat or any right therein in favour of the bank, the undisputed factum that the said agreement to sale was deposited by the original borrowers herein so as to offer the said flat as security would tantamount to an equitable mortgage. Moreover, since at the time of availing the loan, the share certificate of ownership to the said Flat was yet to be issued, it could be said that the respondent no. 1 bank had all the documents to the said Flat that it could have at that time possibly taken in possession, and we even proceed on the footing that the respondent no. 1 bank might have undertaken all the necessary steps to assure itself that there were no other material documents to be taken possession of at the time of extending the loan.

43. Thus, where 'equitable mortgages' have been created based on deposit of part-deeds or documents purporting title or evincing intention of parties to create an interest, all such deposits will be a valid mortgage in equity and the charge that might have been created prior in time will assume priority over any subsequent charges or mortgagors. However, since such a mortgage is an 'equitable mortgage' any rights flowing from such mortgages are only of personal character and only rights *in personam* and as such will not operate against any strangers or subsequent incumbrancers unaware of such equitable mortgage. This stems from the rule that equity acts only *in personam*. The very basis for creation of an 'equitable mortgage' is the intention of parties alone, and as such any action or remedy can be directed only against the parties so involved. This is because, unlike a legal mortgage where a 'charge' is created directly on the property itself and the title or any proprietary interest therein is transferred to the lender thereby becoming a right enforceable in rem in respect to the property, in case of an 'equitable mortgage' no such charge is said to have been formally created on the property nor any transfer or conveyance of interest has said to occur. Rather on the contrary, the *de jure* title or ownership continues to vest with the original borrower and only the documents thereof is ordinarily retained by the lender and as such the right of the lender in such a situation is being enforced through the party having title over the said property alone i.e., the borrower and thus is only a right in *personam*. Edgar N. Durfee in *The Lien or Equitable Theory of the Mortgage* explaining the aforesaid stated that, in cases of equitable mortgage in the absence of any 'conveyance' or creation of 'charge', the money so advanced against the subject property is only in the form of a personal debt and hence a right in *personam* at best and the right of the lender to apportion or appropriate the subject property for repayment of loan only a right to take such an action rather than a right in the property itself.

44. 'Equitable Mortgage' being a right in *personam* will not affect successive incumbrances and will not be enforceable against successive mortgagees if the creation of such equitable charge was no disclosed to them. This is particularly because, 'equitable mortgages' are construed as 'incomplete mortgages' (as no actual charge is created nor any conveyance of title has taken place) and thus no person can be permitted to derive any advantage from any incomplete title who has on his own volition not done everything requisite to complete its title. If a first mortgagee voluntarily either leaves the title deeds with the mortgagor, or voluntarily accepts part-deeds and fails to either secure the rest or assure himself of any outstanding deeds or documents, then the charge of such first mortgagee must be postponed to any and all subsequent mortgagees, without notice of the charge of first mortgagee, because he due to his own gross negligence enabled the subsequent incumbrances. Thus, even if multiple equitable mortgages are created, the first charge will have priority, unless in case of fraud or gross negligence, or a voluntary, distinct, and unjustifiable concurrence, on the part of the first mortgagee in either **(i)** retaining the remaining deeds or **(ii)** failure to take steps in putting everyone to notice, more particularly the subsequent incumbrancers about the first equitable mortgage. Where the first mortgagor has made *bond fide* inquiry for them and received a reasonable excuse for their non-delivery, he shall not be postponed to a subsequent equitable mortgage that may be created.

45. In India, the aforesaid has been recognized in Section 78 of the Act, 1882 which provides that where on account of any fraud, misrepresentation or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee. The said provision reads as under: -

> ***78. Postponement of prior mortgagee. —***
> *Where, through the fraud, misrepresentation or gross neglect of prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee.*

46. It is in this very context, this Court in ***Suraj Lamps*** (supra) emphasized on the need for registration of documents so as to give publicity and public exposure to various transactions in respect of immovable properties and enable people to find out whether any particular property with which they are concerned, has been subjected to any legal obligation or liability and who is or are the person/s presently having right, title, and interest in the property. The relevant observation reads as under: -

> *Advantages of Registration*
> *10. In the earlier order dated 15.5.2009, the objects and benefits of registration were explained and we extract them for ready reference: -*
>
> > *"The Registration Act, 1908, was enacted with the intention of providing orderliness, discipline and public notice in regard to transactions relating to immovable property and protection from fraud and forgery of documents of transfer. This is achieved by requiring compulsory registration of certain types of documents and providing for consequences of non-registration.*
> >
> > *Section 17 of the Registration Act clearly provides that any document (other than testamentary instruments) which purports or operates to create, declare, assign, limit or extinguish whether in present or in future "any right, title or interest" whether*

> *vested or contingent of the value of Rs. 100 and upwards to or in immovable property.*
>
> *Section 49 al the said Act provides that no document required by Section 17 to be registered shall, affect any immovable property comprised therein or received as evidence of any transaction affected such property, unless it has been registered. Registration of a document gives notice to the world that such a document has been executed.*

Registration provides safety and security to transactions relating to immovable property, even if the document is lost or destroyed. It gives publicity and public exposure to documents thereby preventing forgeries and frauds in regard to transactions and execution of documents. Registration provides information to people who may deal with a property, as to the nature and extent of the rights which persons may have, affecting that property. In other words, it enables people to find out whether any particular property with which they are concerned, has been subjected to any legal obligation or liability and who is or are the person/s presently having right, title, and interest in the property. It gives solemnity of form and perpetuate documents which are of legal importance or relevance by recording them, where people may see the record and enquire and ascertain what the particulars are and as far as land is concerned what obligations exist with regard to them. It ensures that every person dealing with immovable property can rely with confidence upon the statements contained in the registers (maintained under the said Act) as a full and complete account of all transactions by which the title to the property may be affected and secure extracts/copies duly certified."

