

intrinsic part of Right to Life and Personal Liberty under Article 21 and entire Part III of the Constitution". The ruling on the highly contentious issue was to deal with a batch of petitions challenging the Centre's move to make Aadhaar mandatory for availing the benefits of various social welfare schemes. While the Centre had argued that right to privacy is not a fundamental right, the petitioners had contended that when a citizen gives his biometrics and personal details to the Government and when in turn it is used by commercial organizations, it is a breach of privacy.

The judgment was limited to the issue of right to privacy and the question whether Aadhaar violates right to privacy will be dealt with the five-Judge Bench which has been hearing the petitions since 2015. The nine Judges unanimously overruled the two earlier judgments of the apex Court that right to privacy is not protected under the Constitution.

The reference is disposed in the following terms:

- i. The decision in *M.P. Sharma's* case, which holds that the right to privacy is not protected by the Constitution, stands overruled.
- ii. The decision in *Kharak Singh's* case, to the extent that it holds that the right to privacy is not protected by the Constitution, stands overruled.

- iii. The right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution.

Scope of Right to Privacy in other legislation

- (1) Information Technology Act, 2000 (as amended) - Section 43, Section 43-A, Section 66-E & Section 72-A
- (2) Indian Penal Code 1860, Sections 228-A, 292(1)-294.
- (3) Right to Information Act, 2005 Section 8(1)(j).
- (4) Cr.P.C., 1973
- (5) Other enactments Section 53 of the Indian Divorce Act, 1869, Section 33 of the Special Marriage Act, 1954, Section 14 The Official Secrets Act, 1923, Section 4 & the Contempt of Courts Act, 1971 and so on.

Conclusion

Though right to privacy is not an express connotation in the Indian polity, its spirit has influenced the Indian Constitutional importance through UDHR and ICCPR and judicial process from *Karak Singh's* case to the present *Puttaswamy's* case. Further its scope in Indian legal system is exposed through various legal systems.

IMPLICATIONS OF NON-REGISTRATION OF PROPERTY DOCUMENT

By

—Dr. MUDDU VIJAI, Advocate
High Court of Hyderabad

Registering the documents relating to the transfer, sale, lease, gift, mortgage or any other form of transfer of immovable property. Registration means recording of the contents of a document with a Registering Officer and preservation of copies of the original document.

The documents are registered for the purpose of conservation of evidence, assurance of title, publicity of documents and prevention of fraud. Also, registration helps an intending purchaser to know if the title deeds of a particular property have been deposited with any person or a financial

institution for the purpose of obtaining an advance against the security of that property.

Section 17 of the Registration Act, 1908. Sub-section (1) specifies what are the documents that are required to be registered. An instrument of gift of immovable property, an instrument which purports to create, declare, assign, limit or extinguish, whether in present or in future any right, title or interest in immovable property, the value of which exceeds Rs.100/-, any instrument which acknowledges the receipt or payment of consideration on account of the creation, declaration, assignment, limitation or extinction of any right title or interest, leases of immovable property from year to year or for a term exceeding one year and instruments transferring or assigning any decree or order of Court or any award where such decree or order or award operates to create, declare, assign, limit or extinguish any right, title or interest in immovable property, the value of which exceeds Rs.100/-. Sub-section (1A) provides that agreements for sale to be used to claim protection of Section 53-A of the Transfer of Property Act entered into after 24.9.2001 require registration. Sub-section (2) excludes from the operation of clauses (b) and (c) of sub-section (1) of Section 17, the various transactions described therein under various clauses.

Section 18 of the Registration Act 1908 : Documents of which registration is optional, (a) instruments (other than instruments of gift and wills) which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of a value less than one hundred rupees, to or in immovable property; (b) instruments acknowledging the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction, of any such right, title or interest; (c) instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in

future, any right, title or interest, whether vested or contingent, of a value less than one hundred rupees to or in immovable property (d) instruments (other than wills) which purport or operate to create, declare, assign, limit or extinguish any right, title or interest to or in immovable property; (e) wills; and (f) all other documents not required by Section 17 to be registered.

