

**Course Name – LL.B 4<sup>th</sup> sem**

**Subject – TPA**

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**Concept – Doctrine of Election**

## Doctrine of Election under the Transfer of Property Act, 1882

### ❖ Doctrine of Election:

Election means choosing between two alternative rights or inconsistent rights. If an instrument confers two rights on a person in such a manner that one right is in lieu of the other, that person can choose or elect only one of them. A person cannot take under and against the same instrument.<sup>1</sup>

Election is an obligation, to choose between two inconsistent or alternative rights in a case where there is a clear intention of the grantor that the grantee should not enjoy both.

The foundation of the doctrine of election is that the person taking a benefit under an instrument must also bear the burden. In other words, a person cannot take under and against one and the same instrument.<sup>2</sup>

*For example*, suppose, by a deed A gives to B a house belonging to C, and by the same instrument gives other property belonging to himself to C. C is entitled to A's property only upon the connection of C's conforming to all the provisions of the instrument by renouncing the right to his own property given in favour of B; he must consequently make his choice, or as it is technically termed "he is put to his election", to take either under or against the instrument. If C elects to take under the instrument, he must relinquish in favour of B his property given to B by A; and takes the property which is given to him by A.<sup>3</sup>

The doctrine of election may be stated in the classic words of **Maitland** as follows<sup>4</sup>:

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<sup>1</sup> *C. Beepathuma v. Velasari Shankarnarayana Kadambolithya*, AIR 1965 SC 241.

<sup>2</sup> Shukla S.N, *Transfer of Property Act*, 24th Edition (2002) Reprint 2007, Revised by D.P Ghoshal, Allahabad Law Agency, Faridabad (Haryana) 2007, p. 84.

<sup>3</sup> Ibid.

<sup>4</sup> See Maitland's Lecture on Equity-Lecture 18, quoted in supra note 2, p. 85.

“He who accepts a benefit under a deed or will or other instrument, must.-

- a. adopt the whole contents of that instrument;
- b. conform to all its provisions; and
- c. renounce all rights that are inconsistent with it”.

The doctrine of election is based on the principle of equity that one cannot take what is beneficial to him and disapprove that which is against him under the same instrument. One cannot approbate and reprobate at the same time. In simple words, where a person takes some benefit under a deed or instrument, he must also bear its burden.<sup>5</sup>

The principle of the doctrine of election was explained by the House of Lords in the leading case of **Cooper vs. Cooper**.

In *Cooper v. Cooper*,<sup>6</sup> **Lord Hather** explained the principle underlying the doctrine of election in the following words,

“ .... there is an obligation on him who takes a benefit under a will or other instrument to give full effect to that instrument under which he takes a benefit ; and if it be found that instrument purports to deal with something which it was beyond the power of the donor or settlor to dispose of , but to which effect can be given by the concurrence of him who receives a benefit under the same instrument, the law will impose on him who takes the benefit the obligation of carrying the instrument into full and complete force and effect .”

Section 35 of the Transfer of Property Act, 1882 embodied the doctrine of election.

### ❖ Election When Necessary (Section 35):

*According to Section 35 of the Transfer of Property Act, 1882, where a person.-*

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<sup>5</sup> *Codrington v. Lindsay*, (1873) 8 Ch 578.

<sup>6</sup> L.R 7, H.L. 53 at p. 69.

- i. professes to transfer property which he has no right to transfer , and
- ii. as part of the same transaction, confers any benefit on the owner of the property, such owner must elect either to confirm the transfer or to dissent from it.

If he dissents from it,-

- a. he must relinquish the benefit so conferred ; and
- b. the benefit so relinquished reverts to the transferor or his representative as if it had not been disposed of.

However , when such benefit reverts back to the transferor , it is subject to the charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred in two cases , namely ---

- i. where the transfer is gratuitous , and the transferor has , before election , died or otherwise become incapable of making a fresh transfer ; and
- ii. where the transfer is for consideration.

### ***Illustration:***

The farm of Ulipur is the property of C and worth Tk. 800. A by an instrument of gift professes to transfer it to B, giving by the same instrument Tk. 1,000 to C. C elects to retain the farm. He forfeits the gift of Tk. 1,000.

In the same case, A dies before the election. His representative must out of the Tk. 1,000 pay (Tk.) 800 to B.

### **Who Need not Elect?**

*Section 35 provides that,* a person taking no benefit directly under a transaction, but deriving a benefit under it indirectly, need not elect. Moreover, a person who in his one capacity takes a benefit under the transaction may in another dissent therefrom.

Thus, an estate is settled upon A for life, and after his death, upon B. A leaves the estate to D, and Tk. 10,000 to B, and Tk. 5,000 to C, who is B's only child. B dies intestate shortly after the testator, without having made an election. C takes out administration to B's estate, and as administrator, elects to keep the estate in opposition to the will, and to relinquish the legacy of Tk. 10,000. C may do this, and yet claim his legacy of Tk. 5,000 under the will.

### **Where Person Elects to Dissent<sup>7</sup>:**

*Under Section 35*, where the owner elects to dissent from the transfer, he shall relinquish the benefit so transferred to him and such benefit shall revert back to the transferor or his representative as if it had not been disposed of. When property reverts back and

- i. the transfer is gratuitous, and the transferor has, before the election, died or otherwise become incapable of making a fresh transfer, and
- ii. in all cases where the transfer is for consideration,  
it shall be the duty of the transferor or his representatives to compensate the disappointed transferee. The amount of compensation shall be the amount or value of the property which was going to be transferred to him, if the option has been exercised in favour of the transaction.

