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EQUITY IN THE TRANSFER OF PROPERTY ACT: RECONSTRUCTING REMEDIES THROUGH INTENT

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ABSTRACT

In the context of equitable remedies under the Indian Transfer of Property Act, 1882 (TPA), this study examines Professor Peter Birks' fundamental distinction between civil "wrongs" and "not-wrongs," where the possibility of compensation delineates a breach of duty.²⁷ It contends that although the Indian Transfer of Property Act, 1882 (TPA) is based on equitable principles, this binary is applied inconsistently, producing frequently unfair results.

To illustrate this conflict, the analysis focusses on particular provisions. It asserts that enhancements made in good faith (S. 51) and transfers made by an apparent owner (S. 41) are appropriately regarded as "not-wrongs," giving transactional certainty precedence and avoiding unjust enrichment, and so simply requiring restitution. Conversely, S. 43 of the TPA unfairly elevates a "not-wrong" to the rank of a "wrong," placing compensation obligation on a non-culpable party by confusing fraudulent and simply erroneous transfers.

The article concludes that fairness under the TPA might be improved by a stricter implementation of Birksian taxonomy.²⁸ The Act could more effectively accomplish its goal of balancing fairness for all parties, including transferors, transferees, and true owners, by purposefully calibrating remedies—reserving compensation for genuine wrongs (fraud, breaches of fiduciary duty) and restricting "not-wrongs" to restorative remedies—instead of favouring one class of innocent parties over another.

Keywords: *Transfer of Property Act, 1882, wrongs, not-wrongs, equity, compensation, remedy*

GRASP - EDUCATE - EVOLVE

²⁷ Mahima Balaji, *Response Paper: Property Law* 1–3 (Jindal Global Law School, Spring 2024)

²⁸ Peter Birks, *Rights, Wrongs, and Remedies*, 20 *Oxford J. Legal Stud.* 1, 1–37 (2000).

I. An Introduction to equitable rules and their remedies

Equitable rules and the principles of justice, equity and conscience owe their emergence to the Courts of Chancery prior to 1873. These were codified in law after the merger of common law courts and the Court of Chancery under the Supreme Court of Judicature Acts. "He who comes into equity must come with clean hands." This maxim is based on the existence of good faith. The aim of equity is to right the wrongs committed. The four conducts in equity, that are treated as wrongs are "breach of fiduciary duty, breach of confidence, dishonestly procuring or assisting a breach of fiduciary duty and those forms of estoppel that constitute causes of action, in particular proprietary estoppel,"²⁹ with respect to the Transfer of Property Act. "Equitable remedies historically addressed 'wrongs'. However, not all grievances stem from wrongdoing. Borrowing Birks' taxonomy, 'not-wrongs' (e.g., mistaken transfers under S43 TPA) lack culpable intent but still disrupt equity, warranting at best restitution rather than punitive compensation. A wrong entails compensation, however per the statement at hand, there is a reversal of the cause and effect in law. Law has no remedy for the wrong doer, however the one seeking equity must do equity, they may not necessarily be right. "Not wrongs" have a lower threshold than being right and don't particularly attract compensation.

Specific performance and compensation are two remedies available against the equitable wrongs. Specific performance is decreed to ensure the performance of a contract whereas compensatory damages aim to restore the position of the plaintiff prior to the occurrence of the wrong, subject to the absence of remoteness, an intervening cause, duty of care to be achieved, and contributory negligence. Equitable rules majorly base the remedies on the intention and morality of the parties, where

the absence of vile or fraudulent intentions would not attract compensation.³⁰

II. The Principle of estoppel as a doctrine of equity under Section 41 and 43 of Transfer of property act:

Section 41 enables the existence of ostensible ownership, where a person appears to be the owner but isn't. This section states that if someone, with the consent (express or implied) of those interested in immovable property, presents themselves as the owner and transfers the property for consideration, the transfer won't be voidable just because the transferor lacked authorization, provided the transferee acted in good faith after ensuring the transferor's authority.³¹

This section is based on two key principles; '*nemo dat quod non habet*' where no one can transfer a higher right over the property than what they possess and '*nemo plus juris and alium transferee potest quam ipsa habet*' where no one can transfer a greater title or right over the property than what they have.³²

The transfer by the ostensible owner aligns with the principle of holding out.

The underlying principle of this section states that if two innocent individuals are deceived by someone who transfers the property of one without consent to another, and these two individuals enter litigation regarding the transferred property, then the party whose actions or consent facilitated the fraud will bear the consequences. The concept of ostensible owner transfer is founded on the doctrine of estoppel, whereby the ostensible owner is presumed to be the owner by the third parties, and they act on that representation, the real owner cannot retract his representation.³³ However, this puts the real owner in a very precarious position whereby he has almost up to no remedies available to him. Although the

³⁰ Jagabandhu Phani, *The Maxims of Equity*: I, 9 Allahabad L.J. 65, 68 (1912).

