06 Dec., 2020

Ques.) "The foundation of Doctrine of Election is that no one can approbate and reprobate at the same time."

Discuss and illustrate your answer.

Ans.) Sec. 35, TP Act, 1882 incorporates "Doctrine of Election" as follows —

Where a person professes to transfer property which he has no right to transfer, and as a 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 the 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.

"Election" means choosing between two inconsistent or alternative rights. Under any instrument if any two rights are conferred on a person in such a manner that one right is in lieu of the other, he is bound to elect (choose) only one of them. A person cannot take under and against the same instrument as held by the Hon'ble S.C. in Beepathumma V. S.V. Kadambolithaya, AIR 1965 S.C. Thus, where some money is gifted to "A" and in lieu of it, "A" is required to transfer his house to "B", then "A" would not be allowed to retain his house and also take the gift. He cannot enjoy both. "A" will have to choose:

(i.) either taking of the gift in which case he must transfer his house to "B"; or

(ii) retain his house in which case he must relinquish the benefit of gift

The doctrine of election is based on equitable principle under which a person may not be allowed to approve that part of an instrument which is beneficial to him and disapprove its that part which goes against him. No one can approbate (अनुमोदन) or reprobate (अस्वीकार) at the same time.

The doctrine of election which is based on equity is applied to every species of instrument, whether deed or "will" and to every kind of property, movable or immovable.

Election is the obligation imposed upon a party by courts of equity to choose between two inconsistent or alternative rights or claims, in case where there is a clear intention that he must not enjoy both. He who accepts a benefit under a deed or a will must adopt the whole contents of the instrument.

Sec. 35 of TP Act, 1882 makes the following provisions in respect of rule of election:

(i.) Where a person professes to transfer a property not his own,

(ii.) and in lieu of this transfer, the transferor confers certain benefits upon the owner of the property, and,

(iii.) the two things, i.e., transfer of property and conferring of the benefit forms part of the same instrument.

Then, the owner of the property is bound to elect (choose) either to take the benefit and transfer his property or to retain his property and to give up the benefit.

⇒ Transferor professes to transfer property not his own : Sec. 35, TP Act, applies where a person professes to transfer the property of another person. Since such person is not the owner, he cannot transfer the property. But he can contract or make arrangement for the transfer of that property which he does not own. For example : 'A' may profess to transfer a property to 'B' which is owned by 'C', and also confer on 'C' a benefit of ₹1000. In this contract, 'A' is not transferring 'C's' property. He is simply professing to transfer a property which he does not own. 'Profess' means purports or makes contract. 'A' is not the transferor but for the sake of convenience, 'A' may be called the transferor. However, it is not necessary that transferor should mention it in specific words that he is professing to transfer a property not his own. This is inferred by the court from the facts of the particular case and from the language used in the instrument.

Knowledge of the fact that the transferor has no authority to transfer the property is immaterial for the applicability of the rule of election. Second paragraph of Sec. 35, TP Act, makes that the rule applies whether the transferor does or does not believe that the property which he is professing to transfer is not his own. The transferor may have misunderstood or forgotten about his rights in the property or may profess to transfer it due to any other reason.

⇒ **Benefit conferred on the owner of the property:**
The transferor must confer any benefit on the owner of the property. The word "owner" includes a person having a vested as well as contingent interest and also a person who has a remote interest in the property as held by the Hon'ble S.C. in Dhanpatti v. Devi Prasad, 1970 SC.
It is the owner of the property who is put to election. Therefore, he must be given some benefit in compensation for his ownership of the property.

To attract the application of the rule of election, there must be two sets of rights:

(i.) the right of ownership;
(ii.) a benefit given under the instrument.

The occasion for election arises only where a benefit is directly conferred on the owner of the property.

The rule of election operates only when the transfer and benefit from part of the same transaction. Transfer of property is made evidently only in lieu of the property. Thus, where the 'benefit' and 'transfer' are interdependant and inseperable they form part of the same transaction. There

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is no election if the two are independent transactions. It is not necessary that these two transactions are provided on one instruments. It is possible that two seperate instruments may be executed to carry out one and the same transaction. Similarly, it is also possible that there is only one instrument containing two seperate and independent transaction.

⇒ <u>Owner's duty to elect</u>: The operative part of Sec.35, TP Act, 1882 is that if a property is professed to be transferred and in the same transaction, some benefit is given to the owner of the property. Then such owner is under a duty to elect. By this election, he may either accept the instrument with all its contents or reject it altogether. He has no option to accept only the beneficial part of the instrument. Where he elects to accept the instrument, he is entitled to get the benefit but he is bound to transfer his property. If he elects to reject the instrument, he cannot claim the benefit but he may retain his property.

Election may be express or implied, he may express his intention in clear and specific words. The intention of the owner may also be inferred from his acts or conduct. This is implied election.

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⇒ Implied election : Election is implied when the owner of the property (donee):

(a.) being aware of his duty to elect;
(b.) having full knowledge of the circumstances, accepts the benefit.

Such election would mean that he has chosen in favour of the transaction. Where the owner knowingly accepts the benefit, it amounts to his election in favour of the transaction. In the following circumstances, there is a presumption of election :

(i.) Where the owner has enjoyed the benefit for two years without doing any act of refusal or dissent of the transaction; it is presumed that he has waived from enquiry. However, he enjoyed the benefit innocently. On such proof, the owner is permitted to make a fresh election.

(ii.) Where the owner of the property exhausts or consumes the benefit.

Thus, whether he has done some act which renders it impossible to place the parties in the same position as before, this too gives presumption of his election for accepting the benefit. For eg: 'A' transfers to 'B' an estate owned by 'C' and as part of the same transaction gives to 'C' a coal mine. 'C' does not elect in express words but takes possession of the coal mine and exhausts it. 'C' is presumed to have elected to take the benefit and thereby transfer his property to 'B'.

⇒ <u>Requisition to elect</u> : There is a special procedure for expediting election. After the expiry of one year, if owner of the property does not elect, i.e., neither confirms or dissents from the transfer, the transferee may require him to make such election. And, if he does not elect it within a reasonable time after such requisition, he is deemed to have elected in favour of the transfer.

⇒ <u>Suspension of election</u> : Where at the time of transfer, the elector (owner of property) is legally disabled, the election is postponed until such disability ceases or until the election is made on his behalf by a competent authority. For Eg : his guardian. Legal disability may be minority or lunacy of the elector. Then his duty to elect is suspended during his minority or lunacy unless the election is made by his legal guardian.

⇒ <u>Election against transfer</u> : The owner of property whose duty is to make elect either for the transfer or against it. Where he elects against it, i.e., dissents from the professed transfer, he forfeits his claim to the 'benefit' conferred on him. The benefit so conferred reverts back to the transferor or his representative.

⇒ Rights of disappointed transferee : When the owner of the property elects against the transfer, the transferee to whom the property was professed to the transferred cannot get the property. He becomes disappointed as he must have entertained some hope of getting the property. However, such disappointed transferee is not allowed to be a helpless person and he has been conferred by law the following rights:-

(i.) where the transfer is gratuitous, i.e., without consideration and the transferor dies or becomes incapable of making a fresh transfer; and

(ii.) Where the transfer is for consideration, whether he is alive or dead at the time of election, the transferee is entitled to get a reasonable compensation from the transferor or his representative. "Reasonable compensation" means compensation equal to the value of the property professed to be transferred.