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Bonafide owner's under defective titles: an insight into property law.

Srijita Chattopadhyay

srijitachatterji8@gmail.com

Vakeelspot Technologies Pvt. Ltd., Bangalore, Karnataka

ABSTRACT

Property can be defined as Ownership coupled with possession and sufficient right or interest to claim the property. The primitive concept of property was that a property consisted of two major elements namely corpus i.e. body and animus i.e. intention to hold the property. In the recent times, due to development of subject matters that act as property even without possessing a body and people claim ownership over it, like Intellectual property the main element of a property has been reduced to that of only "Animus". Any property cannot exist in ambience which means without any claim or a title or ownership. Transfer of Property Act, 1882 deals with Intervivos Trans of Immovable Property. Transfer of Property Act is not exhaustive in its own and the purpose of the act is limited. It does not even deal with all the types of Intervivos Trans of Immovable Property i.e. Trust and Succession are dealt with in this act. Moreover, the act also has territorial restrictions. Section 5 of Transfer of Property Act defines transfer of property as an act by a living person in present or in future to one or more other living person which may include a company, an association or a body of an individual, to himself or to himself and one or more other living person. Transfer of Property has 137 sections divided into 8 parts. Sections 1 to 5 dealing with general sections, Sections 6 to 53A dealing with general concepts within which Sections 6 to 32 deals with general concepts of both movable and immovable property and Sections 38 to 53A deals which concepts that talk specifically about immovable property, Sections 54 to 57 talks about sale of immovable property, Sections 58 to 104 specifically deal with mortgage, Sections 105 to 117 are concerned about lease, Sections 118 to 121 are about Exchange, Sections 122 to 129 deals with gift and Sections 130 to 137 talks about additional claims in regards to immovable property. The present article deals with Bonafide owners under defective titles which is restricted strictly to that of transfer of immovable property and the rights, compensation and other protection guaranteed under Transfer of Property Act along with a few exceptions which are provided under this act in part under Chapter II part B (Of transfer by act of parties- transfer of immovable property). This article aims at highlighting the rights that are guaranteed implicitly under Transfer of Property Act to purchasers or owner who believe that they have a bonafide claim or ownership over the property, but the ownership so granted by the initial owner or the person transferring the owner is false and therefore, the transferee does not have a valid claim over the property even though he believes that he had entered into a valid or good transaction with the transferee. The defective titled so granted to the transferee is due to the false proclamation, misunderstanding or due to certain other acts of the transferor. These rights so given to the bonafide owner under defective title also comes coupled up with duties and exceptions and the article intends on explaining the same with reference to certain case laws.

Keywords: Property Law, Transfer of Property, Defective Title, Bonafide Owner, Ownership

1. INTRODUCTION

During conveyance or transfer from one person to another, by one or more persons to one or more persons, the person who is transferring the proper to the other person is known as the transferor. While the person to whom the property is being transferred by the transferor is the transferee. Therefore, transferor is the person who sells the property whereas; the person who is buying the property is the transferee. The transferor and the transferee should be competent to make such a transfer and the transfer shall be a bonafide transfer.

The transfer so made is valid if only if it's done in bonafide interest. "Bonafide" is a Latin tern which means "good faith". Bonafide person is a person who holds good intention, is honest and sincere and has a reasonable belief. A Bonafide purchaser is one who is

an innocent purchaser who has no notice or idea of the other parties claim or title over the property being sold to him. He purchases the property in lieu of consideration or payment of money or any or commodity to the value of that property he is being sold to. Even if the transferor portrays in ill intention or in a fraudulent manner that he possess the right title over the property in order to make the transaction, of the property that does not belong to him or he has no proper title of the property i.e.it is under the ownership of someone else or the property had already been transferred to someone else, then also the bonafide purchaser has a good title or claim over the property despite the claims made by the other party over the property. However, both the parties who claim rightful ownership over the same property has the cause of action (right to sue) the transferor or the party who has made the fraudulent and inappropriate transaction or conveyance.

Therefore, a Bonafide owner is a person who has purchased the property under good faith, without the knowledge or notice about the good title of the transferor over the property, and purchases such property with good intention and with due believe that the property belongs to transferor and that now the purchased property falls under his ownership.