Section 21 of the Act deals with the provisions relating to the description of an immovable property alongwith maps or plans. It is always necessary, with a view to identify the property involved in a document, that the description of the property is mentioned in a separate schedule, preferable with maps or plans, so as to enable the Registering Authority to make notes in the books to be preserved.

Section 23 of the Act deals with, subject to certain exceptions, any document other than a will has to be presented for registration within four months from the date of its execution. The term "execution" means signing of the agreement. Under the present rules and regulations, all agreements in respect of a transfer of a premise or an immovable property have to be duly stamped, under the provisions of the Bombay Stamp Act, 1958 before the document is presented for registration.

Section 26 of the Registration Act, 1908 deals with if a document purporting to have been executed by all or any of the parties out of India is presented for registration within the prescribed time, the Registering Officer may, on payment of proper registration fee, accept such document for registration if he is satisfied that, (a) the instrument was executed out of India. (b) the instrument has been presented for registration within four months after its arrival in India.

Section 28 of the Registration Act : Place for registering documents relating to land : every, document mentioned in Section 17, sub-section (1), (clauses (a), (b), (c), (d), (f) and (g) of Section 17, sub-section (2)); insofar as such document affects immovable property,

and Section 18 (clauses (a), (b) and (cc)), shall be presented for registration in the office of a Sub-Registrar within whose sub-district the whole or some portion of the property to which such document relates is situate.

Section 32 of the Registration Act, 1908 deals with the presenting of documents for registration by a person. Subject to certain exceptions, every document which is to be registered under the provisions of the Act should be presented at the proper registration office by : (a) the concerned person himself/herself, or (b) the representative or the agent of such a person duly authorized in manner as is stated in Section 33 of the Registration Act, 1908.

Section 5 transfer of property “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, or to himself and one or more living persons; and

“to transfer property” is to perform such act.

In this section “living person” includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals.

The word “transfer” is defined with the reference to the word “convey”. This word in English Law in its narrower and more usual sense refers to the transfer of an estate in land, but it is sometimes used in a much wider sense to include any form of assurance *inter vivos*. The word “conveys” in Section 5 of the Indian Act is used in the wider sense referred to above. Transfer or must have an interest in the property. He cannot sever himself from it and yet convey it. A lease comes within the meaning of the word transfer held in *Krishna Kumar Khemka v. Grindlays Bank PLC*, AIR 1991 SC 899.

Section 54 of the Transfer of Property Act deals with “Sale” is a transfer of

ownership in exchange for a price paid or promised or part-paid and part promised.

Sale how made :—Such transfer, in the case of tangible immovable property of the value of hundred rupees and upwards, or in the case of a reversion or other intangible, thing can be made only by a registered instrument.

In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property;

While referring to Sections 53-A and 54 of the Transfer of Property Act and its decisions in *Narandas Karsondas v. SA Kamtam*, (1977) 3 SCC 247 and *Rambhau Namdeo Gajre v. Narayan Bapuji Dhotra*, (2004) 8 SCC 614, the Supreme Court further observed that a transfer of immovable property by way of sale can be effected only by a deed of conveyance. In the absence of a deed of conveyance (which must be duly stamped and registered as required by law), no right, title or interest in an immoveable property can be transferred. The Court further dealt with the importance of registering documents that record transactions of sale or transfer and the need for all states to take steps to curb malpractice, thereby reducing the circulation of unaccounted wealth (or ‘black money’) in society.

Under Section 17 of the Registration Act, the documents which purport or operate to create, declare, assign, limit or extinguish any right, title or interest of the value of one hundred rupees and upwards, are to be registered. If registration is not done as per the provisions of the act, title will not pass.

As registered deed of conveyance is a statutory requirement, it cannot be decided that the immovable property could be sole by way of unregistered sale deed, in view of the provisions of the Indian Stamps Act and Registration Act and for claiming rights, based on the unregistered document.

Section 107 of Transfer of Property Act : Section 107 prescribes the procedure for

execution of a lease between the parties. Under the first paragraph of this section a lease of immovable property from year to year or for any term exceeding one year or reserving yearly rent can be made only by registered instrument and remaining classes of leases are governed by the second paragraph that is to say all other leases of immovable property can be made either by registered instrument or by oral agreement accompanied by delivery of possession.