(Emphasis supplied)

47. In the present case, it appears from the materials on record, that when the loan was being advanced by the respondent no. 1 bank, a Memorandum of Equitable Mortgage recording transfer / deposit of the agreement to sale in respect of the said Flat was sought to be created, although the same has not been placed on record. There are no correspondences or communications between the respondent no. 1 bank or the original borrowers where the share certificate of ownership was demanded, even though the Bank was well aware that the conveyance of title where the subject Flat is situated only takes place through such certificate and not by the agreement of sale in terms of Section 11 of the Act, 1963 read with Section 4 of the Act, 1970. Moreover, it appears that no steps were taken by the respondent no. 1 bank to issue a public notice of equitable charge that was created in its favour, as discernible from the fact that when the appellant bank upon inquiry was informed by the concerned cooperative housing society that the said flat was not subject to any prior encumbrances or charge. In such a scenario, the equitable charge of the respondent no. 1 bank herein is liable to be postponed to the charge created in favour of the appellant bank herein in terms of Section 78 of the Act, 1882, and the impugned order of the High Court is liable to be set-aside on this ground alone.

v. **Distinction between Mortgage by Deposit of Title Deeds under the English Law and under the Transfer Of Property Act, 1882.**

48. At this stage we must also address ourselves on one another important aspect where the High Court grossly erred whilst passing the impugned judgment and order. As discussed in the foregoing paragraphs of this judgment, the original borrower whilst availing the loan facility from the respondent no. 1 and appellant, had deposited with them two unregistered agreement to sale, and another unregistered agreement to sale along with the share certificate of ownership, respectively. Although both of the aforesaid transactions seek to create mortgage by deposit of documents or title, yet there lies a very fine but pertinent distinction between the two transactions. In respect of the loan advanced by the respondent no. 1 bank, only two unregistered agreements to sale were deposited which as discussed earlier do not purport any title as held in ***Suraj Lamps*** (supra) while with the appellant bank herein apart from one unregistered agreement to sale the share certificate of ownership had also been deposited which has the effect of conveyance of title.

49. Under the English Law, whether the documents so deposited actually purport or transfer any title is immaterial for the purpose of creating an 'equitable mortgage' as long as the intention to do so is clearly discernible. The position in India however is quite different. This is because under the English Law, a mortgage created by deposit of title or documents is not construed as a legal mortgage and is only treated as an equitable mortgage. Whereas in India under the Act, 1882, more particularly under Section 58 sub-section (f) a statutory recognition has been given to the mode of creation of mortgage by deposit of title deeds. Such a mortgage by deposit of title deeds is for all purposes a 'legal mortgage' and not an equitable mortgage. At the cost of repetition, the said provision is once again reproduced hereunder: -

> *"**58. "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgage-deed" defined.—***
> *(a) A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.*
>
> *The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being arc called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.*
>
> *(b) Simple mortgage.— Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.*
>
> *(c) Mortgage by conditional sale.— Where the mortgagor ostensibly sells the mortgaged property— on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void, or on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:*
>
> *Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.*
>
> *(d) Usufructuary mortgage.— Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the*

> *mortgage -money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.*
>
> *(e) English mortgage.— Where the mortgagor binds himself to re-pay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.*
>
> *(f) Mortgage by deposit of title-deeds.— Where a person in any of the following towns, namely, the towns of Calcutta, Madras, and Bombay, and in any other town which the State Government concerned may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immoveable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.*
>
> *(g) Anomalous mortgage.—A mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of this section is called an anomalous mortgage."*

50. Section 58 sub-section (a) stipulates the general rule that mortgage is "*the transfer of an interest in specific immoveable*" or as understood under the English Law as a "legal mortgage". Section 58 sub-section(s) (b) to (g) further explains the different modes to create a mortgage under the Act, 1882. What is particularly important to note is the fact that, the subsequent sub-section(s) do not either expressly or impliedly stipulate that no transfer of interest is taking place where mortgage is created in terms of the other modes provided therein. There is also nothing in the entire Act, 1882 that mortgage created by one particular mode under Section 58 would be subservient to another. In such a scenario, any mortgage that happens to be created in terms of the Act, 1882 more particularly Section 58 would for all purposes be equal except in the consideration of priority of charge. Thus, while mortgage by deposit of title deeds under the English Law is an equitable mortgage and subservient to a legal mortgage, in India mortgage created by such deposit is not subservient to an equitable mortgage as such mortgage is in itself a legal mortgage.

51. Deposit of title deeds is one of the many forms of mortgages whereunder there is a transfer of interest in specific immovable property for the purpose of securing payment of money advanced or to be advanced by way of loan. The three requisites for a valid mortgage are, (i) debt; (ii) deposit of title deed; and (iii) an intention that the deed shall operate as security for the debt. In other words, when the debtor deposits with the creditor title deeds of his property with an intent to create a security, the law implies a contract between the parties to create a mortgage and no registered instrument is required under Section 59 of the Act, 1882 as in other classes of mortgage. It is essential to bear in mind that the essence of a mortgage by deposit of title deeds is the actual handing over by a borrower to the lender of documents of title to immovable property with the intention that those documents shall constitute a security which will enable the creditor ultimately to recover the money which he has lent. Whether there is an intention that the deed shall be security for the debt is a question of fact to be decided in each case on its own merits. The said fact will have to be decided just like any other fact based on legal presumptions, oral, documentary and/or circumstantial evidence. Normally, title deeds are delivered to the bank along with a covering letter indicating therein an intention of delivering title deed i.e. to create security for the present or future liability. In turn, bank gives a letter to the person delivering title deeds indicating acceptance of the documents and/or title deeds by way of security either for the outstanding dues or for the loan to be advanced. The banks, normally, maintain register of securities called Equitable Mortgage Register; wherein the entry of title deeds is taken in the form of memorandum signed by the Branch Manager alone, as a person accepting delivery of the documents as security. **These formalities are done to establish three essential requisites of equitable mortgage, viz. (1) debit, (2) deposit of title deed and (iii) the intention that deed shall operate as security for the present or future debt.** But if the parties choose to reduce the contract to writing, this implication of law is excluded by their express bargain, and the document will be the sole evidence of its terms. In such a case the deposit and the document both form integral parts of the transaction and are essential ingredients in the creation of the mortgage.

52. Thus, when the original borrowers deposited with the appellant bank herein, the share certificate of ownership to the said Flat, on that very day and date, a legal charge is said to have been created on the flat in favour of the appellant bank, whereas, when it comes to the respondent no. 1 bank no such charge on the flat was created, rather what was created was only an equitable mortgage, though prior in time. This distinction is particularly important, because even if the agreements to sale deposited with the respondent no. 1 bank were registered and thereby, giving public notice of their existence, still the appellant bank by virtue of possession of the actual title deeds to the said Flat in the form of the share certificate of ownership would be accorded priority in charge for the sole reason that the charge created by it is a legal mortgage in terms of Section 58 of the Act, 1882. At this stage, we may clarify that deposit of part-deeds of title would not constitute a mortgage in terms of Section 58 sub-section (e) of the Act, 1882 unlike English Law, because under the latter such deposit is only an equitable mortgage and thus, the strict rigidities may not be imposed or insisted upon whereas in India mortgage by deposit of title deeds is a legal mortgage which in effect would defeat any equitable mortgage, and thus, the requirement to deposit all title deeds would have to mandatorily be required except those deeds which despite best of efforts of the mortgagee could not have been deposited or known to be outstanding.

