INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 4 | Issue 2

2021

Unravelling Section 45 of the Transfer of Property Act

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ABSTRACT

Tucked away in the Transfer of Property Act, 1882 ('TPA') is a provision not often discussed — Section 45. This provision essentially says that when two or more persons claim to be co-owners of a property in unequal proportions, they shall each be entitled to a share in the property which is proportionate to the purchase consideration paid by them. However, this provision is not as straightforward as it appears to be at first glance. The effort sought to be made in the essay to show why this is the case, i.e., to show why Section 45 of the TPA is an ordinary provision of little importance. The overall argument advanced here is that Section 45 potentially raises a question mark over a cardinal principle of property law — property once vested, cannot be divested. However, before proceeding to make this argument, this essay will briefly discuss the seminal importance of Section 45. It will thereafter interpret and break down the elements of the provision. Finally, it will draw upon the first two parts of the paper and discuss how Section 45 potentially chips away at the cardinal principle mentioned above.

I. INTRODUCTION

Tucked away in the Transfer of Property Act, 1882 ('TPA') is a provision not often discussed — Section 45. This provision essentially says that when two or more persons claim to be co-owners of a property in unequal proportions, they shall each be entitled to a share in the property which is proportionate to the purchase consideration paid by them. However, this provision is not as straightforward as it appears to be at first glance. The effort sought to be made in the essay to show why this is the case, i.e., to show why Section 45 of the TPA is an ordinary provision of little importance. The overall argument advanced here is that Section 45 potentially raises a question mark over a cardinal principle of property law — property once vested, cannot be divested. However, before proceeding to make this argument, this essay will briefly discuss the seminal importance of Section 45. It will thereafter interpret and break down the elements of the provision. Finally, it will draw upon the first two parts of the paper and

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discuss how Section 45 potentially chips away at the cardinal principle mentioned above.

II. SEMINAL IMPORTANCE OF SECTION 45

(A) Unique Nature of Section 45 of the TPA

What Section 45 of the TPA says in a way is that even if a conveyance records two persons as co-owners of the property, it does not necessarily mean that they are co-owners of equal halves. In case of the one of those persons is able to prove that she paid the entire consideration for the property, she will be the sole owner of that property in the eyes of the law. This statutory scheme is seemingly contrary to the one that emerges under Section 91 of the Indian Evidence Act, 1872.[2] Popularly known as the parole evidence rule, what this provision says is that in a case where the grant or disposition of a property has been reduced to the form of a document, no evidence shall be led as to the terms of such disposition except the document itself. Therefore, ordinarily, in case a conveyance records two persons as co-owners of a parcel of land, no other evidence may be led of such co-ownership except the conveyance itself.[3] Section 45 of the TPA though, allows one to carve out an exception to the parole evidence rule. It is in this sense that it occupied a unique position.

(B) Relevance of Section 45 of the TPA

While a contraposition with Section 91 of the Indian Evidence Act, 1872 allows one to understand the unique nature of Section 45 of the TPA, its relevance truly comes to the fore on a consideration of the Registration Act, 1908. Section 17 of this Act enlists documents of which registration is compulsory. One such document is a non-testamentary instrument that creates, declares or assigns an interest in an immovable property. A sale deed therefore would ordinarily fall within the trappings of Section 17. However, Section 17 cannot be viewed in isolation. It needs to be considered alongside Section 49 of the same Act. Section 49 says that the non-registration of a document which needs to mandatorily be registered only implies that it cannot be received as evidence of the transaction contained therein.[4] It does not say that the creation, assignment, declaration or transfer of the title itself is invalid. Put otherwise, the import of the Registration Act, 1908 is that a conveyance deed is not conclusive proof of title. In these circumstances, Section 45 of the TPA assumes added relevance in that it allows a co-owner to pierce a conveyance deed, and to claim a larger share in the property.

[2]Section 91, Indian Evidence Act, 1872.
[3]*See* Tamil Nadu Electricity Board v N Raju, (1996) 4 SCC 551.
[4]Shyam Narayan Prsad v Krishna Prasad, (2018) 7 SCC 646.

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(C) Stakes Involved in Section 45 of the TPA

Importantly though, the overall stakes at play in Section 45 come to the fore only when undertakes a further comparative analysis of statutes. It is not only a case that one of the co-owners may be able to stake claim to a larger share in the property, basis the consideration paid. In case one of the co-owners has not paid any share of the consideration, the transaction in its entirety may be struck by the Prohibition of Benami Property Transactions Act, 1988 ('PBPT').