It is also a well settled position of law that in the absence of a registered instrument, the Courts are not precluded from determining the factum of tenancy from the other evidence on record as well as the conduct of the parties. A three Judge Bench of this Court in the case of *Anthony v. KC Ittoop and Sons*, MANU/SC/0443/2000 = (2000) 6 SCC 394, held as under :

A lease of immovable property is defined in Section 105 of the TP Act. A transfer of a right to enjoy a property in consideration of a price paid or promised to be rendered periodically or on specified occasions is the basic fabric for a valid lease. The provision says that such a transfer can be made expressly or by implication. Once there is such a transfer of right to enjoy the property a lease stands created. What is mentioned in the three paragraphs of the first part of Section 107 of the TP Act are only the different modes of how leases are created. The first paragraph has been extracted above and it deals with the mode of creating the particular kinds of leases mentioned therein. The third paragraph can be read along with the above as it contains a condition to be complied with if the parties choose to create a lease as per a registered instrument mentioned therein. All other leases, if created, necessarily fall within the ambit of the second paragraph. Thus, dehorn the instrument parties can create a lease as envisaged in the second paragraph of Section 107 which reads as All other leases of immovable property may be made either by registered instrument or by oral agreement accompanied by delivery of possession.

When lease is a transfer of a right to enjoy the property and such transfer can be made expressly or by implication, the mere fact that an unregistered instrument came into existence would not stand in the way of the Court to determine whether there was in fact a lease otherwise than through such deed.

Section 123 of the Transfer of Property Act : For the purposes of making a gift of immoveable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor; and attested by atleast two witnesses.

For the purpose of making a gift of moveable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold may be delivered.

Sections 124 to 129 deal with matters like gift of existing and future property, gift made to several persons of whom one does not accept, suspension and revocation of a gift, and onerous gifts including effect of non-acceptance by the donee of any obligation arising there under. Careful reading of Section 123 (supra) which leaves no manner of doubt that a gift of immoveable property can be made by a registered instrument signed by or on behalf of the donor and attested by atleast two witnesses. When read with Section 122 of the Act, a gift made by a registered instrument duly signed by or on behalf of the donor and attested by atleast two witnesses is valid, if the same is accepted by or on behalf of the donee. That such acceptance must be given during the life time of the donor and while he is still capable of giving is evident from a plain reading of Section 122 of the Act. A conjoint reading of Sections 122 and 123 of the Act makes it abundantly clear that “transfer of possession” of the property covered by the registered instrument of the gift duly signed by the donor and attested as required is not a *sine qua non* for the making of a valid gift under the provisions

of Transfer of Property Act, 1882. Judicial pronouncements as to the true and correct interpretation of Section 123 of the T.P. Act have for a fairly long period held that Section 123 of the Act supersedes the rule of Hindu Law if there was any making delivery of possession an essential condition for the completion of a valid gift held in *Smt. Gontibai (dead) through LRs. and others v. Mattulal (dead) through LRs.*, (1996) 11 SCC 681; *Renikuntla Rajamma v. K. Sarwanamma*, (2014) 9 SCC 445. The pre-existing right, title and interest of donor thereby stand divested in the donee by operation of Section 17 of the Registration Act only when the gift deed is duly registered and thereafter the donor would lose title to the property. It must also be proved that the donee had accepted the property gifted over under the instrument.

Section 129 of the Transfer of Property Act (for brevity 'the Act') which lays down that Section 123 of the Act which mandates registration in case of a gift of an immovable property does not apply to any gift made under the Muhammadan Law and a Muhammadan could make an oral gift of immovable property and if a Muhammadan prepares a document relating to gift such deed of gift continues to be an evidence of gift. In view of the authorities in *Karam Ilahi v. Sharfuddin*, MANU/UP/0067/1916 = AIR 1916 All. 351, *Nasib Ali v. Wajid Ali*, MANU/WB/0076/1926 = AIR 1927 Cal. 197; *Bishwanath Gosain v. Dulhin Lalmani*, MANU/BH/0129/1968 = AIR 1968 Pat. 481 and *Boya Ganganna v. State of Andhra Pradesh*, MANU/SC/0097/1975 = AIR 1976 SC 1541; *Rasbeeda Khatoon v. Ashiq Ali*, 10.10.2014 (SC), MANU/SC/0901/2014.