The seven main essential characteristics of a “Bonafide Owner” or “Bonafide Purchaser” are:

1. The transferee or the purchaser acted in good faith.
2. The transferee or the purchaser has acted under good intention and honestly without any malaise or ill intention.
3. The transferee or the purchaser brought the property with adequate consideration
4. The transferee or the transferor purchased the property with false notice of false title over the purchased property, but he is the bonafide purchaser.
5. The transaction so entered into should be in good faith and without any malafide intention.
6. The transferee had conducted reasonable enquiry over ownership before purchase.
7. The transferee or purchaser has reasonable belief that the property so bought by him belongs to him and he possesses the right of ownership over the purchased property.

2. THE RIGHTS OF BONAFIDE PURCHASERS/OWNERS UNDER TRANSFER OF PROPERTY ACT, 1882.

The Transfer of Property Act,1882 grants certain rights and safeguards to person who has brought property from person without good title over the property they sold and now, the purchaser as he paid due consideration for the same property believes himself to be the bonafide owner of the property even though he has no title to the property he has so brought, as he has been fraudulently taken advantage over.

3. RIGHT OF BONAFIDE PURCHASER AGAINST THE SALE BY OSTENSIBLE OWNER.

Section 41 of TPA talks about this right. Here, ostensible owner means “apparent owner”, a person who is not the real owner but acts and is seemed as the original owner.

ILLUSTRATION: If husband is transferring the property of the wife, which is officially and formally under her name, but the property is maintained, managed and taken care of by him. Then the husband may be considered as the ostensible owner of the property. Here, the property may be the dwelling house etc.

Under this act, a mortgager of an idol or a menial servant cannot claim himself to be an ostensible owner. A mortgagee from an ostensible owner who has acted under reasonable care and good faith has been protected under this section, in accordance to the facts and circumstances of the case. The principle of this section is not restricted to sales. It applies equally to mortgages. [1]

If there is a transaction made by the ostensible owner with consent of the real owner in return for adequate consideration, then such a transfer is valid and cannot be made voidable under the ground that the ostensible owner is not authorized to make such a transfer. Sec 41 enacts a rule which falls under the preview of estoppel but falls short of the requirements under Sec.115 of The Indian Evidence Act. But certain grounds that has to be fulfilled for the same and also for establishing the onus (burden of proof), like:

- The transferor must be the ostensible owner of the property.
- The transferee must not only make reasonable enquiry but also act in good faith.[2]
- The transfer so made shall be for a consideration.
- The transferee must take reasonable care as a prudent and ordinary man is expected to take during any transaction.[3]
- The reasonable care as taken by the transferee is to be ascertained in a particular matter or case through interpretation and reference to the facts and circumstances of the case.[4]

4. EXCEPTIONS TO THIS RULE

1. If the transfer is a gratuitous transfer (the transfer was made by way of gift).
2. Where no prudence has been undertaken or reasonable enquiry made by the transferee while purchasing the property or making the transaction.
3. This right is an exception to the legal rule laid down under Sec. 27 of Sales of Goods Act, and the Latin maxim “nemo dat quo non habet” which means “no one gives that he does not have”.

This rule as provided under this section is an exception to the general rule that a person cannot convey a better title than he himself has in the property.[5]

This rule has its foundation in “The principle of Equity” that no person who has misappropriated his title over the property and fraudulently sold the property to an innocent buyer can secretly claim his right over the property and enjoy the same as an ostensible owner, while the transferee who has suffered the loss of not having the title over the property after paying considerations and taking reasonable care and prudence to enquire over the actual title of the property. Therefore, this right has been provided.

This right however also extends to certain circumstances:

- **Where the transfer is voluntarily made by the ostensible owner** and does not apply to invitium or involuntary transfer i.e. by way of order of court or by auction.
- **It is not limited to the purchaser from the ostensible owner** but it also extends to subsequent purchasers.
- **Where is a charge is created by a decree** on the property in the possession of a judgement-debtor having the effect of reducing his full ownership to a limited ownership, it was held that he was not an ostensible owner of that property within the meaning of Sec. 41 so as to give a title to a transferee- even if he was a transferee for value and without a notice.[6]
- **Transferee from holders of life estate**, where the transferee is a Hindu female possessing only a life estate cannot plead against the reversioners the bar of Sec.41.[7]
- **In case where the person who has allowed another to occupy the position of an ostensible owner has a limited estate, the rule of Sec.41** applies only during lifetime of the limited owner and is not available to protect transferees against the claim of the reversioners.[8]

