

ANALYSIS ON THE LEGAL IMPLICATIONS OF PROFIT A PRENDRE

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ABSTRACT

Profit a prendre was derived from French Language it says “Right of Taking”. The Essay deals with the concept of *Profit a Prendre* and its implications in the legal field. “A Profit a prendre is an interest in land”, this creates an interest in land and gives the right to take something off someone else’s land including wildlife, minerals or timber. The nexus between the profit a prendre and license has been discussed in the essay. section 3 of the Transfer of Property Act, 1882 and subsection 25 of the General Clauses Act 1897, which applies to the immovable property as included “land”, “benefit arising out of land” and the things attached to the earth, which means rooted in the earth or embedded in the earth, or permanently fastened to anything so embedded for its beneficial enjoyments”.The grant of the Profit a prendre is immovable property and has to be by means of a registered instrument. What comes under Immovable property has been sorted out in the paper. Case laws are put to support the concept and to analyse the Profit a prendre. Profit a prendre is one of the essential concept in non-possessionary rights related to transfer of property.

KEYWORDS

Transfer of Property Act, Profit a prendre, Licence, General Clauses Act.

INTRODUCTION

A non-possessory interest in land is a term of the law of property to describe any of a category of rights held by one person to use land that is in the possession of another. Under common law, profit comes under non possessory interest. *Profit a prendre* the right of a person to enter on to the land owned by another person and remove an item or items previously agreed upon¹. Right to take from another's land (gravel, crops, timber, fish, game), property right over the land – right to use the land for a particular purpose (don't own the fish in his pond, have the right to come over his land and fish in the pond) A 'benefit to arise out of land' is an interest in the land, therefore, immovable property. A *Profit a prendre* is not revocable in the sense of a license; it can be terminated at any time upon reasonable notice and can be "gross": doesn't have to tie between 2 pieces of land. "A *Profit a prendre* is an interest in land", this creates an interest in land and gives the right to take something off someone else's land including wildlife, minerals or timber. It can also be characterized as a right to extract some form of natural produce. E.g. oil/natural gas. Like an easement, profits can be created expressly by an agreement between the property owner and the owner of the profit.

MEANING OF PROFIT A PRENDRE

According to section 3 of the Transfer of Property Act, 1882 and subsection 25 of the General Clauses Act 1897, which applies to the immovable property as included "land", "benefit arising out of land" and the things attached to the earth, which means rooted in the earth or embedden in the earth, or permanently fastened to anything so embedded for its beneficial enjoyments". The definition of "immovable property" in section 3 of the Transfer of the Property Act itself shows that definition contained in General Clauses Act. Section 3 of transfer of property act excludes standing timber, growing crops and grass from the definition of immovable property. In other words, all other interests in the land are integral to immovable property.

¹ See Neal. R. Bavens, Real estate and property for paralegals, second edition, wolter kulwer publication, 2008,pg no. 105

According to Black's dictionary, *Profit a prendre*, called also "right of common". A right exercised by one man in the soil of another, accompanied with participation in the profits of the soil thereof. 'Benefit to arise out of land' – A benefit to arise out of land is an interest in land, therefore immovable property. Not only the land, but benefit arising out of it is also regarded as immovable property because benefits arising out of land is an incident of it and cannot be severed from it. The grant of the *Profit a prendre* is immovable property and has to be by means of a registered instrument.

WHAT COMES UNDER IMMOVABLE PROPERTY?

A right to enter on land, for purpose of cutting and carrying way timber standing on it, is a benefit that arises out of land, and under section 3(26) of the general clauses act, it would be regarded as immovable property, because

- a. It is a benefit that arises out of the land, and
- b. Trees are attached to the earth

In *Santabhai vs. State of Bombay*² case it was challenged that whether standing timber comes under immovable property or not. It was held by Vivian that "Now it will be observed that trees are regarded as immovable property because they are attached to or rooted in the earth. Transfer of property does not define immovable property beyond saying that it does not include standing timber, growing crops or grass', trees attached to it are immovable except standing timber.³ In the absence of special definition, the general definition must prevail. Therefore trees are immovable property (except standing timber) are immovable property"⁴ it is proved in the *Santabhai* case that trees are considered as immovable property.

- A contract relating to bamboo constitutes a grant of a profits a prendre and is a benefit to arise out of land and as such creates an interest in immovable property. It was held in *state of Orissa v. Titaghar paper mills co. ltd.*⁵
- A right which takes the form of a grant of benefits arising out of land, as distinguished from a bare right to take the leaves, that is a right not only to take the leaves of trees but also a right of ingress and egress from the land and of further benefits including

² *Santabhai v. State of Bombay*, AIR 1958 SC 532(536)

³ Section 3(26), General Clause Act, 1897.

⁴ *ibid*

⁵ AIR 1975 Ori 90

the right to occupy the land, to erect buildings and to take other forest produce, not necessarily standing timber, growing crop or grass.