53. The underlying reason behind why an equitable mortgage would be subservient to a legal mortgage, even where proper notice was effectuated may be understood in many different ways, we have already discussed one of them in the foregoing paragraphs, particularly that the former does not create any *de jure* charge or right in the subject property and rather is only a right in *personam*, however, the short answer to the above is that equity cannot supplant the law and can only supplement it. Thus, where the law is unambiguous and clear, equity will always yield to the law. However, when it comes to equitable mortgages, we may rephrase the above to only say that equity will yield to the law only to the extent provided by the law. Thus, although the legal mortgage would have assumed priority in charge, yet an equitable mortgage may still be enforceable as secondary charge, provided the other considerations such as notice of such mortgage is fulfilled.

54. This Court in ***K.J. Nathan v. S.V. Maruthi Rao*** reported in **AIR 1965 SC 430** has explained the fine distinction between an equitable mortgage as understood in the English law and the mortgage by deposit of title deed. K. Suba Rao J. (as His Lordship then was) speaking for Court observed as under: -

> *"Under this definition (referring to section 58(f) of the Transfer of Property Act) the essential requisites of mortgage by deposit of title deeds are, (i) debt), (deposit of title-deeds, and (iii) an intention that the deeds shall be security for the debt. Though such a mortgage is often described as an equitable mortgage, there is an essential distinction between an equitable mortgage as understood in English Law and the mortgage by deposit of title deeds recognized under the Transfer of Property Act in India. In England an equitable mortgage can be created either, (1) by actual deposit of title deeds, in which case collateral evidence is admissible to show the meaning of the deposit and the extent of the security created, or (2) if there be no deposit of title deeds, then by a memorandum in writing, purporting to create a security for money advanced; See White and Tudor's Leading Case in Equity, 9th Edition, Vol. II, at p. 77. In either case it does not operate as an actual conveyance though it is enforceable in equity; <u>whereas under the Transfer of Property Act a mortgage by deposit of title deeds is one of the modes of creating a legal mortgage whereunder there will be transfer of interest in the property mortgaged to the mortgagee. This</u>*

> *distinction will have to be borne in mind in appreciating the scope of the English decisions cited at the Bar. This distinction is also the basis for the view that for the purpose of priority it stood on the same footing as a mortgage by deed. […]"*

(Emphasis supplied)

55. However, in order to obviate any confusion, we may clarify that the aforesaid observations in ***K.J. Nathan*** (supra) must not be understood to mean that equitable mortgage has no valid basis or is not recognized *in toto* in India. Any act of the parties that evinces a clear intention of the parties to create a mortgage though the same might not have been created in terms of Section 58 of the Act, 1882, may still be a valid charge in terms of Section 100 of the Act, 1882. The said provision reads as under: -

> *"**100. Charges.—***
> *Where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge.*
>
> *Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust, and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge."*

56. Section 100 of the Act, 1882 provides that where a transaction does not amount to a mortgage i.e., not a mortgage in terms of Section 58 of the said Act, the person to whom the immovable property is offered as a security would still nevertheless be said to have a "charge" in terms of the said provision, and that all provisions under the Act, 1882 as applicable to simple mortgage envisaged under Section 58 sub-section (b) of the said Act shall apply to such "charge" insofar as possible. The key distinction is that any mortgage which is not created in terms of Section 58 of the Act, 1882 i.e., all equitable mortgages are still nevertheless a "charge" to such property. The expression "*and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge*" assumes significance as it is not suggestive that such charge would be deemed a simple mortgage, rather it only goes so far as to provide that the provisions that apply to simple mortgage will also apply to such "charges" so far as possible but by no means does it provide that such "charge" is to be treated as a simple mortgage in terms of Section 58 of the Act, 1882 i.e., as a legal mortgage. The last part of Section 100 of the Act, 1882 further statutorily recognizes the *in personam* nature of such "charge" and provides that they shall not be enforced against any person to whom such property or interest therein has been transferred i.e., to whom it has been mortgaged in terms of Section 58 of the said Act or any other *bona-fide* transferee who does not have notice of the said charge. Thus, what may be discerned is that, 'equitable mortgages' are very much recognized in India under the nomenclature of "charge" in terms of Section 100 of the Act, 1882, and the same will be enforceable as far as possible in terms of the procedure and provisions applicable to a simple mortgage except those without notice of such charge.

57. We are conscious of the decision of this Court in ***J.K. (Bombay) (P) Ltd. v. New Kaiser-I-Hind Spg. and Wvg. Co. Ltd.*** reported in **1968 SCC OnLine SC 32** which held that an agreement to create a mortgage only gives rise to perform such an agreement and does not amount to either a mortgage or a charge and the decision in ***Haryana Financial Corpn. v. Gurcharan Singh*** reported in **(2014) 16 SCC 722** wherein it was held that since all provisions applicable to a simple mortgage shall, as far as possible, also apply to a charge, Section 59 of the Act, 1882 which requires a simple mortgage to be compulsorily be registered would also be applicable and as such the creation of a charge under Section 100 of the Act, 1882 must be compulsorily registered. However, a close reading of the decision in ***J.K. (Bombay) (P) Ltd.*** (supra) will reveal that this Court never held that any agreement to mortgage will be incapable of creating a charge in terms of Section 100 of the Act, 1882, rather what was held is that only those agreement to mortgage where the intention to create a charge in *praesenti* is absent will be incapable of creating either a mortgage or a charge, but where such intention of parties is there, the same will definitely tantamount to a 'charge' under Section 100 of the Act, 1882 as held in ***ONGC Ltd. v. Official Liquidator*** reported in **(2015) 5 SCC 300**. Similarly, the decision of ***Haryana Financial Corpn*** (supra) holding that registration in terms of Section 59 of the

Act, 1882 is mandatory in order to create a charge *prima facie* appears to be incorrect in view of an earlier decision of a larger bench of this Court in ***M.L. Abdul Jabbar Sahib v. M.V. Venkata Sastri & Sons*** reported in **(1969) 1 SCC 573** which in clear terms held that the second part of Section 100 of the Act, 1882 does not attract the provisions of Section 59 of the said Act and that a charge may be made without any writing and there is no provision of law which require that such an instrument must be attested or registered. We are also in agreement with the decision of ***M.L. Abdul Jabbar Sahib*** (supra) as to hold otherwise would result in absurd consequences which could not have been intended by the legislature. We say so because, if a charge can be made only by a registered instrument in accordance with Section 59 of the Act, 1882, then the subsequent transferee will always have notice of the said charge in view of Section 3 Explanation I which stipulates that "*where any transaction relating to immoveable property is required by law to be and has been effected by a registered instrument, any person acquiring such property or any part of, or share or interest in, such property shall be deemed to have notice of such instrument as from the date of registration [...]*". This would effectively render the second part of Section 100 of the Act, 1882 which mandates requirement of notice to all subsequent transferees before the enforcement of a 'charge' as otiose and redundant, as the moment when such instrument is registered, notice is deemed to have been made. The very idea behind stipulating the requirement of notice under