Section 41 is a general section dealing with estoppel in the circumstances mentioned therein. In the presence of a special provision of law applicable to pending suits (Sec.52) the general provisions of estoppel contained in Sec.41 would not apply.[9]

5. CASE STUDY

In CHATTAR V. K. SANKARAN (1957) 2 MLJ 603: It was held that “This section is based on the principle that where one of the two innocent persons must suffer from the fraud of a third party the loss should fall on him who has created or could have prevented the opportunity of the fraud and that in such cases hardship is caused by the strict enforcement of the general rule that no one can confer a higher right on property than he himself possesses.” One of the general principles of the law of TPA is enunciated by the maxim that “no man can transfer to another a right or title greater than what he himself possess” and “he gives not who hath not”. [10] To this general principle there is a well-recognized exception that if the true owner of the property permits another hold himself out as the real owner as by entrusting him with the documents of title or in some other way a third person who bonafide deals with that other may acquire a good title to the property as against the true owner. [11]

SYED ABDUL KHADER V. RAMI REDDY (1979) SC 553.: Section 41 of TPA provides that where with the consent express or implied of the person interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer should not be voidable on the grounds that the transferor was not authorized to make it.

Here, in this present case the father of the plaintiff throughout acted in relation to others as the owner of the property though the plaintiff was the real owner of the property. The father of the plaintiff executed an agreement to sell the land to the Defendant No.1. The transaction was completed in the presence of the plaintiff and the consideration was put in the hands of the plaintiff. The latter, therefore, would certainly be estopped from contesting the validity of the sale on the ground that his father had no authority to sell the land or on the ground that though his father entered into the agreement his constituted attorney acted as a mere rubber-stamp.

It was held that the genesis of the concept of benami is that consideration of the transfer must flow from one person and the transfer must be taken in the name of the other person and the consideration so flowing for the transfer was not intended to be a gift in favor of the person in whose name the transfer is taken. All these ingredients of benami is absent in his case and therefore, the contention that the plaintiff was a benamidar cannot be accepted. [12]

SC in this case also laid down THE DOCTRINE OF HOLDING OUT. The documents of the property stood in the name of A while his father dealt with it as the ostensible owner. The father entered into an agreement for sale of the property. The consideration was paid to A, who accepted it. The sale deed was executed by the power of attorney holder of A, the true owner. The plaintiff challenged the validity on the sale on the ground that his father not competent to execute the agreement which preceded the sale and so the execution of the deed in pursuance of such an agreement of his (plaintiff's) power of attorney holder was not binding upon him. Rejecting the contention the Supreme Court held, that even if the father of the plaintiff could be said to be an ostensible owner of the land and he purported to sell the land the plaintiff and the real owner had acquiesced in the same and accepted the consideration and as such he would be estopped from the challenging the title which was transferred pursuant to the sale and as such Sec. 41 could not be invoked by the transferee. [13]

Right against the transfer made by an Unauthorized person who subsequently becomes authorized to transfer the immovable property.

This right is governed by Sec. 43 of TPA which speaks of “Doctrine of Feeding the grant by Estoppel”. The section says that if a person has fraudulently or erroneously portrayed himself as the owner or that he has the authority or good title to make a transfer of a certain immovable property in return for an adequate amount of consideration, then that property at the option of the person to whom the property is being transferred to, shall operate on the interest as is acquired by the transferor of the property at any time during which the contract still exists.

This section though does not disapprove the right of the transferee if transaction done in good faith and for a consideration even though without notice of the existence of the said option.

PURPOSE: A void transaction is validated under this section, under Spec Successionis, to preserve the interest of an innocent transferee. This rule takes into consideration “The Principle of Equity”, where a person who whom the property does not belong to but under the impression that it is his or in the near future will be under his ownership, has made any transfer is void but this section allows so as the innocent transferee who has taken reasonable care for such transaction should not be denied his right or title over the property for which he has paid consideration. Therefore, even though the property as present is not that of the transferor but ones

it falls under his ownership, he is bound to give the property to the transferee, if that contract of transaction of such property still exists between the transferor and the transferee. "The principle of Equity" is held keeping in mind that a person may not be allowed to approve that part of an instrument which is beneficial to him and disapprove that part of an instrument that goes against him, i.e. no one can approbate and reprobate at the same time. In other words, where a person takes some benefit under a deed or instrument he must also bear its burden.

