7
Certain Equitable Rules When Rights Conflict

Conflict of Rights

Sections 5 to 37 deal with transfers of both movable and immovable property. Sections 38 to 53-A deal only with immovable property. Of these, Sections 38 to 43 and 48 to 53 deal with conflict of rights. Sections 44 to 47 deal with joint ownership and Section 53-A deals with the Doctrine of Part Performance.

In this chapter, we deal with conflict of rights.

Priority

Section 48 provides that:

> Where a person purports to create by transfer at different times rights in or over the same immovable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.[1]

One of the modes of acquiring property is *Qui prior est tempore potior est jure*, that is, he has the better title who was first in point of time. But this rule is very much restricted with the advance of civilization, that we find the French economist Pierre Proudhon, at the other extreme, asserting that: 'property is theft' and George Bernard Shaw commending it by saying: 'This is the only perfect truism that has been uttered on the subject of property'. They do not agree with the maxim *quod nullius est id ratione naturali occupanti conceditur*, which means that which is the property of no one is given by natural reason to the first occupant.

Where there are conflicting rights as to immovable property, Courts will inquire not which party was first in possession, but under what instrument he was in possession, and *when* his right commenced. It is the general rule between encumbrancers, and also between purchasers, but not between a mortgagee and a purchaser, because, the rule applies only

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1. *Varadaraja* v. *Lakshmi Narayana*, AIR 1985 Kant 245; *Manni* v. *Ramayan*, AIR 1985 Pat 35.

between two *conflicting* transfers and not when legal effect can be given to both.

Suppose *A* executes a sale deed in favour of *B* and a few days later before the sale deed was registered, executes another sale deed in favour of *C*. Even if *C's* sale deed is registered first the document executed earlier through registered later will prevail because of Section 47 of the Registration Act. Suppose again, it is the case of two mortgages, and the second mortgage is registered. If the first is registered later, the same rule applies. But, if the first mortgage though compulsorily registrable, was not registered then it will not have any priority because it is not a completed transaction. But, if the second mortgagee has notice of the first then the first will prevail, because of Section 40.

Suppose a contingent interest is created in a property and thereafter an absolute interest. The contingency contemplated happens and the first transferee's interest also becomes absolute. The fact that the contingent interest became vested later will not deprive the first transferee of his right or priority.

Power to Revoke

The rule applies only in the absence of a contract or reservation to the contrary. For example, Section 42 states:

> Where a person transfers any immovable property, reserving power to revoke the transfer, and subsequently transfers the property for consideration to another transferee, such transfer operates in favour of such transferee (subject to any condition attached to the exercise of the power) as a revocation of the former transfer to the extent of the power.

Illustration

A lets a house to *B*, and reserves power to revoke the lease if, in the opinion of a specified surveyor, *B* should make a use of it detrimental to its value. Afterwards *A*, thinking that such a use has been made, lets the house to *C*. This operates as a revocation of *B's* lease subject to the opinion of the surveyor as to *B's* use of the house having been detrimental to its value.

But see Section 126 which provides that except in the special case mentioned therein a gift is irrevocable.

Section 42 requires that the subsequent transfer should be for consideration. Therefore, if the subsequent transfer is to be a gift, the first transfer must be expressly revoked, because, the presumption in the section cannot be drawn in such a case. If however the subsequent

transfer is for consideration, such transfer itself operates as a revocation of the earlier transfer, because, the section allows such a presumption of revocation to be drawn. If the power of revocation depends upon a condition and its fulfilment becomes impossible, the power cannot be exercised.

Further, if the party with the earlier right is guilty of fraud or other inequitable conduct, he cannot claim such priority. See Section 78 below.

Limited Power of Transfer

Section 38 provides that:

> Where any person, authorised only under circumstances in their nature variable to dispose of immovable property, transfers such property for consideration, alleging the existence of such circumstances they shall, as between the transferee on the one part and the transferor and other persons (if any) affected by the transfer on the other part, be deemed to have existed, if the transferee, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith.
>
> *Illustration*
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> *A*, a Hindu widow, whose husband has left collateral heirs, alleging that the property held by her as such is insufficient for her maintenance, agrees, for purposes neither religious nor charitable, to sell a field, part of such property to *B*. *B* satisfies himself by reasonable enquiry that the income of the property is insufficient for *A*'s maintenance, and that the sale of the field is necessary and, acting in good faith, buys the field from *A*. As between *B* on the one part and *A* and the collateral heirs on the other part, a necessity for the sale shall be deemed to have existed.

The powers of a manager of a joint Hindu family and of a widow of a Hindu (before the Hindu Succession Act, 1956), to deal with the family property or the husband's property, could be exercised only when legal necessity is shown to exist. See *Hunooman Persad* v. *Mst. Babooe*[2]. The section is enacted to protect a person who purchases property from such manager or Hindu widow. It must however be noted that a bare representation by the transferor is not sufficient, but the transferee must make reasonable inquiries. Since the circumstances are variable, the legality of the transaction would be judged only according to the circumstances existing at the time of the transaction.

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2. (1856) 6 MIA 393.

Right of Persons Entitled to Maintenance

The next section, Section 39 provides that:

> Where a third person has a right to receive maintenance, or a provision for advancement or marriage, from the profits of immovable property, and such property is transferred, the right may be enforced against the transferee, if he has notice thereof or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands.