Section 2(9) of the PBPT defines a benami transaction as one where a property is transferred to, or is held by, a person, and the consideration for such property has been paid for by another person.[5] Moreover, the property must be held for the immediate or future benefit of the person who paid the consideration. Section 3 of the Act prohibits benami transactions.[6] Therefore, consider a scenario where person X stakes a claim to the title of a property, based on a sale deed which records him as a co-owner. Further, on this claim being opposed by the other co-owner and on an application of Section 45 of the TPA, it is found that person X did not pay any consideration whatsoever towards the purchase of the property. In that case, it is well possible that the conveyance itself may be struck by Sections 2(9) and 3 of the PBPT. The consequence of a property held as benami is provided for in Sections 4 and 5. Section 5, in particular, provides the more draconian consequence. It says that a property which is held benami is liable to confiscation by the Central Government.[7] Therefore, what follows from a joint consideration of the PBPT and Section 45 of the TPA is that the latter is a double-edged sword. While in some scenarios it may allow a person to stake claim to a share in the property which is proportionate to the consideration paid, in others, it may even lead to a confiscation of the property itself.

Before proceeding further with this essay though, it is important that we consider the elements of Section 45 itself.

III. STATUTORY INTERPRETATION OF SECTION 45

The first requirement under Section 45 is that there must be a transfer of immoveable property to two or more persons. The consideration for such transfer must be paid out of a fund held by those persons in common. The shares in this common fund must be ascertainable. If they are so ascertainable, then in the absence of a contract to the contrary, each co-owner will be entitled

[5]Section 2(9), Prohibition of Benami Property Transactions Act, 1988.
[6]Section 3, Prohibition of Benami Property Transactions Act, 1988
[7]Section 5, Prohibition of Benami Property Transactions Act, 1988

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to a share in the property proportionate to the share in the common fund. The provision applies mutatis mutandis when consideration has been paid out of separate funds.

A rather important element of the provision is found in its second paragraph. The second paragraph of Section 45 says that in the absence of any evidence as to the interests in a common fund or in separate funds, the co-owners shall be presumed as being equally interested in the property.

This interpretation of the elements of Section 45 is also in tune with a decision of Supreme Court in *State of Maharashtra v B.E. Billimoria*.[8]

Moreover, this textual analysis of Section 45 is also supported by a structural one. By a structural analysis, the author of this essay only means to convey the interpretation that follows when Section 45 is juxtaposed with other provisions of the TPA. Section 44, for one, talks about the transfer of a share in an immoveable property by one of the co-owners. The transferee in such a case is entitled to all of the rights enjoyed by the transferor, including the right to joint possession and partition. The only exception to the right of joint possession is when the property in question is a dwelling house.[9] Section 46 deals with a scenario where all the co-owners have jointly sold the property. In such a case, each co-owner is said to be entitled to a share in the consideration as is proportionate to her interest in the property. When these shares in the property are not ascertainable though, consideration is to be divided equally among the co-owners.[10] While this essay does not delve into Section 47, it is contended that this provision too follows from the textual analysis of Section 45 detailed above.

IV. A CARDINAL RULE: NOT SO CARDINAL AFTER ALL?

While this textual as well as structural interpretation of Section 45 seems to sit well with the scheme of the TPA, it is also clear that most of the consequences envisaged in these provisions will only follow when there is evidence as to the interests in a common fund. A common fund in such situations may be a joint bank account. Alternatively, it may be the consideration which is obtained from the sale of another property which was jointly or commonly held. It could also be the profits earned by a partnership firm. However, while a common fund is easy to conceptualise, evidence as to specific shares in that fund are not as readily ascertainable.

(A) Evidentiary Hurdles

To put it in more colloquial terms — How do you determine what percentage of the money

[8](2003) 7 SCC 336.
[9]Section 44, Transfer of Property Act, 1882.
[10]Section 46, Transfer of Property Act, 1882.

lying in a joint bank account belongs to which of the two co-owners? How do you determine shares in the consideration obtained from the sale of previous properties? To do so, the interest in that earlier property too would have to be determined. At the risk of sound rhetorical — What if that earlier property too was purchased from the sale proceeds of an immovable property? Taken to its logical conclusion, this may seem like an endless historical enquiry. While the historical depth of the exercise is one concern, some of the practical implications constitute another.

It is a commonly known fact that until recently, most of the transactions that took place in India were cash transactions. Immovable property too was purchased in cash. When one considers this fact, anxieties increase. It may well be possible that while a certain part of the consideration was paid via cheque or a bank transfer, the other part was paid by cash. In our example of reinvestment of sale proceeds earned from property, it is well and truly possible that the sale consideration of an earlier property may have been paid by only one of the co-owners in cash. Yet, the other co-owners may now claim an equal share in one of the subsequent properties purchased. It is very difficult to prove the payment of consideration in cash. What this difficulty results in though is that a rightful co-owner is deprived of a proportionate share in the property.