ILLUSTRATION: If A sells property X, Y, Z to B where X and Y belongs to him and Z is under the ownership of A's father, but still A transfers the property to B. Under the impression that subsequently, on the death of his father A will receive the property. Any contract entered with such expectations is void. But, in this section, if the contract between A and B are subsisting in time, B can enforce the contract against A, as soon as A receives property Z from his father. A then has to give the property to B.

Essentials/ applicability to this rule:

1. The transfer is by an unauthorized person.
2. The transferee had taken the transfer acting on that representation.
3. An erroneous or fraudulent representation by the transferor regarding his right to transfer the property in question
4. The transfer was for a certain amount of consideration
5. The transferor is found to have subsequently acquired the interest which he professed to transfer
6. There is no transferee in good faith for consideration and without notice of the rights under the prior transfer
7. The contract of transfer has not been cancelled and is still subsisting.

This section is similar to Sec. 18 of The Indian Specific Relief Act, 1877 but unlike this section which immovable property only, Sec.18 applies both to immovable and movables.

The words "fraudulently or" have been newly added. The word "erroneously" as used before the amendment was construed to include all representations, whether tainted or untainted with fraud. The use of the words "fraudulently or" along with the word "erroneously" only makes the meaning clear.[14]

"Doctrine of Estate feeding Estoppel". Under the English common law doctrine where a grantor has purported to grant an interest in land which he did not at the time possess but subsequently acquires, the benefit of his subsequent acquisition goes automatically to the benefit of the earlier grantee, or, as it is usually expressed, "feeds the estoppel". [15] The scope of this doctrine as under Sec. 43 was founded on the law of England as embodied in Phillimore L.J., in Poulton v. Moore.[(1915) 1 KB 400 (414-415)].

The transaction under Specs Successionis which becomes void-ab-intio is validated under this section as the property comes under the ownership of A subsequently, and thus makes the contract a valid contract.

Exceptions To This Rule

1. If there is no due consideration received for the transfer, or that the transfer is a gratuitous transfer (transfer by way of gift).
2. If no reasonable care was taken for the transaction or enquiry as to real title was not made as a reasonable and prudent man while making the transaction.

DIFFERENCE BETWEEN SEC. 6 (a) AND SEC. 43 OF TPA:

The difference between Sec. 6(a) and Sec. 43 of TPA can be illustrated and explained with the help of the case JUMMA MASJID V. KODIMANIANDRA DEVIAH [1962 SCJ (2) 303].

In this case the heir apparent sold his would be share in the joint property to the transferee, subsequently when the transferor became entitled to his share as a legal heir, transferee invoked Sec.43 to compel him to pass the property. It was contented on behalf of the transferor that interest was Spec Successionis, therefore is void-ab-intio under Sec. 6(a) and Sec. 43 is not applicable.

It was held by the Supreme Court, that transferee is entitled to get benefit under Sec. 43 and the transferor was bound to pass all the title of the property in question to the transferee.

The court also observed that, the two sections Sec. 6(a) and Sec. 43 is not contrary instead they are effected in their respective spheres. Sec. 6(a) is a part of substantive law whereas; Sec. 43 is based on the 'Principle of Estoppel' which is a part of the procedural law (i.e. evidence) and therefore, transferee will have a right over the property.

6. CASE STUDY

ALAMANYA V. MURUKUTI [(1915) M 972: 29 MLJ 733.]: In this case a suit to enforce a mortgage executed by the son over properties belonging to the father while he was alive. The father died pending the suit, and the properties developed on the son as his heir. The point for decision was whether the mortgage could claim the protection of Sec.43 of TPA. The argument against it was that Sec.43 should not be allowed to bar effect of Sec. 6(a) by validating a transfer which becomes initially void under Sec. 6(a).

The court rejected the contention and held that such argument fails to highlight the distinction between purporting to transfer the chance of heir apparent, and falsely representing that he is authorized to make such transfer of an immovable property. Therefore, a transfer of an interest as mentioned under Sec. 6 (a) is void, but if it purports to be an interest in the present time, then it falls under protection granted under Sec.43.

SHYAM NARAIN V. MANGAL PRASAD, [57 A 474: (1935) A 244]: Ram Narain, was the son of the daughter of the last male owner, sold the properties of the respondents in 1910, while the properties and the ownership was vested in the name of the daughter Akashi. On her death, he succeeded to the ownership of the property being the heir and subsequently, sold the properties to the appellants in 1927. The appellants claimed the estate on the ground that the sale in 1910 gave them no title as then Ram Narain was only a Specs Successionis. The respondents contented that they only became entitled to the property when he acquired them in 1926 as he was the heir. The court held that Sec.43 applied and that the respondents had acquired a good title over the property, while providing this judgement they referred to the judgement provided under Alamanya v. Murukuti (1915) M 972: 29 MLJ 733.

