



FACULTY OF JURIDICAL SCIENCES

COURSE: BALLB &BBALLB

SEMESTER: VI

SUBJECT: LAW OF PROPERTY

SUBJECT CODEB A L 603

&BBL 603

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Lecture-12



DOCTRINE OF ELECTION

Section 35 of the Transfer of Property Act, 1882:-

It subsumes the Doctrine of election alongwith Sections 180-190 of the **Indian Succession Act 1925**.

Election means choosing between two alternative rights. If two rights are endowed on a person under any instrument in such a manner that one right is more preferable than the other, he is bound to elect or choose only one of them.

Theme behind Section 35-

Allegans contraria non est audiendus : he is not to be heard who alleges things contradictory to each other.

Section 35 of Transfer of Property Act, 1882 reads:

Where a person professes to transfer property which he has no right to transfer, and as part of the same transaction confers any benefit on the owner of the property, such owner must elect either to confirm such transfer or to dissent from it; and in the latter case he shall relinquish benefit so conferred, and the benefit so relinquished shall revert to the transferor or his representative as if it had not been disposed of, subject nevertheless, where the transfer is gratuitous, and the transferor has, before the election, died or otherwise become incapable of making a fresh transfer, and in all cases where the transfer is for consideration, to the charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred to him. The rule in the first paragraph of this section applies whether the transferor does or does not believe that which he professes to transfer to be his own. A person taking no benefit directly under a transaction, but deriving a benefit under it indirectly, need not elect. A person who in his own capacity takes a benefit under the transaction may in another dissent there from.

This doctrine is universal in nature and is applicable to Hindus, Muslims, Christians. This doctrine consists of the principle of a person exercising a choice out of his own free will to do

one thing and is founded on the equitable doctrine that he who accepts the benefit under an instrument or transaction of its choice must adopt the whole of it or renounce everything.

This principle was determined in the case of **Codrington v Codrington (1857) 7 HL 854, 861.**

Essential Conditions-

From the case of **Dhanpati v. Devi Prasad and others (1970) (3) SCC 776 (778)**, it was determined that before election following conditions must be fulfilled-

1. A person having no right to transfer, transferring property
2. He must transfer some benefit on the owner of the property, as part of the same transaction
3. The owner must elect either to confirm the transfer or to dissent from it.

Effect of election against the transfer-

Where the owner dissents from the transfer of his property –

1. He must forgo the benefit
2. The benefit contemplated for him would then go back to the transferor.

Exceptions:

Where a particular benefit is expressed to be conferred on the owner of the property which the transferor possesses to transfer, and such benefit is in lieu of that property, if such owner claims the property, he is not bound to relinquish any other benefit that he achieves through the same transaction.

The acceptance of the benefit by the original owner will be considered to be an election by him to confirm the transfer, if he is aware of his duties and responsibilities and of the circumstances that might influence a prudent (reasonable) man into making an election.

This knowledge of the circumstances can be assumed if the person who gets the benefit enjoys it for a period of more than two years without doing any act to express dissent.

The transferor would ask him to elect his choice, if the original owner does not elect his option within a year of the transfer of property. Even after the reasonable time, if he still does not elect, the original owner shall be presumed to have elected the validation of the property transfer as his choice.

In context of a minor, the period of election shall be adjourned till the individual attains majority unless he is represented by a guardian.

Modes of Election

The election by the owner can either be direct or indirect.

In direct election, one just needs to simply communicate about the elected choice or option. Though, in case of an indirect election, the acceptance of the benefit by the owner is subject to two conditions:

1. He has to have the knowledge of his responsibility to elect.
2. There must be proof of knowledge of circumstances which would influence the judgment of a prudent man to make an election.

The election shall be presumed when the donee acts in such a manner with the property gifted to him that it becomes impossible to return it to the original owner in its original state.

Difference between English Law and the Indian Law Perspective-

The English law depends upon the principle of compensation which states that if the original owner does not validate the transfer, he will be able to retain the property and also the benefit accrued, subject to compensation provided to the donee, to the extent to which he had suffered a loss.

But in the Indian law, this doctrine is affected by the principle of forfeiture which says that if the real owner does not confirm the transfer, the donee incurs a forfeiture of the granted benefit which goes back to the transferor.

Compensation

The estimated cost of the property which is to be transferred to the transferee is the approximate value of the compensation that he will receive. But in case of immovable properties, the issue of changing value of the properties according to the lapse of time arises. Thus, this valuation needs to take place at the time of the instrument coming into force rather than at the time of election

Conclusion:

Section 35 of the Transfer of Property Act, 1882 explains the concept of the Doctrine of Election. This article deals with the various gradations involved in the doctrine through the usage of various landmark judgments. A special emphasis has been conferred upon the conditions necessary for the election by the original owner. The differences between the Indian Law perspective as well as the English Law perspective are mentioned here to critically analyze the provisions i.e. Principle of forfeiture and Principle of compensation. The foundation of the

doctrine of election is that the person taking a benefit under an instrument must also bear the burden. In simple words, a person cannot take under and against one and the same instrument.

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1. Under the provisions of section 35 of the Transfer of Property Act, 1882, where a person professes to transfer property which he has no right to transfer, and as part of the same transaction confers any benefit on the owner of the property then

- (a) such owner must elect either to confirm such transfer or to dissent from it
- (b) such owner can elect to confirm such transfer only
- (c) such owner can dissent from transfer only
- (d) none of the above.

2. The foundation of doctrine of election under the Transfer of Property Act, 1882 is that a person taking the benefit of an instrument:

- (a) must bear the burden
- (b) must not bear the burden
- (c) burden is not the subject of election
- (d) none of the above.

3. A person is not put to his election, unless he has a proprietary interest in the property disposed off in derogation of his rights. This is the subject matter under provisions of:

- (a) section 35 of the Transfer of Property Act, 1882
- (b) section 35 of the Indian Registration Act, 1908
- (c) section 35 of the Indian Succession Act, 1925
- (d) General Clauses Act, 1897.

4. In the Transfer of Property Act, 1882, sections 33 to 37 apply to

- (a) movable property only
- (b) immovable property
- (c) both immovable and movable property
- (d) none of the above.

5. 72. Cooper V. Cooper (1874) relates to:

- (a) Rules against perpetuity
- (b) Doctrine of election
- (c) Doctrine of part performance
- (d) Transfer for unborn child