Section 100 of the Act, 1882 seems to be to save even those transactions which are not registered and do not amount to a mortgage yet in equity may still be enforceable provided the subsequent transferee has notice of such charge. We do not intend to dwell any further on the decisions of this Court in ***J.K. (Bombay) (P) Ltd.*** (supra) and ***Haryana Financial Corpn*** (supra) as the present case does not require examining whether the respondent no. 1 bank could be said to have an enforceable charge against the appellant bank, and even otherwise if an ‘equitable mortgage’ cannot be construed as a ‘charge’ in terms of Section 100 of the Act, 1882, the former may still be permitted to be enforceable in the extant of equity in the peculiar facts of each case. This is because the enforcement of an ‘equitable mortgage’ being a by-product of the doctrine of equity is purely a matter of discretion that a court of conscience may grant keeping in mind the principles of fair-play, good conscience and justice. Where any ‘equitable mortgage’ is found to be unenforceable, the same though neither a ‘legal mortgage’ nor a ‘charge’ may still nevertheless entitle a lender to seek other reliefs such as specific performance of the contract or a suit for recovery on the strength of the *ab inito* intention of the parties to create a security evident from such ‘equitable mortgage’.

58. We are conscious of the decision of this Court in ***Kedar Lal v. Hari Lal*** reported in **AIR 1952 SC 47** wherein it was held that the whole of law of mortgage in India, including the law of contribution arising out of a transaction of mortgage, is now statutory and is embodied in the Act, 1882 read with the Civil Procedure Code, 1908 and that the courts cannot travel beyond these provisions. The relevant observations read as under: -

> *"27. So far as Section 43 is concerned, I am not prepared to apply it unless Sections 82 and 92 can be excluded. Both Sections 43 and 82 deal with the question of contribution. Section 43 is a provision of the Contract Act dealing with contracts generally. Section 82 applies to mortgages. As the right to contribution here arises out of a mortgage, I am clear that Section 82 must exclude Section 43 because when there is a general law and a special law dealing with a particular matter, the special excludes the general. In my opinion, the whole law of mortgage in India, including the law of contribution arising out of a transaction of mortgage, is now statutory and is embodied in the Transfer of Property Act read with the Civil Procedure Code. I am clear we cannot travel beyond these statutory provisions."*

59. However, a close reading of the aforesaid paragraph of ***Kedar Lal*** (supra) would reveal that the observations were made in light of the question whether Section 43 of the Indian Contract Act, 1882 which deals with right to contribution would be applicable to such a right which is arising out of a mortgage to the exclusion of Section 82 of the Act, 1882 which deals with mortgages. It was in this context this Court held that when it comes to mortgages it will not be permissible to travel beyond the scheme of Act, 1882 and venture into the provisions contained in other laws.

60. However, this by no stretch means that the concept of equitable mortgage has no place in the Indian jurisprudence. The concept of equitable mortgage is purely a creation and by-product of the doctrine of equity, and thus, the absence of any specific provision under the Act, 1882 providing for such a mortgage will not run to the detriment of something which is essentially designed to ensure that principles of fair-play, good conscience and justice endure. There is no decision which either specifically excludes or outrightly rejects the application of this doctrine. Rather, the subsequent decision of this Court in ***K.J. Nathan*** (supra) it was specifically stated that although the concept of equitable mortgage as evolved under the English Law cannot be considered to be a rule of law, which as also discussed by us in the foregoing paragraphs is by-product of doctrine of equity and not the law of the land, yet they may serve as a guide. The relevant observations read as under: -

> *10. The foregoing discussion may be summarized thus : <u>Under the Transfer of Property Act a mortgage by deposit of title deeds is one of the forms of mortgages whereunder there is a transfer of interest in specific immovable property for the purpose of securing payment of money advanced or to be advanced by way of loan. Therefore, such a mortgage of property takes effect against a mortgage deed subsequently executed and registered in respect of the same property. The three requisites for such a mortgage are, (i) debt, (ii) deposit of title deed; and (iii) an intention that the deeds shall be security for the debt</u>. Whether there is an intention that the deeds shall be security for the debt is a question of fact in each case. The said fact will have to be decided just like any other fact on presumptions and on oral, documentary or circumstantial evidence. There is no presumption of law that the mere deposit of title deeds constitutes a mortgage, for no such presumption has been laid down either in the Evidence Act or in the Transfer of Property Act. But a court may presume under Section 114 of the Evidence Act that under certain circumstances a loan and a deposit of title deeds constitute a mortgage. But that is really an infer-*

> *ence as to the existence of one fact from the existence of some other fact or facts. Nor the fact that at the time the title deeds were deposited there was an intention to execute a mortgage deed in itself negatives, or is inconsistent with, the intention to create a mortgage by deposit of title deeds to be in force till the mortgage deed was executed. The decisions of English courts making a distinction between the debt preceding the deposit and that following it can at best be only a guide; but the said distinction itself cannot be considered to be a rule of law for application under all circumstances. Physical delivery of documents by the debtor to the creditor is not the only mode of deposit. There may be a constructive deposit. A court will have to ascertain in each case whether in substance there is a delivery of title deeds by the debtor to the creditor. If the creditor was already in possession of the titledeeds, it would be hypertechnical to insist upon the formality of the creditor delivering the title deeds to the debtor and the debtor redelivering them to the creditor. What would be necessary in those circumstances is whether the parties agreed to treat the documents in the possession of the creditor or his agent as delivery to him for the purpose of the transaction."*

(Emphasis supplied)

61. Thus, in such a situation where a transaction does not amount to a mortgage but nevertheless can be construed as a preliminary step towards the preparation of a mortgage which will be security thereafter with nothing else done for conveyance or transfer of title or interest, there three recourses may be available to the lender: -

(i) He may simply claim that the transaction amounts to an equitable mortgage as it was for the purpose of creating a present or immediate security which a court of equity ought to consider; or

(ii) He may claim that there has been a sufficient part performance of the contract, with attending circumstances which a court ought to relieve by permitting the lender to 'perfect its mortgage' i.e., to take further steps for the transfer of conveyance of title or interest in order to create a mortgage; or

(iii) He may bring a suit for recovery of money and base his claim simply on the *ab initio* intention of the parties to create a security in the first place and the resultant part-performance of the contract insofar as the loan was extended based on such promise or consideration of security.