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

But where an erroneous representation is made by the transferor to the transferee that he is the full owner of the property transferred and is authorized to transfer it and the property transferred is not a mere chance of succession but immovable property itself, and the transferee acts upon such erroneous representation, then if the transferor happens later before the contract comes to an end, to acquire an interest in that property, no matter whether by private purchase, legacy, gift or by inheritance or otherwise, the previous transfer can at the option of the transferee operate on the interest which has subsequently been acquired although it did not exist at the time of transfer”.[16]

Right of compensation for improvements made by bonafide holders under defective titles.

When the transferee of immovable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell interest in the property to the transferee at the then market value thereof, irrespective of the value of such improvement.

The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction. When, under the circumstances aforesaid, the transferee has planted or sown on the property crops which are growing when he is evicted therefrom, he is entitled to such crops and to free ingress and egress to gather and carry them.[17]

ILLUSTRATION: A builds on land which he thinks is his, but is really B's and B knowing of his mistake encourages A to build either directly or by abstaining from asserting his legal right. In such a case equity will intervene for the protection of A.

B's conduct is such that from it may be inferred, a contract by B not to disturb A in the possession of A or it may amount to a statement by B that the land is A's, upon the faith of which A has acted and built but under Sec.51 the conduct of B is not material. A on conviction by B is entitled to compensation for improvement made by him on the land, if he in making the improvement, believed in good faith that he was absolutely entitled to the land.[18]

Improvements means any work that adds to the market value of the holding consistent with the purpose for which it was let out, in other words, anything that enhances the value of the property as a marketable subject, and not the amount incurred by the transferee.[19]

- I. Under Specs Successionis if a transferor without any authority to transfer has made a transaction to the transferee and if the transferee has made renovation to the property and later the real owner of the property wants it back or dissents to it, the real owner has to pay the amount of renovation as made by the transferee in the said property.
- II. If the transferor lends out a cultivable land to the transferee, but the better title of the property is owned by someone else and not the transferor and if the real owner dissents to the transfer or wants the property back then the crops own on that and by the transferee, the benefits from it shall be paid by the real owner with the better title to the transferee.
- III. If the transferor transfers a property to the transferee when the transferor himself does not have a good title over the property, and in such a situation the transferee cuts down the tree which was beneficial for the real owner then the transferee has to pay the amount of the loss rendered to the transferor.

“The Principle of Equity” is applied in this section. If the real owner asks for an eviction, then the value of the renovation as made by the transferee has to be calculated and the same amount has to be paid to the transferee.

Remedy granted under this section:

1. To compensate for the renovation.
2. First preference for sale of such property shall be made to the transferee or the person who has renovated the property and only if he rejects will such property be open to other people for sell.
3. The transferee will be entitled to have the property then sold to him at the then market price thereof, irrespective of the value of the improvements.[20]

Essentials/ applicability to this rule:

If the transferee of an owner with defective title makes improvements on his property believing in absolute good faith that the property belongs to him then he shall have the above remedies or alternatives against the real owner, provided that [21];

- i. Where the improvements so made by the transferee are under the honest impression and good faith that the property belongs to him.[22]
 - ii. Where the transferee has made reasonable enquiry as to the real ownership of the property and has done so under good faith.[23]
 - iii. The transferee must be entitled to belief that he is the absolute owner of the property; otherwise he cannot claim compensation for the improvements even if he had so under good faith.[24]
 - iv. The transferee must not be a complete stranger or a trespasser who has no status in respect to the property.[25]
- This section does not require reasonable care on behalf of the transferee [26] and that this section even applies if the transferor is the evictor. [27]

“Doctrine of Quidquidplantatur solo, solo cedit” meaning whatever is affixed to the soil belongs to the soil. Under this English maxim “whatever is affixed to the soil, becomes in contemplation of law, a part of it and is subjected to the same rights of the property as the soil itself”. [28] It is submitted that once the maxim viz. that whatever is affixed or built on the soil belongs to the soil and is subjected to the rights of property as the soil itself is held to have no application in this country it follows that the party so building on another’s land should be allowed to remove the structure (irrespective of whether the structure was raised with or without the consent of the owner) and restore the property to its original condition. [29]