- In *Bhola nath nundi vs. Midnapore zamindari*⁶ co ltd the Calcutta high court held that, ‘a *Profit a prendre*’ is an incorporeal right clothing the possessor of it with an interest in the land. It is a right to enter on the land of another and take their form a profit of the soil. It is so called because the claimant is entitled to take the profit for himself.
- An allowance charged on land
- A grant of an annual allowance to be levied from certain land
- A life interest in the income of immovable property
- The right to receive future rent, being a benefit to arise out of land, assignment of future rents and profits can only be made by registered instruments.
- A right of way and rights of easement;
- Ferry rights;
- A lease, being a transfer of immovable property; the benefit to arise, in such a case, is an interest in immovable property and, therefore, immovable property, a lease, without doubt be regarded as immovable property.
- The right to collect rent from the tenants, being a right to the benefits arising out of land and a lease of immovable property. Held in *udayanaryan v badai dasu*, when the plaintiff transferred a house to the defendant, the rent which is given by tenants residing in the house is also transferred, being it is a benefit arising out of land. It was challenged that profits arising out of land is not immovable property. But court reversed it.

LICENSE AND PROFIT A PRENDRE

Profit a prendre is a similar to a license since both permit use of another’s land for specified purpose. But the *Profit a prendre* is not revocable like a license which is generally terminable at any time upon reasonable notice. More is required. The nature of Profit a Prendre is to remove something from the land. The major difference between license and *Profit a prendre* is license to use and right to take is also, a license will not be enforceable against third parties.

⁶ (1904)8 CWN 425.

PROFIT A PRENDRE AND PART PERFORMANCE

The part performance in *Profit a prendre* is dealt in the case *Mason v. Clarke* (1955)⁷, M paid 100 pounds for the right to kill and take rabbits from a certain estate. Owners sold the estate, and the new owner, (D) refused to from hunting. Court held that an equitable interest of *Profit a prendre* was created on the basis of part performance.

CASE ANALYSIS ON *PROFIT A PRENDRE*

In Bihar eastern Gangetic Fisherman Co-operative Society Ltd vs. Siphani Singh⁸, it was observed-

That apart, there is an additional reason for holding that the settlement of Jalkar with respondent No.1 was not valid and enforceable. The right to catch and transfer away the fish being a '*Profit a prendre*' i.e. a profit or benefit arising out of land, it has to be regarded as immovable property within the meaning of the transfer of property act read in the light of section 3(26) of the General Clauses Act. If a '*Profit a prendre*' is tangible immovable property, its sale has to be means of a registered instrument in case its value exceeds Rs.100/- because of section 54 f the transfer of property Act. If it is intangible, its sale is required to be effected by a registered instrument whatever its value. Therefore in either of the two situation, the grant of the *Profit a prendre* has to be by means of registered instrument. Accordingly the transaction of sale of the right to catch and carry away the fish is not effected by means of a registered instrument would pass no title or interest. Even if the settlement of Jalkar with respondent No.1 is regarded as a lease, it would not make any difference because a lease of fishery which is immovable property as defined by section 2 (6) of the registration act if it is for any term exceeding one year or reserves a yearly rent has also to be registered.⁹As in the instant case, the transfer of the '*Profit a prendre*' in favour of respondent No.1 was admittedly for two years reserving a yearly rent and was not evidenced

⁷http://www.jaani.net/resources/law_notes/property_law/02_Creation.pdf (Last Accessed on 29-10-2014; 12:38)

⁸ AIR 1972 Mad. 129.

⁹ Section 17(1) (d) of the Indian Registration Act, 1908.

by a registered instrument, he had no right, title or interest which could be forced by him. Manifestly therefore, the writ petition was misconceived and ought to have been dismissed.

PROFIT A PRENDRE IN GROSS-ABANDONMENT¹⁰

The *Profit a prendre* in gross abandonment has been clearly come into key role in Mathews Slate Co. v. Advance Industrial Supply Co¹¹. In 1871 E conveyed part of his farm to the plaintiff's predecessors in title, reserving to himself, his heirs and assigns, all the waste or rubbish stones which might be obtained from working quarries on the land conveyed "and the right to remove the same at pleasure." The remainder of the farm came by mesne conveyances to the defendant, the intermediate owners having occasionally exercised the privilege given by the reservation. E died in 1887 and in 1917 his heirs and next of kin conveyed all their interest under the reservation to H who conveyed to the defendant. There was no evidence of user by E or his heirs or next of kin. The plaintiff sought to enjoin the defendant from entering to remove the stones. Held (two judges dissenting) that the interest reserved constituted a *Profit a prendre*, that it was in gross and not appurtenant to the land retained, and hence it had been abandoned.