62. Before we close this judgment, we must look into the observations made by the High Court in para 8 of its impugned order. In para 8 the High Court has recorded that at the time of sanction and grant of the loan by the appellant-bank herein i.e. sometime in November, 1998 the flat in question was in *custodia legis* of the court receiver appointed in the year 1994. What weighed with the High Court was the submission canvassed on behalf of the Central Bank that the validity of the mortgaged flat in question in favour of the appellant bank was also questionable. The reason why the High Court said so is because both the agreements are unregistered. According to the learned counsel appearing for the Central Bank, the agreement which appellant bank accepted was also unregistered. Then both the banks are sailing in the same boat. However, what seems to have been overlooked by the Central Bank is the fact that when the borrowers approached the appellant bank for loan they had a valid title deed i.e., the original share certificate issued by the society. The issuance of the original share certificate was also confirmed by the society vide letter dated 13.11.1998, which forms a part of the record.

63. The original share certificate which was produced before the appellant-bank as availed Title deed assumes significance in view of the provisions of Section 11 of the Act 1963, more particularly, sub-section (1) of Section 11 of Act which reads thus: -

> *"11. Promoter to convey title, etc., and execute documents, according to agreement.— (1) A promoter shall take all necessary steps to complete his title and convey, to the organisation of persons, who take flats, which is registered either as a co-operative society or as a company as aforesaid, or to an association flat-takers or apartment owners his right, title and interest in the land and building, and execute all relevant documents therefor in accordance with the agreement executed under Section 4 and if no period for the execution of the conveyance is agreed upon, he shall execute the conveyance within the prescribed period and also deliver all documents of title relating to the property which may be in his possession or power."*

(Emphasis supplied)

64. In para 8 of the impugned judgment, the High Court has recorded that the appellant bank herein had sought to rely upon the original share certificate issued by the Society as a valid piece of title deed. However, the High Court got carried away by the fact that the first charge was that of the Central Bank and not of the appellant bank, and failed to notice the distinction that exists between an ‘equitable mortgage’ and a ‘legal mortgage’.

65. The proposition of law is that though the transaction evidenced by the prior unregistered document is valid in itself, yet any title or interest created by it is liable to be defeated under the rule of priority by a valid later and legal sale or mortgage evidenced by a duly registered document. The reason is, otherwise, no effect can be given to the rule which implies that the later registered title is intended to prevail against an earlier unregistered title. No weight can, therefore, be attached to the contention that by a valid unregistered agreement of sale, the vendor's title is exhausted, he has, afterwards, nothing to sell, and the later registered sale deed gives nothing to the predecessor. The fallacy in the contention lies in ignoring the reason of the rule, namely that as between the registered and unregistered transactions, the registered transaction creates the dominant right or title.

E. CONCLUSION

66. In view of the aforesaid, we have reached the conclusion that the impugned order passed by the High Court is not correct and it deserves to be set aside.

67. In the result the appeal succeeds and is hereby allowed. The impugned Order passed by the High Court is hereby set aside. Since, the respondent no. 1 had failed in bringing the factum of its ‘equitable mortgage’ to the notice of the appellant bank, the respondent no. 1 bank is not entitled to enforce the same qua the recovery proceeds of the appellant bank herein.

68. We are informed that an amount of Rs. 51 lakh is lying deposited with the DRT maintained in an escrow account. The same now be disbursed along with interest in favour of the appellant bank.

69. We direct the Registry to send one copy each of this judgment to all the High Courts with further request to each of the High Courts to forward the judgment to the DRTs and DRAT benches.

70. Pending application(s), if any, stand disposed of.

... J.
(J.B. Pardiwala)

... J.
(R. Mahadevan)

New Delhi;
04th February, 2025

Construing Section 59 as conferring a power of revision against an order passed under Section 44(2) is not in any way contrary to the principle laid down in the above decision.

8. We agree with the view taken by the Orissa High Court that the language of Section 59(1) is wide enough to enable the Collector to revise any order including an appellate order under Section 44 of the Act. In the result the appeal is dismissed with costs.

(1977) 3 Supreme Court Cases 247

(BEFORE A. N. RAY, C.J. AND M. H. BEG AND JASWANT SINGH, JJ.)

NARANDAS KARSONDAS .. Appellant;

Versus

S. A. KAMTAM AND ANOTHER .. Respondents.

Civil Appeal No. 1020 of 1975†, decided on December 7, 1976

Transfer of Property Act, 1882 — Sections 58(c), 60 and 69(1)(c) — English mortgage — The right of redemption of the mortgagor under a mortgage giving right to the mortgagee to sell the mortgaged property without intervention of the Court, held, is not extinguished on mere execution of such mortgage — Conditions under which such right can be extinguished explained — English law compared and explained — Right therefore not lost merely by putting the property to auction unless sale completed — Section 17, Indian Registration Act — Indian Contract Act, 1872, Sections 202, 203 and 204 — The mortgagee does not become agent of the mortgagor

Transfer of Property Act, 1882 — Sections 5 and 40 — Rights created by contract of sale of immovable property explained — Specific Relief Act, 1963, Section 3 — Trusts Act, Section 91

The respondent Housing Society, the mortgagor, had taken loan from the co-respondent Finance Society and mortgaged the property to it under an English mortgage. On default, the mortgagee exercised his right under the mortgage to sell the property without intervention of Court and after notice put the property to sale by public auction. The appellant auction purchaser paid the sums due. Before the sale was completed by registration etc. the mortgagor sought to exercise his right of redemption by tendering the amount due.

The appellant based his case on the plea that in such a situation the mortgagee acts as agent of the mortgagor and hence binds him.