In *Narayan v. Bholagir* [6 BOM HCR (AC) 80] COUCH C.J., observed : “We cannot....apply to cases arising in India the doctrine of the English Law as to buildings, viz. that they should belong to the owner of the land. The only doctrine that we can apply is the doctrine established in India that the party so building on another’s land should be allowed to remove the materials”. [30]

In another respect the “Doctrine of Equitable Estoppel by Acquiescence” goes far beyond this section. Under this section the transferee can only be compensated once he is evicted, but the estoppel prevents the owner from asserting his title and evicting the defendant. The defendant does not merely get a charge on the property as against the plaintiff who is the owner for the money spent in improving the property. [31]

Sec. 51 lays down an equitable principle and enables a Court to determine the equities between the parties. [32] The section is based on the equitable maxim- “He who seeks equity, must do equity” [33]. The principle is that no man should be allowed to enrich himself unjustly at the expense of another, and that consequently, where the transferee has made the improvements on the property in good faith as a bonafide occupant of the land, and belief that the land is his own, the plaintiff or the real owner who obtains the benefit of the expenditure which has increased the value of the property, is bound to reimburse the expenditure so made. [34]

7. CASE STUDY

MD. ALI V. KANILAL [(1934) C 625].: A Hindu widow who inherited some property made a gift of it to a stranger who in turn sold it to another person. The purchaser bonafide believed he was the owner of the property purchased, demolished an old dilapidated house on the land and erected a new and substantial building on its site. The purchaser on eviction by the rightful owner was allowed compensation for the house. In the case of *Kedarnath v. Mathumal* [40 C 555 (565)] , the Privy Council upheld in a similar case a decree for compensation for enhancement of the value of the property as a marketable subject. So also in *Narayanswami v. Rama Ayyar* [(1930) PC 297: 53 M 60], a decree for compensation for improvement was upheld by the Lordships of the Privy Council.

SHAMGUNNI V. VEERAPAN [18 M (467-468)]: The court held that, compensation does not mean the capitalized value of the improvements, but only value for the work done by the transfereeWhere a tenant claimed that he was entitled to receive under the head of compensation for improvements the capitalized value of the coconut trees planted by him computed with the reference to the probable productive life of the trees, it was stated that he was not entitled to have the whole of the future annual produce of the trees taken into consideration in computing the value of the improvements.

NARAYANSWAMI V. RAMA AYYAR [(1930) PC 297: 53 M 60].: The court held that Sec.51 merely lays down the equitable principle and enables a court to determine the equities between the parties. The Supreme Court also laid down the computing the amount of compensation the principle on which one must proceed was what, was the worth of the improvement of the property as a vendible subject. It was further held that if the evidence enabled a court to do so it should assess the valuation of the improvement as at a date before the property was transferred to the transferee. In *Kandarpa v. Jogendra* [(1910) 12 CLJ 391], *Mookherjee and Teunon, JJ.*, observed that “As a general rule, in order to entitle an occupant of the land to compensation for improvements , three things must concur....thirdly, he must have acted in good faith i.e., under the honest believe that he has secured good title to the property in question, and is the rightful owner thereof: and for this belief, there must be some reasonable grounds, such as would lead a man of ordinary prudence to entertain it”.

Right of the bonafide purchaser, when property is transferred to him with intent to defraud or delay the creditors of the transferor.

Sec. 53 talks about “Fraudulent transfer” and it is divided into two parts:

1. Every transfer of immoveable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed. Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration. Nothing in this sub-section shall affect any law for the time being in force relating to insolvency. A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor shall be instituted on behalf of, or for the benefit of, all the creditors.

2. Every transfer of immoveable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee. For the purposes of this sub-section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made. [35]

The first clause deals exclusively with intent to defeat or delay creditors. It talks about the intent to defeat or delay is established, the transfer is voidable at the option of the creditor so defeated or delayed. It also postulates the existence of both good faith and consideration as sufficient to take the case out of the operation of the rules. But mere payment of consideration, even if it be adequate does not protect the purchaser if he has been a party to the fraud.

The second clause provides that a transfer without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee. It also provides that a voluntary conveyance if made bonafide and without fraudulent intent shall not be deemed to be fraudulent by reason of any subsequent purchase for value.

“Every transfer” means with or without consideration. The transferor’s intent to defeat or delay is essential, added to which there shall be want of good faith in the transferee.