PROFIT A PRENDRE RIGHT TO SELF HELP¹²

In the case Hope v. Osborne, the defendants had a right to cut heather on the plaintiff's estate. When the land became thickly grown with small trees so as to interfere with gathering the heather, they entered and began cutting down the trees. The plaintiff asked that they be restrained. Held, that the defendants be enjoined from further cutting. It is uncertain how far the holder of a *Profit a prendre* may protect his interest by self-help. One whose property rights have been invaded may certainly in some cases take the law into his own hands, provided the amount of force used is reasonable. The victim of a private nuisance may enter upon the offender's land and forcibly abate it. This was held in Amoskeag Mfg. Co. v. Goodale. But if the land owner was not the original wrongdoer, notice must be given first,

¹⁰ See The Yale Law Journal, Vol. 29, No. 2 (Dec., 1919), p. 247.

¹¹ (1918, N. Y. App. Div.) 172

¹² See : Harvard Law Review, Vol. 27, No. 2 (Dec., 1913), p. 186

except in emergencies¹³. The owner of a chattel which is wrongfully being detained from him may in general enter and retake it. But he may not enter upon the land of one who is not responsible for the chattel's being there, as where a former tenant is claiming a chattel that he left behind. The holder of an easement may remove any obstruction placed upon it by the owner of the servient tenement without making a prior request. But if it was put there by a stranger or by the grantor of the servient owner, notice must be given. Lord Coke indicated that the holder of a *Profit a prendre* was justified in breaking down any serious obstruction erected; by the land owner. So it has been held that where the lord has planted hedges a commoner may pull them up. It was observed in *Mason v. Caesar*. But on the analogy of the above cases it would seem that where the landowner, as in the principal case, has been guilty of no misfeasance, but merely of a failure to do something, the holder of a *Profit a prendre* should not have self-help; certainly not without prior request. Where affirmative duties are involved it would seem safer to leave all remedy to the courts

ANALYSIS OF PROFIT A PRENDRE

The benefits arising out of land which is also an immovable property, when an immovable property is transferred. The benefits arising out of the land are also transferable, with the immovable property. Once the property is transferred all the benefits arising out of such property also stand transfer to the transferee. It is not revocable unlike a licence. Judiciary has upheld the principal of *Profit a prendre* in its various decisions.

*Fairbrother v. Adams*¹⁴

Nature of the case: appeal for judgement for plaintiff in an action interpreting a grant of rights.

Fact summary: the Fairbrothers (P) claimed that language in a deed pursuant to which they conveyed to the Adams (D) “the hunting and fishing rights on the other lands of the Fairbrother farm” created purely personal, non-exclusive rights.

Concise rule of law: A deed that grants “the hunting and fishing rights on other lands” creates an exclusive, assignable *Profit a prendre* in those other lands.

¹³ Jones v. Williams, II M. & W. 176

¹⁴ Vt. Sup., Ct 378 A, 2d 102 (1977)

Facts: The Fairbrothers (P) conveyed to the Adams (D) a parcel of land of approximately three acres. The warranty deed contained the following language. “There is also conveyed here with hunting and fishing rights on the other lands of the Fairbrother farm,” this raised issues as to whether the deed conveyed exclusive hunting and fishing rights; the scope of those rights; whether those rights were personal only or were alienable and assignable; and if so, what parts of the entire Fairbrother (P) farm was subject to them.

Issue: Does a deed that grants “the hunting and fishing rights on other lands” create an exclusive, assignable *Profit a prendre* in those other lands?

Holding and Decision: Yes, A deed that grants “the hunting and fishing rights on the other lands” creates an exclusive, assignable *Profit a prendre* on those other lands. There is no dispute that the grant of hunting and fishing rights by a deed conveyance creates a *Profit a prendre*, which is an interest in land. Here, what constitutes the ‘other land’ of the Fairbrother (P) farm is to be determined by what land the deed described and in what towns the land is located in the recorded reference deed. Here, the rights are exclusive because of the deed’s use of the definite article which implies exclusively. The rights here are also alienable and assignable, not merely personal. Because profits a prendre may be granted separately from the freehold of the land, they imply inheritance and assignability unless expressly reserved. Here, the deed was clear and unambiguous, vacated and remanded.

Analysis: The modern view is that partial assignments of benefits in gross are permissible so long as the resulting use does not burden the estate beyond what was originally contemplate. Thus, theoretically, the Adam (D) in this case could partially assign their profit and retain of it, as long as the burden placed on the Fairbrother (P) farm was not increased unreasonably.

CONCLUSION

Profit a prendre is one of the most important concepts relating to transfer of property. By including benefits arising out of the land within transfer of property it greatly widened the scope of transfer. The difference between licence and *Profit a prendre* plays a key role in understanding the concept. Profit a prendre is one of the essential concept in non-possessory rights related to transfer of property. Judicial interpretation of this concept is very much essential for the proper implementation of the laws.