Rejecting the appeal, the Supreme Court

Held:

The right of redemption which is embodied in Section 60 of the Transfer of Property Act is available to the mortgagor unless it has been extinguished by the act of parties. In India it is only on execution of the conveyance and registration of transfer of the mortgagor's interest by registered instrument that the mortgagor's right of redemption will be extinguished. The conferment of power to sell without intervention of the Court in a mortgage deed by itself will not deprive the mortgagor of his right to redemption. The extinction of the right of redemption has to be subsequent to the deed conferring such power. The right

†Appeal by Special Leave from the Judgment and Order dated April 18, 1975 of the Maharashtra State Co-operative Appellate Court in Appeal No. 54 of 1975.

of redemption is not extinguished at the expiry of the period. The equity of redemption is not extinguished by mere contract for sale. (Para 34)

The mortgagor's right to redeem will survive until there has been completion of sale by the mortgagee by a registered deed. In England a sale of property takes place by agreement but it is not so in our country. The power to sell shall not be exercised unless and until notice in writing requiring payment of the principal money has been served on the mortgagor. Further Section 69(3) of the Transfer of Property Act shows that when a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale. Therefore, until the sale is complete by registration the mortgagor does not lose right of redemption. (Para 35)

The English decisions are based on the provisions of the Law of Property Act, 1925. In England sale is effected by the contract of sale, and in India an agreement for sale is not a sale or transfer of interest. In England, a mortgagee gets an equitable interest in the property. Under the English doctrine a contract of sale transfers an equitable estate to the purchaser. In India there is no equity or right in property created in favour of the purchaser by the contract between the mortgagee and the proposed purchaser. In India, there is no distinction between legal and equitable estates. The law of India knows nothing of that distinction between legal and equitable property in the sense in which it was understood when equity was administered by the Court of Chancery in England. Under the Indian law, there can be but one owner that is, the legal owner. (Paras 30 and 31)

A contract of sale does not of itself create any interest in, or charge on, the property. This is expressly declared in Section 54 of the Transfer of Property Act. The fiduciary character of the personal obligation created by a contract for sale is recognised in Section 3 of the Specific Relief Act, 1963, and in Section 91 of the Trusts Act. The personal obligation created by a contract of sale is described in Section 40 of the Transfer of Property Act as an obligation arising out of contract and annexed to the ownership of property, but not amounting to an interest or easement therein. (Para 32)

Rani Chhatra Kumari Devi v. *Mohan Bikram Shah*, (1931) 58 IA 279: AIR 1931 PC 196 and *Rambaran Prosad* v. *Ram Mohit Hazra*, (1967) 1 SCR 293: AIR 1967 SC 744, *relied on.*

In India, the word "transfer" is defined with reference to the word "convey". The word "transfer" in English law in its narrower and more usual sense refers to the transfer of an estate in land. The word "conveys" in Section 5 of the Transfer of Property Act is used in the wider sense of conveying ownership. (Para 33)

Hence it cannot be held that the mortgagor lost the right of redemption just because the property was put to auction. The mortgagor has a right to redeem unless the sale of the property was complete by registration in accordance with the provisions of the Registration Act. (Para 37)

Abraham Ezra Issac Mansoor v. *Abdul Latif Usman*, ILR 1944 Bom 549: AIR 1944 Bom 156 and *Ellappa Naicker* v. *Sivasubramanian Maniagram*, (1936) 71 MLJ 607: AIR 1937 Mad 293, *approved.*

Meenakshi Velu v. *Kasturi Sakunthala*, ILR (1967) 3 Mad 161, *overruled.*

Waring (Lord) v. *London & Manchester Assurance Co.*, (1935) Chancery 310 and *Property and Bloodstock Ltd.* v. *Emerton*, (1968) LR Chancery 94, *explained and distinguished.*

It is erroneous to suggest that the mortgagee is acting as the agent of the mortgagor in selling the property. The mortgagee exercises his right under a totally superior claim which is not under the mortgagor, but against him. (Para 36)

Transfer of Property Act, 1882 — Section 58(c) — "English mortgage" — meaning of

Held :

Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will retransfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage. (Para 27)

M/3380/C

Advocates who appeared in this case :

J. L. Nain and *U. R. Lalit*, Senior Advocates (*V. N. Ganpule*, Advocate, with them), for the Appellant;

V. M. Tarkunde, Senior Advocate (*Sharad Manohar, P. H. Parekh* and *Miss Manju Jetley*, Advocates, with him), for Respondent No. 1.

M. C. Bhandare, Senior Advocate (*S. Bhandare, N. S. Narasinhan, K. C. Sharma, A. K. Mathur* and *A. K. Sharma*, Advocates, with him), for Respondent 2.

The Judgment of the Court was delivered by

RAY, C.J.—This appeal by special leave is from the judgment dated April 18, 1975 of the Maharashtra State Co-operative Appellate Court.

2. The question for consideration in this appeal is whether a mortgagor can exercise his right of redemption after a mortgagee under an English Mortgage with power to sell mortgaged property without the intervention of the Court gives notice to the mortgagor to sell the mortgaged property by public auction and sells it by public auction.

3. The appellant is the auction purchaser. The respondents are Flora Co-operative Housing Society in liquidation the mortgagors (hereinafter referred to as the Society) and the Maharashtra Co-operative Housing Finance Society Ltd., the mortgagee (hereinafter referred to as the mortgagee).

4. In 1964 the Society was registered as a Housing Society with 12 members. The paid up capital of the Society was Rs. 21,000. The Society wanted 12 flats to be constructed in one structure of ground and two upper floors. The Society purchased plot No. 153 in Santa Cruz at Bombay, measuring 1002 sq. yards. The price was Rs. 1,02,000.

5. In 1966 the Society mortgaged the land and the incomplete structure in favour of the mortgagee. The mortgage was for the sum of Rs. 70,000. It was an English mortgage. In 1968 the mortgagee advanced a further sum of Rs. 42,000.

6. In 1966 Fair Deal Builders entered into a contract with Society to build. The work was stopped. Thereafter in 1967 the Society entrusted the work to Maharaja Builders. In 1968 the contract with Maharaja Builders was terminated. The work was given in 1969 to Kamal Construction Company, who abandoned it in incomplete stage.

7. On diverse dates between August 29, 1967 and November 29, 1970, notice was given by the mortgagee to the Society for non-payment to the mortgagee and to sell the property by public auction.

8. On March 9, 1971 the Assistant Registrar of Co-operative Societies, Maharashtra, appointed a Special Liquidator of the Society

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under Section 102 of Maharashtra Co-operative Societies Act, 1960. The Assistant Registrar communicated the order of appointment of liquidator to the mortgagee on April 22, 1971. The order of appointment of a liquidator was published in Maharashtra Government Gazette on April 29, 1971.

9. The mortgagee advertised through Government auctioneer for public auction of the property. The public auction was held on April 14, 1971. The claim was for Rs. 1,22,888·22 paise. The appellant was declared the highest bidder for Rs. 1,31,001. The terms of sale inter alia were that 25 per cent was to be paid in advance and the balance in 30 days. The sum of Rs. 33,000 was paid as 25 per cent advance and the balance purchase price of Rs. 98,001 was paid to attorneys of the mortgagee. The auction purchaser took possession on April 17, 1971.