³¹ Transfer of Property Act, 1882, § 41.

³² Deepa Saxena & Garima Muniyal, *Transfer of Property by Ostensible Owner*, 3 J. Indian L. & Soc'y 1, 4 (2012).

³³ Poonam Pradhan Saxena, *Property Law* (3d ed., LexisNexis 2017) at 45.

²⁹ Andrew Burrows, *We Do This at Common Law but That in Equity*, 22 Oxford J. Legal Stud. 1, 5 (2002).

transferor gives consent to the ostensible owner, he does so for the possession not for a particular sale. If the ostensible owner performs a transaction which is not so beneficial to the owner, the real owner has no actual remedy available to him if the transferee has taken reasonable care. While rendering the transfer voidable would indeed unjustly burden the transferee, and hence the law is correct in this aspect. However, the absence of a specific balance and remedy for the real owner's protection results in a wrong against them.

A. Comparison of s41 and s35 on the basis of equitability

Comparing S41 to S35 of the transfer of property act, it is evident that the doctrine of election allows for a more equitable balance. As per s 35 In order for a property to be transferred, the transferor must claim possession of the property being transferred. However, contrary to s41 it allows the real owner to dissent to the contract directly or show the assent through their actions. It provides a mechanism for the true owner to enforce their rights and reclaim the property from the transferee, even if the latter has acted in good faith and paid consideration for the property. While for the transferee as per s 35 if he is wronged by the circumstances there exists an equitable compensation available to him.³⁴ Estimated cost of the property which is attempted to be transferred towards the transferee is the approximation of the compensation that he shall receive.

Although s 35 and 41 are both based on the same principles of equity, one safeguards the interests of all the parties while one does not. The s 41 although equitable on face value, protects the transferee from the wrong while indirectly perpetrating a wrong towards the real owner. S41 exemplifies a 'not-wrong': the ostensible owner's transfer, though harmful to the true owner, lacks fraudulent intent. Unlike S35 (a 'wrong' where the transferor actively misrepresents ownership), S41 prioritizes

transactional certainty over fault, reflecting equity's balance between innocence and redress.

Implementing a system for the registration and documentation of property transfers can help in providing a clear and traceable record of ownership rights. This would not only protect the true owner's rights but also offer a level of certainty to transferees regarding the validity of the property transfer.

B. Section 43 and the lack of distinction between fraud and error

The section 43 outlines the regulation concerning transfers initiated by a transferor lacking the initial capacity to transfer property but engaging in the transaction through misrepresentation of their title to said property. The transferor induces the other party to act based on this misrepresentation, subsequently gaining rightful title to the property. In such instances, if the contract remains valid and the property is still available, the transferee is granted the choice to proceed with the transfer or rescind it. Should the transferee opt to uphold the contract, they can validate the initially flawed transfer by exercising their option, thereby rendering it valid upon their action. Importantly, the transferor's willingness to proceed with the transfer is inconsequential; the decision lies solely with the transferee, who demonstrates their choice by exercising the option for the transfer to become valid.³⁵ The section 43 treats fraudulently and erroneously as wrongs at the same threshold.³⁶

Fraudulent transfer under Section 43 occurs when the transferor deliberately intends to defraud creditors by transferring property without adequate consideration. On the other hand, erroneous transfer arises when the transferor mistakenly believes that the transfer is valid and effective. This means that in the case of an erroneous transfer, there is no intention to defraud creditors, but rather there is a genuine misunderstanding of the legal

³⁴ Transfer of Property Act, 1882, § 35.

³⁵ *Id.* § 43.

³⁶ Poonam Pradhan Saxena, *supra* note 7, at 5.

implications. In the case of a fraudulent transfer, the transferor is aware of the consequences and intentionally seeks to deceive creditors. The intent hereby is considered immaterial which is putting an unjust burden on the transferor in an erroneous transfer. There should be differentiation between fraudulent and erroneous transfers to align with the transferor's intent. They ought to possess distinct threshold to qualify as a wrong.

