

IMPORTANCE OF NOTICE IN ASCERTAINING THE VALIDITY OF TRANSFER OF PROPERTY: AN OVERVIEW

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Abstract

The free flow of property is a crucial component for the development of our society. When the idea of property first emerged in the early modern era, people started to acquire it by using their great power, but this is no longer possible because the law protects ownership of property against unauthorized taking of property. In order to safeguard the residents' property rights, each nation has its own set of laws. Property refers to a group of rights over various movable or immovable objects. The only things that can be transferred from one person to another are ownership rights. Both the transferor and the transferee must enter into a legal contract to specify the terms and conditions of the transfer in order to transfer ownership rights from one person to another. Every contract is made by the free consent of both the parties to a contract. A person may form a valid consent only when he or she knows all the information about the subject matter of the contract. If any contract is made between two parties each of them must know about the subject matter of the transfer. Here, the concept of notice is crucial to the transfer of property because it ensures that all parties are fully informed and capable of making informed decisions about the transfer and helps to prevent conflicts and legal issues that may arise from a lack of information or disclosure. Notice is an important part of transferring property because it helps to prove that the transfer is legal, protects the buyer or transferee from legal problems, and figures out the order of ownership rights. To avoid legal problems and make sure the property transfer goes smoothly, both buyers and sellers must make sure they follow the rules for giving notice. In the above context, an effort has been made to discuss the theoretical evolution of the concept of notice, conceptual understanding of notice in relation to transfer of property and various legal principles, statutory provisions and judicial pronouncements as well as the legal implication of withholding of notice in relation to it.

Keywords: *Notice, Information, Constructive Notice, Movable, Immovable, Transfer, Property.*

1. Concept of Notice

Notice means information or knowledge about any fact relating to any issue that has relevance in relation to any dispute. This information or knowledge must be given to the parties to the dispute in relation to the issue or subject of the dispute. It's important because in the world we live in now, there are too many problems with buying and selling property, especially in the real estate market, and promoters don't always tell you everything you need to know about the property. There could be a problem with the title or liens on the property, or the person selling the property could be trying to delay or stop the

buyer from getting title to the property. Sometimes the seller may enter into an agreement to sale with one person and subsequently sell the property without disclosing the fact of previous agreement. The seller may make a deal to sell to one person and then sell the same property to someone else without telling them about the first deal. A single property may be transferred simultaneously to different transferees. The importance of notice and information with respect to each and every transfer and proof of the fact of the notice for the purpose of establishing the title is a technical legal issue.

2. Meaning of the term notice in relation to Transfer of Property Act.¹

In the context of a transfer of property, notice generally refers to the communication or disclosure of information that is relevant to the transfer. This information may include details about the property's title, including any encumbrances, liens, mortgages, or other claims or disputes that could affect the transfer.

Notice² is an important part of the process of transferring property because it makes sure that everyone involved in the transfer has access to important information and can make decisions about the transfer based on that information. Failure to provide notice or disclose relevant information may result in the transfer being void or voidable or may lead to disputes or legal challenges.

There are different kinds of notice that may be needed when transferring property. These include actual notice, constructive notice, and inquiry notice.

2.1 Theoretical evolution of concept of notice in relation to transfer of property

The concept of "notice" in relation to the transfer of property has evolved over time in legal theory. Here is a brief overview of the theoretical evolution of the concept of notice:

Early Common Law:

The principle of *caveat emptor*, which means "let the buyer beware," was used in the transfer of property under the common law. This meant that buyers were responsible for investigating the property and ensuring that they were acquiring a clear title. The seller did not have to tell the buyer about any problems with the property.

¹ The Transfer of Property Act, 1882. Act No. 4 of 1882.

Equity:

In the 16th century, courts of equity began to develop in England. These courts recognised that the strict application of *caveat emptor* could result in unfair outcomes, particularly in situations where a seller had defrauded a buyer. Equity courts began to require sellers to disclose certain defects in the property, such as encumbrances or easements.

Statutory law:

In the 19th century, statutory law started to codify the rules requiring the giving of notice when one sold or gave away property. In the UK, for example, the Conveyancing and Law of Property Act of 1881 required that sellers tell buyers about certain things about the property, such as any problems with the title.

Modern Law:

In modern law, notice is a very important part of making sure that the transfer of property is valid. Buyers and people who receive the property usually have to do a title search to find out if there are any liens, encumbrances, or other claims on the property. The seller and the person who gets the property must also tell the buyer about certain things about the property, such as any problems with the title or environmental hazards.

3. Types of Notice

According to the definition of in Transfer of Property Act, Notice may be either direct or indirect

3.1 Real notice

A direct communication or information disclosure is defined as real notice. When

² Section 3 of The Transfer of Property Act, 1882.

someone is made aware of a truth or specific facts pertaining to a legal dispute, this is known as actual or express notice. As official notices, hearsay and hazy rumours are not accepted.