10. On August 13, 1971 the Society filed a dispute before the Officer on Special Duty under the Maharashtra Co-operative Societies Act against the auction purchaser and the mortgagee for injunction against completing sale. The Society obtained an ex parte injunction restraining transfer. On September 29, 1971, the interim injunction was vacated.

11. Thereafter the Society filed an appeal against the said order before the appellate Tribunal.

12. In the meantime the appellant filed a writ petition in the Bombay High Court under Article 227 of the Constitution.

13. On June 16, 1972 there was an interim order by the High Court in the writ petition. The Society undertook not to dispose of property until disposal of dispute. Both parties were allowed to keep watchmen.

14. The Society borrowed a sum of Rs. 1,31,000 and paid the same to the mortgagee on October 15, 1972.

15. On January 16, 1975 the Officer on Special Duty delivered judgment. He held that the dispute was maintainable under Section 91 of the Maharashtra Co-operative Societies Act. The Society was held not competent to challenge the auction sale held on April 14, 1971. It was also held that the validity of auction was not affected. The mortgagee was held entitled to exercise power of sale as a secured creditor without being affected by the winding up order against the Society. It was also held that the mortgagee did not commit any breach of the statutory provisions of Section 69 of the Transfer of Property Act. The sale was not vitiated. It was found that there was no irregularity at the auction and there is no ground for setting aside the sale. The society was entitled to redeem the property because the conveyance was not complete.

16. The auction purchaser filed before the Maharashtra State Co-operative Appellate Court an appeal against the said order. In appeal the plaint was allowed to be amended and prayer for redemption was allowed to be introduced. On April 18, 1975 the Maharashtra State Co-operative Appellate Court dismissed the appeal and held that the dispute

as initiated by the Society fell within the ambit of Section 91 of the Maharashtra Co-operative Societies Act. The appellate Court further held that there was no complete sale within the meaning of Section 69(3) of the Transfer of Property Act, and the equity of redemption was therefore not lost. It was further held that the auction price was grossly inadequate. The auction sale was not a sale after a fair competition.

17. The Mortgage Deed provided inter alia as follows:

> It is hereby agreed and declared that it shall be lawful for the mortgagees at any time without any further consent on the part of the mortgagors to sell the said morgaged premises . . . . The aforesaid power shall be deemed to be a power to sell or concur in selling the said mortgaged premises in default of payment of the mortgage money without the intervention of the Court within the meaning of Section 69 of the Transfer of Property Act.

18. Clauses (7), (8) and (33) in the Conditions of Sale may be referred to.

19. Clause (7) provided as follows. Upon payment of the balance of the purchase price, the purchaser shall be entitled to a conveyance from the vendors. The vendors shall in the conveyance of the property purchased by purchaser give the usual covenant required of a limited owner against encumbrances. The vendors shall give no other covenant required of an absolute full owner. The vendors shall not be required to procure the consent of the mortgagors or of any other person in the conveyance.

20. Clause (8) was as follows. After payment of the balance of the purchase money the purchaser shall be entitled to the rents and profits of the said property. The vendors as the mortgagees are not in possession of the property and will not do any thing to deliver possession of the property to the purchaser. The vendors as the mortgagees shall not be able to give vacant or symbolic possession of the property to the purchaser. On payment of the balance of the purchase price the purchaser shall at his own cost be at liberty to take such steps as the purchaser may deem necessary for obtaining possession of the property from the mortgagors.

21. Clause (33) provided as follows. If the mortgagors shall deposit all the amounts due to the vendors as mortgagees in Court or pay the same to the vendors or their attorneys between the date of sale and the completion thereof and if as a result thereof the vendors have to reconvey the property to them or if the vendors cannot thus proceed with the sale and the sale is not completed on that account the vendors shall return the said deposit to the purchaser without any interest and/or costs and the vendors as such mortgagees shall not be held liable for any damage.

22. Counsel for the appellant advanced these contentions. First, under Section 69 of the Transfer of Property Act a mortgagor confers on the mortgagee a power of sale through Court or without intervention of Court. The power of sale is of the entire legal estate of the mortgagor. Second, when such a power is conferred it is agency coupled with interest under Section 202 of the Indian Contract Act. The agency cannot be

revoked without payment to mortgagee. Third, if the power is acted upon, revocation even on payment cannot nullify acts pursuant to powers. Reliance was placed on Sections 203 and 204 of the Indian Contract Act. Fourth, if the act done pursuant to power is that the property is put up for sale and it is knocked down it is an act done by the mortgagee for mortgagor. In other words it is as if an act done by the mortgagor. The sale pursuant to the power is a subsequent act within the meaning of Transfer of Property Act and this subsequent act will extinguish the mortgagor's right of redemption. Fifth, in a suit for specific performance by auction purchaser the purchaser will be entitled to specific performance because it is a sale by mortgagor.

23. Counsel for the appellant relied on two English decisions. These are: *Waring (Lord)* v. *London and Manchester Assurance Co.*[1] and *Property & Bloodstock Ltd.* v. *Emerton*[2], in support of the propositions that the mortgagor's right to redemption would be extinguished when the mortgagee exercised the power of sale and the third party entered into a binding contract to purchase the property.

24. The English decisions are based on the provisions of the English Law of Property Act. The provisions create a statutory power of sale, which gives to a mortgagee power to sell the mortgaged property, and it means that the mortgagee has power to sell out and out by private contract or by auction and subsequently to complete the conveyance. The English decisions are that if a mortgagee exercises power under Section 100(1)(i) of the Law of Property Act, 1925, to sell the mortgaged property by public auction or by private contract it is binding on the mortgagor before completion unless it is proved that he exercised it in bad faith.

25. It was said in the *Property & Bloodstock case* (supra) that the contract for sale by the mortgagees to the purchaser precludes the mortgagor from his right of redemption pending completion even if the property is sold subject to one or more conditions. The English decision naturally notices distinction between condition precedent and the terms of contract of sale, namely, conditions dealing with matters of title for carrying out the contract. The mere fact that the label "condition" happens to be attached to conditions does not preclude its being in the latter category of "condition" or matter of title. The condition that the sale is subject to the reversioner's licence being obtained where necessary is held in the English decision to be commonly regarded as no more than a term of the contract relating to title.

26. The provisions in the Transfer of Property Act relevant to the purpose of present appeal are Sections 54, 60 and 69. Under Section 54 of the Transfer of Property Act, sale is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. Such transfer in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing can be made only by a registered instrument. A contract

1. (1935) Chancery 310. 2. (1968) LR Chancery 94.

for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties.