In *Hafeeza Bibi and others v. Shaikh Farid (Dead) by LRS. and others*, (2011) 5 SCC 654; a two-Judge Bench referred to the authority in *Mohd. Abdul Ghani v. Fakhr Jaban Begum*, AIR 1932 PC 13; where in the Privy Council had made a reference to Mohammedan Law by *Syed Ameer Ali* and approved the statement as regards the essential three conditions for a valid gift. Thereafter, the learned Judges referred to

Nasib Ali (supra); *Assan Ravther v. Manabapra Charayil*, AIR 1972 Ker. 27 and *Javeda Khatun v. Mosked Ali*, AIR 1973 Gau. 105 and stated the position of law thus:

The position is well settled, which has been stated and restated time and again, that the three essentials of a gift under Mohammadan Law are: (1) declaration of the gift by the donor; (2) acceptance of the gift by the donee; and (3) delivery of possession. Though, the rules of Mohammadan Law do not make writing essential to the validity of a gift; an oral gift fulfilling all the three essentials makes the gift complete and irrevocable. However, the donor may record the transaction of gift in writing. Held in *Rasbeeda Khatoon v. Ashiq Ali*, (2014) 10 SCC 459.

In *Suraj Lamp & Industries Pvt. Ltd. v. State of Haryana*, (2012) 1 SCC 656; the Supreme Court of India held that sale agreement, GPA and will transfers do not convey title and do not amount to a transfer of immovable property. The Court further held that such transactions cannot be recognized as a valid mode of transfer of immovable property. However, while the Supreme Court held such transactions to be invalid, it also clarified that such observations were in no way intended to affect the validity of sale agreements and powers of attorney executed in genuine transactions. The Supreme Court therefore held that sale agreement; GPA and will transfers do not convey any title or create any interest in immovable property.

According to Section 49(c) of the Act, if a document of which registration is compulsory under section 17 of Registration Act, has not been registered, it cannot be produced as an evidence in a Court of law.

From the principles laid down in the various decisions Supreme Court, in *Bondar Singh and others v. Nihal Singh and others*, (2003) 4 SCC 161; *M/s. K.B. Saba and Sons Pvt. Ltd. v. M/s. Development Consultants Ltd.*, (2008) 8 SCC 564; wherein the apex Court held that unregistered document though

admitted into evidence would not affect the immovable property. The Court finally laid down the following guidelines:

(i) A document, which is compulsory registerable, but not registered, cannot be received as evidence of any transaction affecting such property or conferring such power. The phrase “affecting the immovable property” needs to be understood in the light of the provisions of Section 17(b) of the Registration Act, which would mean that any instrument which creates, declares, assigns, limits or extinguishes a right to immovable property, affects the immovable property.

(ii) The restriction imposed under Section 49 of the Registration Act is confined to the use of the document to effect the immovable property and to use the document as evidence of a transaction affecting the immovable property.

(iii) If the object in putting the document in evidence does not fall within the two purposes mentioned in (ii) *supra*, the document cannot be excluded from evidence altogether.

(iv) A collateral transaction must be independent of or divisible from a transaction to affect the property *i.e.*, a transaction creating any right, title or interest in the immovable property of the value of rupees hundred and upwards.

(v) The phrase “collateral purpose” is with reference to the transaction and not to the relief claimed in the suit.

(vi) The proviso to Section 49 of the Registration Act does not speak of collateral purpose but of collateral transaction *i.e.*, one collateral to the transaction affecting immovable property by reason of which registration is necessary, rather than one collateral to the document.