It is important to note that the transfer of property act treats a transferee acting in good faith different from a transferor acting in good faith. Whereby the intent or reasonable care on the part of the transferee is taken into consideration as portrayed in s 43 and 41 while the intent on part of the transferor does not matter. For the transferor, if due to his representation, for which he is not maliciously responsible, the other party has been made to act on it, s. 43 would apply. The transferee hereby has been put on a different pedestal as compared to the transferor whereby the threshold for perpetuating is the wrong is scaled much higher than the transferee. The importance of different thresholds in identifying fraudulent transfers under Section 43 of the Transfer of Property Act cannot be overstated. By establishing varying levels of scrutiny based on the circumstances surrounding a transfer, the law can effectively distinguish between transactions that are genuinely fraudulent and those that may have been made in error while considering the amount of compensation. Under s43, Erroneous transfer should be treated as a 'not wrong' whereby the question of compensation shall not arise and it should entail only returning back the benefit that was received as per section 72 of the Indian Contract Act, This approach ensures fairness by acknowledging that errors which may occur without malicious intent and seeks to restore the parties involved into the similar state as they were before the contract was initiated.

Further as per section 43, where there are two transferees, person A and person B the subsequent transferee will enjoy the fruits of the

contracts while person A is only entitled to compensation and not the property which he was promised. There is no basis provided for this unjust conclusion in this deciding the priority of rights. It is not *per se* equitable to decide who gets the greater benefit as seems to contradict the priority of interest where the latter transaction is subject to the rights previously created as per section 48 of the TPA. S43's failure to distinguish fraud (a 'wrong') from error (a 'not-wrong') creates inequity. Fraudulent transfers, as wrongs, warrant compensatory damages; erroneous transfers, as not-wrongs, should limit remedies to restitution, aligning with Birks' principle that not-wrongs lack the moral culpability to justify punitive measures.

III. Crystallization of the equitable doctrine of acquiescence and unjust enrichment under Section 51 of Transfer of property Act:

Section 51 applies to a transferee, who, in good faith, believing himself to be the owner of property makes improvements under this belief over the said property. This applies to only absolute ownership. The transferee cannot claim the remedy under this section if it was gratuitous or if he was aware of the lack of title on his part.³⁷

On being evicted by the real owner, he may either choose to acquire from the owner the value of improvements or transfer to him the interest in property at the market price. The owner may neither be unjustly enriched nor shall the transferee benefit from encroachment.³⁸ The underlined doctrines of unjust enrichment, established in *Moses v Macferlan*, as well as that of acquiescence aim to strike at the unjust advantage received at the expense of the other and provides for the equitable remedy of compensation. The actual owner, aware of the lack of ownership on the part of the other cannot take undue advantage of the improvements made by the transferee. If they do so they are said to have acquiesced in

³⁷ *Ibid.* at 80.

³⁸ Transfer of Property Act, 1882, § 51.

the action of the other and will have to compensate the transferee.³⁹ This principle is also applicable to S52 of the Transfer of Property Act.

S51's compensation for improvements reflects unjust enrichment—a 'not-wrong' where liability arises from benefit retention, not fault. Conversely, S53's voidance of fraudulent transfers treats them as wrongs, meriting harsher remedies.

IV. The equitable doctrine of lis pendens as established under s 52 of the Section 51 of Transfer of property Act:

S52 is based on the doctrine of lis pendens and the roman maxim "Rem de qua controversia prohibemur in acrum dedicare".⁴⁰ This section subjects the transfers or any other form of alienation of a specific immovable property to court authority, if a non-collusive suit pertaining to it is filed in the court of a competent jurisdiction⁴¹ as laid down in Bellamy v Sabine.⁴² This continues till the execution of the final decree, taking into account the appellate stages of proceedings. The decision is binding on the transferees who may have purchased the property during these proceedings, and they are assumed to have notice of these proceedings, hence there is no mention of a bona fide transferee except with reference to absence of collusion.⁴³ However, this applies only to court proceedings, and excludes every other proceeding such as arbitration.⁴⁴

This doctrine aims at protecting the interest of the actual owner and the transferee who might have acquired the property during the proceedings the title of the property is in dispute and a person who does not have ownership of the property cannot rightfully alienate it. It ensures that one party does not endanger the interests of the other.⁴⁵ The

transferee pendente lite may be impleaded as the third party to suit as per Jayaram Mudaliar v Ayyaswamy.⁴⁶ A person aware of their own defective title will have to make do the loss to the transferee based on the doctrine of acquiescence, who will also have a remedy under s 43 of the Transfer of Property Act. However, the transferee receiving the property from the judgement debtor would have to file a separate suit for receiving compensation.⁴⁷

It does not render the transaction void however provides the apparently wronged transferee with a right to ask for compensation. However, the only right provided here should have been to restore the benefit to the transferor in lieu of the transaction, for the transferee is presumed to have notice of the dispute in either the title, possession, or right of alienation etc.