The following key requirements must be met by an actual or express notice:

1. Actual knowledge of a fact or clear, direct information is required.
2. A transactional party may only have first-hand knowledge.
3. The transaction must be linked to real-world knowledge.

For example, suppose A sells his land to B. A contract exists between A and B. B agrees to give A half of the money now and the rest after the instrument is registered. A has once again sold the same land to C. If C is aware of A and B's prior agreement, B may file a lawsuit against C.

3.2 Notice that is effective (Constructive notice)

The rule of constructive notice assumes that a party knows certain information that has been made public or is kept on file in government registries. "Constructive notice" is defined as knowing the specific facts that a court attributes to a party. According to the legal presumption of constructive notice, in certain circumstances, a person is presumed to have knowledge of a fact as if he genuinely knows it. A person is presumed to know certain information if the circumstances suggest that a prudent person should have known it in relation to the transfer transaction. This serves as a legal stipulation.

The following are the primary requirements for application of the rule of constructive notice in relation to a registered transaction:

1. According to the Registration Act of 1908, the document must be registered.

2. The document must be properly recorded or lodged in the required records under Section 51 of the Registration Act of 1908.

3. According to Section 55 of the Registration Act of 1908, the information pertaining to the transaction to which the instrument pertains must be accurately entered in the indexes maintained.³

3.3 Legal Presumption of Constructive Notice:

The following situations give rise to the legal presumption of constructive notice:

3.3.1 Wilful failure to search or inquire:

A person is presumed to have a notice of a fact if it was his duty to inquire or if there was something to set him on an investigation that, if he had continued it, would have led him to the truth. The phrase "will abstain from an inquiry or search" in Section 3 refers to a refusal to conduct a search or inquiry that would show a lack of bona fides. Simply failing to conduct inquiries does not constitute constructive notice under the Section. As an example, suppose A sells property to B. When A acquired the property through partition, the partition document reserved presumption rights. Before purchasing the property, B must inspect the division deed; if he chooses not to do so in order to avoid competition, this is considered a deliberate abstention.

3.3.2 Extreme negligence:

We don't just mean carelessness when we say gross negligence; we mean a level of negligence that is so extreme that it can be used as evidence of fraud in court. If there is a lack of awareness

³ Explanation I of the definition of notice under section 3 of the Transfer of Property Act, 1812.

of obvious risks, this is considered extreme negligence or carelessness. What is considered egregious negligence in one situation may not be in another. Everything depends on man's knowledge and the tools available to him for gathering information. The main difference between willful omission and severe carelessness is that in the latter case, there is no intention to deceive or cheat. As an example, suppose X purchases a property within the municipality. X failed to investigate whether any municipal taxes on the property were past due. She should have checked before buying because of X's excessive irresponsibility. In *Tilakhari v. Khedan Lal*⁴ The Privy Council held that before purchasing an immovable property, the omission to search the Register kept in the Register's office may amount to gross negligence so as to attract the consequences which result from notice.

3.3.3 Documents required for registration:

When a document is required to be registered, registration is considered constructive notice. The 1929 Amendment Act made it abundantly clear that registering a real estate instrument constitutes notice of the document as of the registration date. Registration serves as notice only in the following circumstances: I) when the instrument must be registered in order to be valid; ii) when notifying a subsequent transferee. iii) The instrument must have been registered in accordance with the guidelines of the Registration Act of 1908, and prior transferees are unaffected by notification of subsequent transactions resulting from its registration.

3.3.4 Sincere ownership:

A buyer must be aware that if an immovable property is in their possession, someone is exercising their right of possession and enjoyment over it. In other words, anyone who

deals with movable property is assumed to be aware of whoever is temporarily in actual possession of it. The possession has to be real. After selling his property to B, A asks B to let him live there while he looks for a new place to live. There was no sign-up. C has the same property as A. Because B does not actually own anything, it is not a constructive notice to C.⁵

3.3.5 A word of caution to an agent:

The general rule is that a person knows something when it is communicated to or learned by his agent. The agent's knowledge is thought to be equivalent to the knowledge of principal. This broad concept is subject to several constraints.