(B) 'Clear & Clinching'

Therefore, the historical nature of the enquiry required and the practical implications at play considerably muddle the waters. Perhaps, it is on this count that the Madras High Court in *R. Ramanathan v M. Arunkumar*,[11] was constrained to observe,

> "***31.*** *The cited Section comprised of various components and ingredients. The pith and marrow of the law points got embedded in the said Section is to the effect that if at all there could be any evidence to prove on what proportion the individuals contributed for purchasing a property, then according to the said proportion the property should be divided among them; in the event of the parties concerned are not in a position to adduce clinching and clear evidence in that regard then the Court has to hold that all the joint purchasers are equally entitled to the said property*."

It is commonly known that the standard of proof applicable in civil cases is one of balance of probabilities. Even then, the Madras High Court observed that the evidence which must be adduced in a trial under Section 45 of the TPA must be clear and clinching. On a bare reading of the phrase '*clear and clinching*', it follows that the standard of proof required is more than

[11]2012 SCC Online Mad 356.

one of balance of probabilities. One of the reasons underlying the decision of the Madras High Court may have been what has been discussed above in this essay. The Court may have been concerned about factual realities at play in the property market in India.

Alternatively, the Court may have been concerned about what has now been present subliminally in the discussion in this essay. Given how difficult it is to determine the historicity of property transactions, and to prove interests in the consideration paid for the purchase of property, Section 45 poses a risk to the cardinal principle '*property once vested, cannot be divested*.'[12] Even though property may have vested in one of the co-owners, it may now come to be divested through the mere operation of Section 45. In this regard, while Section 45 is unique in that it runs contrary to Section 91 of the Indian Evidence Act, 1872, it also chips away at a very important safeguard contained in that provision. Section 91 lends sanctity to the vesting of property through title deeds. Section 45 chips away at this sanctity.

The other way in which Section 45 may do so is if on an application of that provision it is found that the entire sale consideration was only paid by one of the two co-owners. However, if the title deed reflected the names of both co-owners, Section 18 of the TPA would come into operation. In the absence of any time specified in the title deed or anything contrary in the terms, title in the property would vest forthwith in both co-owners. This co-owner may then even proceed to assign, transfer or encumber his interest in the property, even if this interest had not been specifically ascertained. In a scenario such as this, Section 45 only serves to divest such an owner of his title. Consequently, doubts may even be raised about any assignment, transfer or encumbrance effected by such co-owner.

It may be argued that a transaction of this sort would be hit by the PBPT. However, it is now a settled position in law that a case under the PBPT is made out only if willingness, or other such intention, were shown on part of the person creating a benami interest.[13]

(C) Only a clarificatory tool?

One more counter-argument may be levied against the proposition advanced above. It may be argued that Section 45 of the TPA does not divest title. It only helps understand the extent to which title had been vested to begin with. However, this argument is only theoretically sound at best. The second paragraph of Section 45 itself suggests that a presumption is cast by the statute in favour of equal ownership.[14] Therefore, in the absence of a contract to the contrary,

[12]*See*: Official Assignee v Haradgiri Basvanna Gowd, AIR 1963 SC 754; Govind Desai v Nagappa, (1972) 1 SCC 515.
[13]Atindra Nath Chakrabarty v Anil Kumar Chakravarty, AIR 2006 Cal 88.
[14]*Id.*

the co-owners of a property as well as the transferees/assignees they transact with, may arrange their affairs based on this presumption. In light of the difficulty surrounding the procurement of evidence in such cases, it is near impossible for such transferees/assignees to assume otherwise. For all practical purposes, title would have vested.

Admittedly, it is a settled position in law that a party cannot confer a better title than what she possesses. However, in cases such as the ones covered by Section 45, title may never be perfected unless one of the co-owners seeks a partition by metes and bounds, or seeks declaratory relief. It is not reasonable to expect parties to wait till such a time to enjoy their property interests. Nor, it is reasonably likely that this may occur. For all practical purposes therefore, Section 45 may actually work to divest co-owners of their title.

V. CONCLUSION

In this essay, the author has provided a brief overview of why Section 45 is of some importance and why it may also be considered as unique. Moreover, the essay has also undertaken a textual and structural analysis of the provision. Lastly, through a discussion of the evidentiary requirements that follow from a textual interpretation of Section 45, the essay showed how this provision of the TPA chips away at one of the fundamental principles of property law. Perhaps, if such an exercise were conducted as regard several other provisions of the TPA, this principle may not appear to be as cardinal after all. However, on account of a paucity of space, the author has shied away from such an exercise.

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 [ISSN 2581-5369]