V. The Principle of estoppel as a doctrine of equity under 53 of Transfer of property act:

S53 is framed to protect the interests of the creditor, where a transfer of an immovable property by the debtor has been affected to the either defeat or delay their rights.⁴⁸ Such transfers and those without consideration are voidable at the instance of the creditors however they would have no remedy against a bona fide transferee with no notice of the same.⁴⁹ The intention is not imminent in a transfer without consideration, only the existence of transfer is, and is voidable on the creditor's part. While partitions are not transfer as per V.N. Sarin v Ajit Poplai,⁵⁰ fraudulent partitions which do not provide a chance of recovery to the creditors would be hit by this section.

The debtor cannot take away the creditors' right to the money they furnished by parting from a property, especially if there is a single property in his ownership. The bona fide transferee who is not wrong in purchasing the property has no

³⁹ Jagabandhu Phani, 'The Maxims of Equity: II' (1912) 9 Allahabad LJ 93.

⁴⁰ Jayaram Mudaliar v. Ayyaswamy (1972)2 SCC 200, page 8.

⁴¹ Poonam Pradhan Saxena, *supra* note 7, at 87-89.

⁴² Bellamy v. Sabine, (1857) 1 De G. & J. 566.

⁴³ The Transfer of Property Act 1882, § 52.

⁴⁴ Nagubai Ammal v. B. Shama Rao, (1956) SCR 451.

⁴⁵ Muskan Sethi, 'Indian Law on Lis Pendens' (2021) 4 Int'l JL Mgmt & Human 1967.

⁴⁶ Jayaram Mudaliar v. Ayyaswamy (1972)2 SCC 200, page 10.

⁴⁷ Muskan Sethi, *supra* note 19.

⁴⁸ Poonam Pradhan Saxena, *supra* note 7, at 101.

⁴⁹ The Transfer of Property Act 1882, § 53.

⁵⁰ V. N. Sarin v. Ajit Kr. Poplai (1966) 1 SCR 349.

responsibility towards the creditors. This section taps onto the principle of estoppel, of the transferor towards the transferee in conveying the property and towards the creditors in furnishing back their money.

VI. The equitable doctrine of past performances as established under s 53A of Transfer of property act and the remedies of specific performance:

S53A is a shield against a willing and ready transferee's eviction who has paid consideration based on the equitable doctrine of past performance.⁵¹ They must have done an act in furtherance of the agreement. The instrument here is incomplete, it also pertains to agreements of sale, and is applicable to ownership and all profits a prendre. The instrument is to be signed, registered, as well as attested by two witnesses. They should have possession of the property in question which can be proved through presenting electricity bills, water bills, tax bills etc. The doctrine protects the transferee from the wrongs of fraud and breach of confidence by providing them with the remedy of specific performance. The transferor however is not prohibited from selling the property to a third party, and the first transferee would not have a remedy against the bona fide third party, who had no notice of the possessor's right.⁵² The subsequent transferee is said to have committed no wrong hence is not liable to the prior transferee. However, they would have a remedy against people claiming under the transferor who may either be an heir or a subsequent transferee.⁵³

The equitable remedy to this of specific performance, which aims at the performance or fulfilment of the contractual obligations till the extent to which it is possible and practicable. This is based on underlining belief that no individual enters into a contract apprehending that it will not be fulfilled. The remedy is based on the normative aspect of the losses as

opposed to factual aspect, as it tries to rectify the injustice caused by identifying the disparity between the existent situation of the transferee and what it would potentially have been based on their agreement. Specific performance under S53A bridges wrongs and not-wrongs: it enforces agreements where the transferor's conduct (e.g., selling to a third party) may be a wrong, but protects transferees whose claims arise from non-culpable reliance (a not-wrong).

VII. Conclusion

The law focuses on the existence of compensation to classify an act as breach or a wrong and puts the remaining acts under the umbrella term of "not wrongs" not encompassing compensation. The sale to a transferee by an ostensible owner is not considered wrong and does not provide the owner with a remedy against this transaction. This surmises a different threshold for these not wrongs and even though they may not be entirely equitable do not entail the liability of paying compensation. Equity's remedies must distinguish wrongs from not-wrongs. Current ambiguities (e.g., S43's conflation of fraud and error) perpetuate inequity. By adopting Birks' taxonomy, the TPA could better calibrate remedies: punitive for wrongs, restorative for not-wrongs. Equity to one party is not necessarily equitable to all parties in question, and this is portrayed in the determination of compensation provided to acts which are considered right, wrong or not wrong.

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⁵¹ The Transfer of Property Act 1882, §53A.

⁵² Abhineet Upadhyay, Harsh Raj Singh & Patnika Rajesh, *Analysis of the Doctrine of Part Performance*, 4 Indian J.L. & Legal Rsch. 1 (2022).

⁵³ Poonam Pradhan Saxena, *supra* note 7, at 106.



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