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Fraudulent Transfer of Immovable Property

Aryan Bammi[1,*]

Abstract

The subject of the present study is the "Transfer of Property Act, 1882". The researcher has, in the present study, included specific provisions related to the fraudulent transfer of immovable property. Specifically, section 53 of the act which defines the term fraudulent transfer. This study will delve into the various aspects surrounding fraudulent transfers, its meaning and applicability of section 53 in various cases. The present study will also briefly discuss the kind of transfers which do not come within the ambit of section 53. The researcher has used legislations and case laws to explain the concept of fraudulent transfers in his best available capacity.

Keywords: Fraudulent transfer, immovable property, transfer of property act, Section 53, Intention

INTRODUCTION

Section 25 of the Indian Penal Code defines the term "Fraudulently". Under section 25, it is stated that:

"A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise" [1].

In the case of *Dr. Vimla V. Delhi Administration*, [2] the Hon'ble Supreme Court explained the meaning of the term "defraud" by stating the two essential elements that constitutes defraud. The two elements are:

i. Deceit and;
ii. Some form of injury caused to such deceived person. Such an injury is not restricted to any form of financial loss. Depriving a person of their proprietary rights or causing harm to their person in any form or depriving such a person of money is also inclusive of an injury leading to defraud.

Every owner of a property has certain proprietary rights that they are entitled to use for their personal benefit. Such proprietary rights include the right to transfer the property as per the discretion of the owner. However, such a transfer must be done with a *bona fide* intention and must not include any form of malfeasance. If it is found that there was malfeasance involved, pertaining to the intention, the transfer is referred to as a fraudulent transfer.

*__Author for Correspondence__
Aryan Bammi
E-mail: aryan.bammi@student.slsh.edu.in

[1]Student, Department of Law, Symbiosis Law School, Hyderabad, Telangana, India

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In Partridge v. Gopp [3], it was stated by Lord Keeper that, "no one has power over his property to such extent using which he, whilst using his right of alienation of property, can delay, defraud or hinder his creditors. The only the situation he can do is when it is bona fide and is done upon consideration considered good in the eyes of law."

The concept of fraudulent transfer is covered under Section 53 of the Act Fraudulent transfer is mentioned under section 53 of the Transfer of

Property Act, 1882 (hereinafter referred to as 'TPA'). Under section 53 it is stated that:

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" [4].
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" [5].

The transferor's intention to "defeat or delay" the creditors is covered under Section 53(1) and the intention to "defraud" the transferee is covered under Section 53(2).

The intention of the transferor to "defeat or delay" the creditors must be proved in order for a transfer to be adjudged as a fraudulent transfer.

For a transfer to be deemed as fraudulent, the intention of the transferor to "defeat or delay" the creditors with the transfer must be proved. To further perpetuate on this matter, the applicability of section 53 depends on the availability of four key elements that must be met with in order to constitute a fraudulent transfer. They are as follows:

i. Transfer of Immovable Property;
ii. Mala Fide Intention of the Transferor;
iii. Filing of Suit and;
iv. Bona fide Transferee.

The essential elements mentioned above will be dealt with at a later stage of this study.

RESEARCH QUESTIONS

i. Whether fraudulent transfers are covered under the Transfer of Property Act, 1882?
ii. What are the different requirements for a transfer to be deemed as fraudulent?
iii. Whether multiple creditors can file for a single suit of fraudulent transfer?

RESEARCH OBJECTIVES

The researcher's objectives for the present research are to address the following research objectives:

i. To differentiate between a fraudulent transfer and a legal transfer;
ii. To discuss about the way the Transfer of Property Act of 1882's Section 53 operates and what it covers;
iii. To highlight the various requirements of a fraudulent transfer pertaining to section 53.

SCOPE

The present study is predominantly restricted to the laws and legislations of India. However, the researcher has used one English case law to explain the concept of fraudulent transfers. The only limitation of the present study is that it is doctrinal in nature, which entails that, it is written after researching on pre-written sources. Thus, there was no field work conducted by the researcher. Furthermore, due to the restricted scope of the present study, the researcher could not meet with the assigned word limit.

RESEARCH METHODOLOGY

In the present study, the researcher has followed the doctrinal method to conduct the research. The researcher has used primary sources such as legislations and case laws in his research. Similar to this, the researcher's study incorporated secondary sources including journal articles, blogs, etc.

ANALYSIS

In this part of the study, the researcher will delve into the various essential elements which constitute a fraudulent transfer.

Transfer of Immovable Property

The most basic and the most essential element for a fraudulent transfer to succeed is the transfer of a property. Such a transfer must be valid and must follow the norms and regulations of the TPA. According to section 5 of the TPA.

"Transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, 1 [or to himself] and one or more other living persons; and "to transfer property" is to perform such act" [6].

For section 53 to be applicable, there must be a transfer and such a transfer must involve the transfer of an immovable property. The transfer must not be fictitious in nature and must be a real transfer which include the transfer of the title to the transferee. Fictitious transfers are transfers in which the transferor remains the real owner of the property [7].

Mala fide Intention of the Transferor

One of the most important objectives behind section 53 is to protect the creditors from being deceived. For a fraudulent transfer to succeed, the mala fide intention of the transferor must be proved. If malfeasance is so proved, then the transfer would be deemed as voidable on the discretion of the creditor.

Furthermore, the term "creditors" that is used in the provision does not necessarily imply that there must be multiple creditors or the transferor must deceive all the creditors involved. If it is proved that even a single creditor has been deceived, section 53 would be applicable.

In the case of *Kanchanbai v. Moti Chand [8]*, the transferor raised a contention that section 53 would not be applicable since there was only one creditor. However, contrary to the claims of the transferor, the Hon'ble Supreme Court enunciated that, "the phrase creditors would also include a single creditor. The section would be attracted even when a single creditor is defrauded or there was intention just to defraud a single creditor. Here the transfer was done with the intention to defeat and delay the creditor's claim. Hence, section 53 would be applicable."

Filing of Suit

In the case of fraudulent transfers, the principle of privity of contract is applied which means that only those parties who are a part of the contract or whose name is mentioned in the contract can sue for action. No other party can sue for action on behalf of the creditor if they are not a party to the contract. A creditor can file a suit on the ground that the transferor had a mala fide intention to deceive the creditor through the transfer.

Filing of suit on behalf of all the creditors, by one creditor is followed to refrain from multiplicity of suits and the verdict on the suit, either for or against the creditors, will affect all the creditors in the same manner.

Furthermore, the burden of proof falls onto the shoulders of the creditors. Indian Courts follow the principle of *innocent until proven guilty*, which is applicable in cases fraudulent transfers as well. For fraud to exist, it must be proved to the courts that the transfer was fraudulent in nature. As a result, the burden of proof falls on the creditors to demonstrate to a court of law that the transferor intended to "defeat or delay" the creditors.

However, if it is proved that the transferor did intend to "defeat or delay" the creditors, the transferee must prove that the property purchased by him/her was in good faith and conscience.

Bona Fide Intention of Transferee

Section 53 protects the interests of a bona fide transferee from deceit and fraud. However, to be called a bona fide transferee, the transferee must have purchased the property in good faith and must have had no knowledge about the fraud. If the transferee purchased the property in good faith and with no knowledge of the fraud, he is protected under section 53 of the TPAA creditor is a transferee in good faith even if he is aware of another creditor's proceedings against the transfer, as long as he is protecting his own interests and not undermining the interests of other creditors [9].

Furthermore, the transfer must involve a form of consideration since gratuitous transfers are not covered under Section 53 of the TPA.

LITERATURE REVIEW

"Fraudulent Transfers" [10] -Dr. Ravi Kant Gupta: The above is an online document released by Dr. Ravi Kant Gupta, who is a faculty of law at Rama University. The document explains fraudulent transfers in a coherent manner and includes the essential elements required for a fraudulent transfer to succeed. At the end of the document, there are a few MCQs which test you on the concept of fraudulent transfer.

Online Document from SMM University [11] -Mrs. Aakanksha: The above is an online document released by Mrs. Aakanksha, who is a faculty of law at SSM University. In the document, the author has explained the doctrines of *lis pendens,* fraudulent transfers and part performance, which are covered under sections 52, 53 and 53-A respectively, in a coherent manner. However, for the sake of the present study, the author had referred only to the fraudulent transfer part of the document which has exuberantly helped in conducting and formulating the present study.

"Doctrine of Fraudulent Transfer under Section 53 of TPA" [12] -Mr. Pushkaraj G: The above is an article published in the blog, *Legal Service India*. The author has described the key aspects of fraudulent transfers accurately and without missing any detail. Similar to the previous literatures, this article has exuberantly helped in conducting and formulating the present study.

CONCLUSION

Fraudulent transfers are considered as voidable with the intention to give an option to the creditor to either go forward with the transfer or not go forward with the transfer. Such an option is given by the courts because according to the law, the transfer is a valid one but it is left to the discretion of the creditor to go forward with it or not.

Fraudulent transfers, as the name suggests, involves deceit and fraud which are against the principles of contract. The parties involved in a transfer of property must share a common intention and carry out their respective duties in good faith. However, when one of the parties do not follow this, it is expected of the courts to impose liability upon such individuals, considering their guilt is proven.

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