Essentials/ Applicability Of The Rule:

- 1) Intention to defeat or delay the creditors.
- 2) Security given by the debtor on the property.
- 3) Voidable only at the option of any creditor.
- 4) Transferee in good faith from a fraudulent transferee.
- 5) The rights of the transferee in good faith and consideration shall not be impaired by the sub-section.

The terms of the Sec.53 (1) are satisfied even if the transfer does not defeat but only “delays” the creditors. The fact therefore, that the entirety of the debtor’s property was not sold cannot by itself negative the application of Sec.53(1) unless there is cogent proof that there is other property left sufficient in value and of easy availability to render the alienation in question immaterial for the creditors.[36]

The term “Creditors” includes a decree-holder. It also includes both secured and unsecured creditors.[37] Intention is necessary and it means a dominant motive without which the action would not have been taken.[38] The creditor has the option of either accepting the transaction or avoiding it, but once he decides to do the one thing, he loses the other option, and he cannot be allowed to reprobate what he has once approached.[39]

When the effect of any transfer was to defeat or delay creditors and the transfer was made gratuitously or for grossly inadequate consideration, the transfer might be presumed to have been made with intent to defeat or delay creditors. The principle is “the court is to decide in each particular case where on all the circumstances, it can come to the conclusion that the intention of the settlers in making the settlement was to defeat, hinder or delay his creditors”.[40]

The following are some of the indicia of fraud and collusion:

- 1) The debtor sells all his property reserving nothing to himself
- 2) The purchaser buys the property without seeing it or taking care to value it
- 3) The consideration consists of sometime- barred debts not payable at the time.
- 4) The properties sold remains in possession of the vendor who pays assessment of the same.
- 5) The consideration is grossly inadequate.
- 6) The transfer is made in secret and haste manner.
- 7) The transferor is a relation of the transferee on whose whole sympathy the transferor may count
- 8) The transferor has motive for the transfer.

These are, however, no conclusive evidence of fraud but are mere circumstances which must be considered in determining the bonafides of a transaction. It is not correct to take each fact which militates against the bonafides of the transaction separated from the rest and then proceed to demonstrate that it is quite consistent with good faith.[41]

The Calcutta High Court held in some cases that were in a mortgage bond two considerations, are stated, one of which is valuable and is separable from the other, effect may be given to the instrument to the exact amount of consideration which is valuable and to that extent the transaction cannot be regarded as fraudulent.[42]

8. CASE STUDY.

NAGARTHANA V. CHIDAMBARAM [(1928) M 864].: The court held that, “Sec.53 so far as it deals with defeating or delaying creditors is aimed, not at debtor who chooses to prefer one creditor to another, to transfer his property in satisfaction of on debt rather than another, but a debtor who transfers his property with the object of screening is permanently or temporarily from all his creditors uses the transfer as a cloak to preserve the benefits of the property for himself or for some person in whom he is interest, instead of letting it go towards the payment of any of his debts”.

MINAKUMARI V. BIJOY SINGH [(1916) 44 C 662 (671).]: The court opined that, it is open to every creditor to try his best to release his debt from the common debtor and ordinarily in the race between the creditors, he who lags behind cannot complain of him who proceeded and fast and succeeded in getting at the property of the debtor. “The preference of one creditor to another by the judgement-debtor does not make the transfer a fraudulent one. A debtor for all that is contained in Sec.53 may pay his debts in any order he pleases and may prefer any creditor he chooses”. [43] In **MusaharSahu v. Hakim Lal** [34 C 999], where a creditor filed a suit against the debtor for recovery of his debt. The creditor presented a petition for the attachment of the property of a debtor. Debtor filed an affidavit stating that he did not intend to transfer any of his property where after, despite of this affidavit he sold the property to another creditor. Creditor 1 pleaded that this transfer was made with the intent to defeat or otherwise delay his interest in this. The Privy Council dismissed the appeal and held that the transfer of property by the debtor to one creditor in reference to the other one is not a fraudulent transfer with intent to defeat or delay the interest of another one.

ELEMENTS OF Sec.53 A-

- Consideration should be paid (partly paid or promise).

- Transferee should have performed his part and should have taken consideration.
- Term should be in writing and signed.
- Term should be clear.