### ***Illustration***

The farm of Ulipur is the property of C and worth Tk. 800. A by an instrument of gift professes to transfer it to B, giving by the same instrument Tk. 1,000 to C. C elects to retain the farm. He forfeits the gift of Tk. 1,000.

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<sup>7</sup> Dr. Avtar Singh, *Textbook on The Transfer of Property Act*, 4th Edition (New Delhi: Universal Law Publishing C. Pvt. Ltd, 2014), p. 91.

### **Exception to the Rule of Election under Section 35:**

*Section 35 provides that,* Where a particular benefit is expressed to be conferred on the owner of the property which the transferor professes to transfer, and such benefit is expressed to be in lieu of that property, if such owner claims the property, he must relinquish the particular benefit. But he is not bound to relinquish any other benefit conferred upon him by the same transaction.

### **What Constitutes Election?**

If a person accepts such benefit for two years, it is to be assumed that he has elected in favour of the transfer.

*Section 35 provides that,* Acceptance of the benefit by the person on whom it is conferred constitutes an election by him to confirm the transfer,

- if he is aware of his-
  - i. duty to elect and
  - ii. of those circumstances which would influence the judgment of a reasonable man in making an election, or
- if he waives enquiry into the circumstances.

### **Knowledge or Waiver when Presumed and Inferred:**

*Section 35 provides that,* knowledge or waiver shall be presumed, in the absence of evidence to the contrary, if the person on whom the benefit has been conferred has enjoyed it for two (2) years without doing any act to express dissent.

*Section 35 also provides that,* such knowledge or waiver may be inferred from any act of such person which renders it impossible to place the persons interested in the property professed to be transferred in the same condition as if such act had not been done.

### ***Illustration***

A transfers to B an estate to which C is entitled and as part of the same transaction gives C a coal-mine. C takes possession of the mine and exhausts it. He has thereby confirmed the transfer of the estate to B.

### **Time Limit for Election:**

*Section 35 says that*, if the owner of the property does not within one (1) year after the date of the transfer signify to the transferor or his representatives his intention to confirm or to dissent from the transfer, the transferor or his representatives may, upon the expiration of that period, require him to make his election; and, if he does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the transfer.

### **Election by the Person under Disability:**

*Section 35 provides that*, where the person making election suffers from some disability, the election shall be postponed until-

- the disability ceases or
- the election is made by some competent authority on his behalf.

### **❖ Application of Doctrine of Election:**

#### **Hindu Law:**

The principle underlying this section has always been applied to Hindus. In the case of *Rungamma v. Atchamma*<sup>8</sup>, the Privy Council referred to the rule that a party shall not at the same time affirm and disaffirm the same transaction-affirm it as far as it is for his benefit and disaffirm it as far as it is to his prejudice.

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<sup>8</sup> (1858) 4 Moo Ind App 1: 7 Suth WR 57.

## **Muslim Law:**

In the case of *Sadik Hussain v. Hashim Ali*<sup>9</sup>, the Privy Council applied this doctrine to Muslims also.

## **English Law:**

Under English Law, a transferee by electing against the transfer does not lose his benefit but he becomes bound to make compensation out of it to the disappointed person.

## **❖ Difference between English law and Bangladeshi Law:**

There is difference between English and Bangladeshi law regarding the doctrine of election. Main points of difference are as follows:

1. English law applies the principle of compensation while the Bangladeshi law adopts the rule of forfeiture.
2. English law does not specify any time within which election is to be made. Bangladeshi law specified one year time within which owner of the property is to elect whether he confirms the transfer or dissents from it .If the owner does not comply with such requisition, he is to be deemed to have elected to confirm the transfer.

## **❖ Essential Conditions for Application of this Doctrine:**

Essential conditions for application of this doctrine are as follows:-

1. The transferor must not be owner of the property which he transfers.
2. The transferor must transfer the property of other (owner) to a third person.
3. The transferor must at the same time grant some property, by the same instrument, out of his own, to the owner of property.

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<sup>9</sup> (1916) 38 All 627; 36 IC 104.



4. The two transfers i.e. transfer of the property of owner to the transferee and conferment of benefit on the owner of property must be made by the same transaction. Question of election does not arise if the two transfers are made through two separate instruments.
5. The owner must have proprietary interest in the property.
6. The owner taking no benefit under a transaction directly, but diverting a benefit under it indirectly, need not to elect.
7. Question of election does not arise when benefit is given to a person in a different capacity.

### **Case Law**

In *Muhammad Kader Ali Fakir v. Fakir Lakman Hakim*, (PLR 1956 Dacca 370), the doctrine of election was explained by the Court. The Court explained that,

“the foundation of the doctrine of election is that a person taking the benefit of an instrument must also bear the burden, imposed thereby and that he cannot take under and against the same instrument. It is a breach to the general rule that no one may approbate or reprobate. The doctrine is based on intended intention to this extent that the law presumes that the author of an instrument intended to give effect to every part of it. There is an obligation on him who takes a benefit under a will or other instrument intended to give full effect to that instrument under which it was beyond the power of the donor or settler to dispose of, but to which effect can be given by the concurrence of him who receives the benefit under the same instrument, the law will impose on him who takes the benefit, the obligation of carrying the instrument into full and complete force and effect. If an instrument is invalid in part what remains is sufficient to put a person to his election if he claims a benefit under it”.