(vii) Whether a transaction is collateral or not needs to be decided on the nature, purpose and recitals of the document. Having culled out the legal propositions, the discussion on this issue will be incomplete if a few illustrations as to what constitutes

collateral transaction are not enumerated as given out in *Radbomal Alumal v. K.B. Allah Baksh Khan Haji Muhammad Umar and another*, AIR (29) 1942 Sind 27 and other judgments. They are as under:

(a) If a lessor sues his lessee for rent on an unregistered lease which has expired at the date of the suit, he cannot succeed for two reasons, namely, that the lease which is registerable is unregistered and that the period of lease has expired on the date of filing of the suit. However, such a lease deed can be relied upon by the plaintiff in a suit for possession filed after expiry of the lease to prove the nature of the defendant's possession.

(b) An unregistered mortgage deed requiring registration may be received as evidence to prove the money debt, provided, the mortgage deed contains a personal covenant by the mortgagor to pay (See: *Queen-Empress v. Rama Tevan*, 15 Mad. 253; *V.M. Kunhu Moidu v. T. Madhava Menon*, 32 Mad. 410 and *Vani v. Bani*, 20 Bom. 553).

(c) In an unregistered agreement dealing with the right to share in certain lands and also to a share in a cash allowance, the party is entitled to sue on the document in respect of movable property (*Hanmantappa Rao v. Ramabai Hanmant*, AIR 1919 Bom).

(d) An unregistered deed of gift requiring registration under Section 17 of the Registration Act is admissible in evidence not to prove the gift, but to explain by reference to it the character of the possession of the person who held the land and who claimed it, not by virtue of deed of gift but by setting up the plea of adverse possession (*Varada Pillai v. Jeevaratnammal*, 43 Mad. 244 (PC)).

(e) A sale deed of immovable property requiring registration but not registered can be used to show nature of possession *Radbomal Alumal v. K.B. Allah Baksh Khan Haji Muhammad Umar and another* (*supra*); *Bondar Singh and others v. Nihal Singh and others*, AIR 2003 SC 1905; *A. Kishore @ Kantha Rao v. G. Srinivasulu*, 2004 (3) ALD 817

(DB) and *R. Suresh Babu v. G. Rajalingam and others*, 2017 (1) ALT 668.

It is the general proposition of law in view of the provisions of Section 49 provides that any document which is required to be registered, if not registered, shall not effect any immovable property comprised therein nor such document shall be received as evidence of any transaction affecting such property. Proviso, however, would show that an unregistered document affecting immovable property and required by 1908 Act or the Transfer of Property Act, 1882 to be registered may be received as an evidence to the contract in a suit for specific performance or as evidence of any collateral transaction not required to be effected by registered instrument. By virtue of proviso, therefore, an unregistered sale deed of an immovable property of the value of Rs.100/- and more could be admitted in evidence as evidence of a contract in a suit for specific performance of the contract. Such an unregistered sale deed can also be admitted

in evidence as an evidence of any collateral transaction not required to be effected by registered document. When an unregistered sale deed is tendered in evidence, not as evidence of a completed sale, but as proof of an oral agreement of sale, the deed can be received in evidence making an endorsement that it is received only as evidence of an oral agreement of sale under the proviso to Section 49 of 1908 Act. It is also true that in accordance with the provisions of Section 107 of the Transfer of Property Act, 1882, a lease of immoveable property from year to year or for any term exceeding one year or reserving a yearly rent can be made only by a registered instrument, as per Section 123 of the Transfer of Property Act, 1882 a gift of immoveable property the transfer must be effected by a registered instrument signed by or on behalf of the donor; and attested by at least two witnesses, as per Section 17 of Registration Act any instrument of immovable property more than Rs.100/- which create interest in immovable property shall be registered.

WHETHER AND WHEN EX PARTE AD INTERIM INJUNCTION CAN BE GRANTED

By

—POLLA SAMBASIVA RAO, Advocate
Narsipatnam

It is well settled, grant of injunction, *ex parte* or otherwise, is the discretion of the Court, but that discretion is guided by the well regulated principles, covered by Order 39 CPC in which temporary injunction may be granted

Where in any suit it is proved by affidavit or otherwise :-

- (a) where any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree or

- (b) that the defendants threatens or intends to remove or dispose of the property with a view to defrauding his creditors.
- (c) That the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit.

The Court may by order grant a temporary injunction to restraining such act or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or