EXCEPTION TO THE GENERAL RULE OF PROTECTION OF INTEREST OF BONAFIDE HOLDERS/PURCHASERS:

Rights of Bonafide purchasers should always be protected as held under Transfer of Property Act, 1882. But there shall be some exceptions as provided under the act. Sec.52 of TPA provides some exceptions to the general rule.

Sec.52 states that the “Doctrine of Lis Pendens” which means “Litigation Pending”. In regards to the pending property if the matter is subjudged the litigant cant transfer the title of the property to someone else. If the title is clear that the property belongs to the owner then in such a case he can transfer the property.

In case of “Doctrine of Lis Pendens”, the litigation should be directly related to the title.

This section is based on the legal maxim “ult lite pendent nihil innoveture” which means that during the pendency of the suit or litigation nothing new should be introduced (i.e. creation of a new title) and it is based on the principle of necessity and also on “Doctrine of Equity”, where both the parties shall have adequate chance of right over the property, and the best interest of whom over the property shall be decided by the court and not by themselves in an arbitrary manner. The court shall decide on absolute right of one party over the property according to the facts and circumstances of the case, while allowing one party to make one sided transaction who hamper the right of the other and create more confusion regarding as to matter of title and ownership over the property in question.

This section is based on the principle of Necessity as for administration of justice it is necessary that when a suit is pending in the court of competent jurisdiction regarding the title of the property, the litigants should not be allowed to take decisions themselves and transfer the disputed property. As a matter of public policy, the principle of Necessity is to prevent the parties from disclosing of a disputed property in such a manner as to interfere with the court’s proceedings.

ILLUSTRATION: A brings a suit against B for declaration of title to and possession of property X. During the pendency of the suit B transfers X to C. A’s suit is dismissed in the trial court. A appeals and the judgement of the trail court is reversed, A’s suit is decreed. C’s purchase is affected by “Lis Pendens”. The proceedings in appeal court are merely a continuation of those in the previous suit.[44]

Essentials Of This Section:

- 1) There is a pendency of suit on proceeding.
- 2) The suit or proceeding should be pending the court of competent jurisdiction.
- 3) The property should be directly and specifically involved in the suit.
- 4) The suit or proceeding should not be collusive.
- 5) The property in dispute must be transferred or otherwise dealt with by any other party to the suit.
- 6) The transfer must affect the rights of the other party to the litigation.

Exception To This Rule:

If the transfer is made while the suit is pending and transfer is made with the permission of the court, this principle of “Lis Pendens” is not applicable.

9. CASE STUDY

BHARATI GANADEVJI PEOPLE’S COOPERATIVE BANK LTD. CASE [AIR 2009 Guj 209].: The court held that, a mortgage suit continues after the decree and does not terminate till the security is released for the satisfaction of the decree. After a final decree the defendant has a right to appeal, within the period of litigation, where an appeal is before the limitation period the appeal would be a continuation of the suit and litigation shall be deemed to continue during the appeal. The transfer of appeal may during appeal be a transfer during pendency of suit, so pendency begins from the date of presentation of plaint and continues up to termination of litigation including appellate stage and execution proceedings.

RAJAKRISHNA V. RADHAMOHUN [21 WR 349]: A mortgages X property to B. In execution of a money decree against A, C attaches X. About a year after, B brings a suit on the mortgage and gets a mortgage decree. About 2 months after X is sold under the previous attachment of C, and purchased by D. B then executes his mortgage decree and purchases the property himself. D having purchased X at the time of B’s mortgage suit was pending, the doctrine of “Lis Pendens” is applied and B’s purchase is binding on D.

10. CONCLUSION

Thus we can come to a conclusion that The Transfer of Property Act, 1882 has provided a lot of safeguards to the innocent and bonafide purchasers or holders or owners of property against the defective title that hold due to the ill intention or mistake on the part of the transferor. In spite of the safeguards provided, the law also provides for exceptions under this rule. It takes into consideration the fact that safeguards cannot be provided one sided and thus, in circumstances where there is a mistake on part of the transferee, such rights shall not be provided to him at the disadvantage of the transferor. One of the major principles kept in mind while providing such rights and safeguards to both the sides; transferee’s through safeguards of their right and the transferor’s

while putting restrictions on such rights is the principle of “Equity”, that none of the parties be left at the disadvantage of one another. The legal maxim “nemo quo non dathabet” also contributes as a major exception to this right provided to the bonafide transferees. Though, these rights can only extend in case of purchase in return for adequate consideration and not for a gratuitous transfer as in gift.

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