27. An English Mortgage is defined in Section 58(e) of the Transfer of Property Act. Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will retransfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

28. The Rights and Liabilities of Mortgagor are dealt with in Section 60 of the Transfer of Property Act. It is that at any time after the principal 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 (a) to deliver to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee, (b) where the mortgagee is in possession of the mortgaged property to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as, he may direct, or to execute and to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished. There is a proviso that the right conferred by this section has not been extinguished by the act of the parties or by decree of a Court. The right conferred by Section 60 of the Transfer of Property Act is called a right to redeem. Therefore, the said Section 60 provides for a right of redemption provided that the right has not been extinguished by the act of parties.

29. Section 69 of the Transfer of Property Act deals with mortgagees' power of sale. Under the said Section 69(1)(c), a mortgagee has power of sale without the intervention of the Court where power is conferred by the mortgage deed and the mortgaged property or any part thereof was on the date of the execution of the mortgage deed, situate within the towns of Calcutta, Madras, Bombay or in any other town or area which the State Government, may, by notification in the official Gazette, specify.

30. The principal question in this appeal is whether the right to redemption has been extinguished by any act of the parties. The English decisions are based on the provisions of the Law of Property Act, 1925. In England sale is effected by the contract of sale, and in India an agreement for sale is not a sale or transfer of interest. In England, a mortgagee gets an equitable interest in the property. Under the English doctrine a contract of sale transfers an equitable estate to the purchaser. The Court does not assist the mortgagor by granting him a remedy unless there is collusion on the part of the mortgagee.

31. In India there is no equity or right in property created in favour of the purchaser by the contract between the mortgagee and the proposed purchaser. In India, there is no distinction between legal and equitable estates. The law of India knows nothing of that distinction between

legal and equitable property in the sense in which it was understood when equity was administered by the Court of Chancery in England. Under the Indian law, there can be but one owner that is, the legal owner. See *Rani Chhatra Kumari Devi* v. *Mohan Bikram Shah*[3].

32. A contract of sale does not of itself create any interest in, or charge on, the property. This is expressly declared in Section 54 of the Transfer of Property Act. See *Rambaran Prosad* v. *Ram Mohit Hazra*[4]. The fiduciary character of the personal obligation created by a contract for sale is recognised in Section 3 of the Specific Relief Act, 1963, and in Section 91 of the Trusts Act. The personal obligation created by a contract of sale is described in Section 40 of the Transfer of Property Act as an obligation arising out of contract and annexed to the ownership of property, but not amounting to an interest or easement therein.

33. In India, the word "transfer" is defined with reference to the word "convey". The word "transfer" in English law in its narrower and more usual sense refers to the transfer of an estate in land. Section 205 of the Law of Property Act in England defines: "Conveyance" includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument. The word "conveys" in Section 5 of the Transfer of Property Act is used in the wider sense of conveying ownership.

34. The right of redemption which is embodied in Section 60 of the Transfer of Property Act is available to the mortgagor unless it has been extinguished by the act of parties. The combined effect of Section 54 of the Transfer of Property Act and Section 17 of the Indian Registration Act is that a contract for sale in respect of immoveable property of the value of more than one hundred rupees without registration cannot extinguish the equity of redemption. In India it is only on execution of the conveyance and registration of transfer of the mortgagor's interest by registered instrument that the mortgagor's right of redemption will be extinguished. The conferment of power to sell without intervention of the Court in a Mortgage Deed by itself will not deprive the mortgagor of his right to redemption. The extinction of the right of redemption has to be subsequent to the deed conferring such power. The right of redemption is not extinguished at the expiry of the period. The equity of redemption is not extinguished by mere contract for sale.

35. The mortgagor's right to redeem will survive until there has been completion of sale by the mortgagee by a registered deed. In England a sale of property takes place by agreement but it is not so in our country. The power to sell shall not be exercised unless and until notice in writing requiring payment of the principal money has been served on the mortgagor. Further Section 69(3) of the Transfer of Property Act shows that when a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale. Therefore, until the sale is complete by registration the mortgagor does not lose right of redemption.

3. (1931) 58 IA 279: AIR 1931 PC 196. 4. (1967) 1 SCR 293: AIR 1967 SC 744.

36. It is erroneous to suggest that the mortgagee is acting as the agent of the mortgagor in selling the property. The mortgagor exercises his right under a different claim. The mortgagee's right is different from the mortgagor's. The mortgagee exercises his right under a totally superior claim which is not under the mortgagor, but against him. In other words, the sale is against the mortgagor's wishes. Rights and interests of the mortgagor and the mortgagee in regard to sale are conflicting.

37. In view of the fact that only on execution of conveyance, ownership passes from one party to another it cannot be held that the mortgagor lost the right of redemption just because the property was put to auction. The mortgagor has a right to redeem unless the sale of the property was complete by registration in accordance with the provisions of the Registration Act.

38. The decision in *Abraham Ezra Issac Mansoor* v. *Abdul Latif Usman*[5], is correct law that the right to redeem a mortgage given to a mortgagor under Section 60 of the Transfer of Property Act, is not extinguished by a contract of sale of the mortgaged property entered into by a mortgagee in exercise of the power of sale given to him under the mortgage deed. Until the sale is completed by a registered instrument, the mortgagor can redeem the mortgage on payment of the requisite amount.

39. The Madras decision reported in *Meenakshi Velu* v. *Kasturi Sakunthala*[6] on which Counsel for the appellant relied is contrary to the view expressed in *Ellappa Naicker* v. *Sivasubramaniam Maniagaram*[7] and the aforesaid Bombay decision.

40. We are entirely in agreement with the Bombay decision. The Madras decision *Meenakshi Velu* v. *Kasturi Sakunthala* (supra) which holds a contrary view on which Counsel for the appellant relied is wrong.

41. For the foregoing reasons, the appeal is dismissed with costs to respondent 1.

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(BEFORE M. H. BEG, C.J. AND A. C. GUPTA AND P. S. KAILASAM, JJ.)

P. CHITHARANJA MENON AND OTHERS .. Appellants;

Versus

A. BALAKRISHNAN AND OTHERS .. Respondents.

Civil Appeal No. 1547 of 1975†, decided on April 25, 1977

Constitution of India — Article 226 — Laches — Government servants — Neither the promotions made in 1961-62 nor the G. O. of 1962 challenged — Held, G. O. of 1969 fixing date of commencement of service and seniority cannot be challenged by a writ petition filed in 1972 because of undue delay —

5. ILR 1944 Bom 549: AIR 1944 Bom 156.
6. ILR (1967) 3 Mad 161.
7. (1936) 71 MLJ 607: AIR 1937 Mad 293.

†Appeal by Special Leave from the Judgment and Order dated January 24, 1974 of the Kerala High Court in O. P. No. 5566 of 1972.