3.3.6 A notice to an agent is also a notice to the principal in the following situations:

- a. fact must be something that the agent is aware of.
- b. The agent had to learn the information while performing their duties.
- c. The agent must have been assigned to a particular transaction or line of business.
- d. The factual information must be relevant to the specific transaction or business.
- e. The information must be gathered in good faith and with the care of a sensible, prudent man. The following are exceptions to the rule:
 - i) If the agent fraudulently conceals knowledge of a fact with malicious intent, his knowledge will not be considered the principal's knowledge.
 - ii) If a third party is also involved in the deception, and that third party is aware that the agent is concealing the truth with

⁴ AIR 1921 PC 112, also available in Avtar Singh and Harpreet Kaur, *Textbook on Transfer of Property Act*, (6th ed, 2019), LexisNexis. p.22

⁵ Explanation II of the definition of notice under section 3 of the Transfer of Property Act, 1812.

malicious intent, the agent's knowledge does not equate to the principal's knowledge.⁶

Overall, notice is an important concept in property transfers because it ensures that all parties involved in the transfer are fully informed and able to make informed decisions about the transfer, and it helps to avoid disputes and legal challenges that can arise from a lack of information or disclosure.

4. Importance of notice in relation to transfer of property

Notice is a very important part of the transfer of property because it lets people know important things about the property being transferred. "Notice" refers to the law that says a person selling or transferring property must tell the buyer or transferee important information about the property.

In the context of property transfers, notice is important for several reasons. **Firstly**, notice helps establish the validity of the transfer by ensuring that the buyer or transferee is fully informed of the property's status and any encumbrances or restrictions on it. This can include information about any liens, mortgages, or other claims against the property that could affect the buyer's ownership rights.

Secondly, notice helps to protect the buyer or transferee from any unforeseen legal issues that may arise after the transfer. For example, if the seller fails to disclose a defect in the property or an existing dispute with a third party, the buyer could face legal challenges or financial losses in the future.

Thirdly, notice is important in establishing the priority of ownership rights when there are competing claims to the property. For example, if two parties claim ownership of the same property, the party who has given notice of their

ownership rights first may have a stronger claim to the property.

5. Principles behind the doctrine of notice in relation to transfer of property

The doctrine of notice in relation to transfer of property is based on several key principles:

Good faith:

The doctrine of notice is based on the principle of good faith, which requires parties to act honestly and fairly in their dealings with each other. This means that parties are expected to disclose all relevant information and not withhold any material facts that could affect the transfer.

Knowledge:

The doctrine of notice is based on the principle of knowledge, which means that parties are generally presumed to have knowledge of information that is publicly available or recorded in official registries. This includes information about any encumbrances or claims against the property, as well as any defects or limitations in the title to the property.

Reasonable inquiry:

The doctrine of notice is also based on the principle of reasonable inquiry, which requires parties to conduct a reasonable search or inquiry into the title of the property to uncover any relevant information. This may include reviewing public records, conducting a physical inspection of the property, or obtaining legal advice.

⁶ Explanation III of the definition of notice under section 3 of the Transfer of Property Act, 1812.

Notice is more important in relation to transfer of immovable property rather than movable property:

Notice is generally considered more important in relation to the transfer of immovable property than movable property for several reasons:

Immutability of immovable property:

Immovable property, such as land or buildings, are generally considered to be more permanent and immutable than movable property. This means that the effects of any transfer of immovable property are likely to be long-lasting and have significant consequences for the parties involved. It is therefore important to ensure that all relevant information is disclosed and that proper notice is given to avoid any misunderstandings or disputes.

Public recording:

In many jurisdictions, the transfer of immovable property is recorded in public registries, such as land title offices or land registries. This public recording makes it easier for parties to obtain constructive notice of any encumbrances or claims against the property, and to ensure that all necessary notice requirements are complied with.

Legal formalities:

The transfer of immovable property often involves more legal formalities than the transfer of movable property, such as signing a written agreement, paying stamp duty, and registering the transfer with government authorities. The goal of these procedures is to make sure that the transfer is properly recorded and that all relevant information is shared with all parties.

6. The laws governing the requirement of notice in transfer of property

Different places have different laws about whether or not you have to give notice when you sell or give away property. But in general, notice is a legal requirement that is meant to make sure that people who are buying or getting property are fully informed about it. Here are some of the laws that govern the requirement of notice in the transfer of property:

6.1 Statutory Requirements and Judicial pronouncement on notice for validity of different type of transfer under the transfer of property Act 1882:

There are statutory disclosure requirements in many jurisdictions that a transferor must follow when transferring property. For example, in India, Transfer of Property Act, 1882 provides some general principles relating to Transfer. Where Sections 38 to 53A of the transfer of property Act speaks about specifically the rules relating to transfer of immovable property only. In this part, specially section 39, 40, 41, 43, 53 and 53A speaks about notice and constructive notice to make the transfer valid and provides some advantage to the transferee of good faith with bonafide intention, with consideration and without notice.

Over time, Indian courts have made a number of decisions about whether or not notice is needed for different kinds of transfers to be legal under the Transfer of Property Act of 1882. Here are some examples:

6.1.1 Sale of Immovable Property:

In the case of *Ramesh Hiranand Kundanmal vs. Municipal Corporation of Greater Bombay*⁷, the Supreme Court of India held that the seller of immovable property has a duty to disclose all material defects in the property to the

⁷ [(1992) 2 SCC 524].

buyer, failing which the sale can be declared voidable at the option of the buyer.

6.1.2 Right to Maintenance:

Section 39 of the transfer of Property Act Provides that where a third person is entitled to receive maintenance from the income of the immovable property and such property is transferred the third person can enforce the right against the transferee if the transfer is for consideration and the transferee has notice of such right and where the transfer is gratuitous, the notice to the transferee is immaterial. In *Kaveri v. Parmeswari*⁸ it has been ensured that the right to receive maintenance is not only the first instance but the enhanced maintenance in future depending on the changed circumstances.

6.1.3 Restrictive Covenants:

If any negative covenant is made between two owners of different immovable properties regarding the use or enjoyment of the said land, the subsequent transferee or series of transferees of both the parties to the covenant are bound by the said covenant if the transfer is without consideration or if the transfer is with consideration the transferee must have the notice of it. In a landmark case⁹ it was held that T the owner sold the garden to E with a covenant that E and his successors or assignees shall keep the garden intact as ornamental and shall not construct any building on it. It was a negative covenant and when the subsequent purchaser or purchasers having notice about the said covenant may be restrained by T or his successor to construct any building on that garden. This is an equitable doctrine inserted in section 40 of the Transfer of Property Act, 1882.

6.1.4 Transfer made by ostensible owner:

Section 41 of the Transfer of Property Act existed before the Benami Transaction (Prohibition of the Right to Recover Property) Act, 1988. Both the laws aimed to restrict the real owner or the successor of the real owner to

deny the right to transfer by the benamidar if the transferee has taken reasonable care to ascertain the transferor's right to transfer. The transferee's right to good faith has been protected in this case. But if the transferee fails to comply with the requirement of taking reasonable care before the transfer, the transferee may be presumed to have constructive notice of the fact. On the other hand, if the ostensible owner (benamidar) has taken express or implied consent from the real owner to exercise the right to transfer then the real owner cannot deny the transfer provided the transferee in good faith has exercised reasonable care in finding the out the transferor's power to make the transfer and the transfer is for consideration. Thus, section 41 provides an equitable remedy to a bonafide purchaser for value without notice.

6.1.5 Transfer by an Unauthorized Person:

No person is allowed to transfer any property that does not belong to him at the date of transfer. But if any property is transferred by a person fraudulently and erroneously representing that he has the authority to transfer it, when at the date of transfer he was not authorised to do it. Here, Section 43 of the Transfer of Property Act of 1882 protects the right of the transferee, as the transferee may make the transferor bound to validly convey the same to him if the transferor subsequently becomes the owner and the contract subsists between them. The transferee or all the subsequent transferees may exercise this option against the transferor. Each subsequent transferee will be able to exercise the right against the transferor if he has taken the transfer in good faith for consideration and without notice of the existence of the said option.

6.1.6 Fraudulent Transfer:

The principle of equity does not allow any person to alienate his own property when such alienation tends to delay or defeat the interest of the creditor or subsequent transferee. Section

⁸ AIR 1971 Ker.216

⁹ Tulk v. Moxhay (1848) 2 Phil.774, also see R.K. Sinha , Transfer of Property Act, CLA, 2003, at 137.

53 of the Transfer of Property Act has two parts. In the first part, it protects the rights of the creditors of the transferor to make the transfer void only when the transferee has not acted in good faith. If the transferee has knowledge of the fact, the creditor can exercise the right. The second part of this section provides that a gratuitous transfer with an intent to defraud a subsequent transferee is voidable at the option of such transferee. Thus, in the first part of this section, knowledge of or notice to the transferee is an important factor in the exercise of the two-conflicting rights of either the creditor of the transferor or the transferee.

6.1.7 Part performance

Section 53-A of the Transfer of Property Act provides that if a person has taken possession of an immovable property on the basis of part performance of the contract and willing to perform the rest of the part of the contract but without registration, until the contract is subsisting between the parties, no subsequent transferee can evict the previous transferee with possession even though it was unregistered. Here the transferee with possession can only defend his possession when any attempt is made to eject him. But the right given in this section to the transferee with possession is not applicable where the subsequent transfer is for consideration and the transferee has no notice about the contract or of the part performance.

7. Conclusion

In conclusion, notice is a crucial element in the transfer of property because it helps to establish the validity of the transfer, protect the buyer or

transferee from legal issues, and determine the priority of ownership rights. Buyers and sellers must ensure that they comply with notice requirements to avoid legal disputes and ensure a smooth transfer of property

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