The section was amended by Act 20 of 1929 and prior to the amendment, persons, who had a right of maintenance, were protected only when it was established that the transfer was made with the *intention* of defeating such right, but such proof is no longer necessary.[3] Since the amendment is retrospective if a property was transferred before 1st April, 1930, but the suit by the maintenance holder was filed thereafter, the claimant was not obliged to prove the intention but only the notice as required by the present amended section.

This section does not deal with a charge on the property. That is dealt with in Section 100 of the Act. The difference between the two lies in this. If family property is sold for paying off *the debts of the family*, if there was *no charge for maintenance*, the purchaser would get a good title even if he had notice of the right to maintenance. If however the property was *subject to a charge*, then the charge has precedence provided the purchaser had notice of it.[4]

Advancement

It is an irrevocable gift *in praesenti* of money or property, to a child, by a parent, to enable the donee to anticipate his or her inheritance to the extent of the gift, as for example, marriage expenses. It is a payment to persons before they become absolutely entitled to an estate, but who are entitled to have a vested or contingent interest in the estate or legacy.

Holding Out

The other cases where equities between conflicting rights require adjustment are set out in Sections 41 and 43. I have already dealt with Section 43. Section 41 provides that:

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3. *Ibrahim* v. *Md. Saleem*, AIR 1980 Mad 82; *Siddegowda* v. *Lakkamma*, AIR 1981 Kant 24.
4. *Dan Kuer* v. *Sarala Devi*, AIR 1947 PC 8.

Where, with the consent, express or implied, of the person interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it.

Provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

This section deals with what is known as the doctrine of holding out. It forms an exception to the general principle of contracts *nemo dat quod non habet*, which means that a person cannot convey a better title than he himself has, and resolves the dispute which arises when the rights of two innocent persons come into conflict. When members of a joint Hindu family live together, if their property stands in the name of one of the members a purchaser or other persons dealing with such a family, have to make more than ordinary enquiries and satisfy themselves that the person conveying the property has the right to do so. That is because, as the Privy Council said in *Ramcoomar* v. *Macqueen*[5], the existence of the joint family is a 'circumstance which ought to have put him upon an inquiry that, if prosecuted would have led to a discovery of it'. Such a person is *not the ostensible owner*. An ostensible owner is one who, on inquiry by a prospective purchaser, which a prudent and careful man would make in the circumstances of the case, appears to have all the characteristics of a real owner and the real owner himself does not dispel the impression. Whether a person is holding himself out as the ostensible owner *with the consent of the real owner* is therefore a question of fact depending upon the circumstances of each case. For example, an entry in the municipal registers of the name of a person as the real owner of the property *without* the knowledge of the real owner will not estop the real owner. The section cannot be invoked against minors[6] because, they are

5. [1872] 52 IA (Supp) 40; *Shiv Das* v. *Deoki*, AIR 1978 P&H 285; *Satish Chandra* v. *Saila Bala*, AIR 1978 Cal 499; *Syed Abdul Khader* v. *Rami Reddy*, (1979) 2 SCC 601: AIR 1979 SC 553; *Amit Mukherjee* v. *Bibhabati*, AIR 1979 Cal 344 (Insolvent cannot be treated as ostensible owner); *Jakhar* v. *Jt. Director*, AIR 1980 All 215; *Gapadibai* v. *State of M.P.*, (1980) 2 SCC 327: AIR 1980 SC 1040 (benami transaction); *Bhim Singh* v. *Kan Singh*, (1980) 3 SCC 72: AIR 1980 SC 727; *Abdul Rahim* v. *Vithaldas*, AIR 1981 Bom 58; *Mehdi Hasan* v. *Ramkar*, AIR 1982 All 92; *Radheyshyam* v. *Maharaj*, AIR 1982 Cal 31; *State* v. *Subimal Kumar*, AIR 1982 Cal 351; *Bhramar* v. *Govinda*, AIR 1983 Ori 36; *Qundhara* v. *Union of India*, AIR 1984 P&H 51; *Rajnarain* v. *Baijnath*, AIR 1984 Delhi 155; *Avtar Singh* v. *Hazara*, AIR 1984 P&H 211; *Raj Ballav* v. *Haripada*, AIR 1985 Cal 2; *Digpal Singh* v. *Wife of Laldhan Ojha*, AIR 1955 Pat 110; *Rajammal* v. *Raman*, AIR 1985 Mad 223; *Banga Chandra* v. *Jagat Kishore*, ILR 44 Cal 186 (PC).

6. *Sitaramrao* v. *Bibhisano*, AIR 1978 Ori 222.

incapable in law of giving the necessary consent either expressly or by implication. In this country where the *benami* system prevails and is legally recognised, the *benamidar* is the ostensible owner. But see the Benami Transactions Prohibitions Act, 1988.

In one case, a husband purchased property in the name of his wife and held her out as the true owner. She was the *benamidar* and mortgaged the property as the ostensible owner. Later, in execution of a decree obtained against the husband a purchaser purchased the same property as that of the husband. It was held he was not entitled to dispute the title of the mortgagee from the wife. In *Phool Kuer* v. *Prem Kuer*[7], a Hindu widow surrendered the property inherited by her in favour of *A* who was not the nearest reversioner. *A* sold the property to *B*. After the widow's death, *C*, the nearest reversioner claimed the property. He is entitled to succeed because at the time when the widow surrendered to *A*, *C* was not the real owner (he was only a possible reversioner), and so, no question of holding out by the real owner arises. The section is based on the principle of estoppel enunciated in Section 115 of the Indian Evidence Act. Therefore, to imply consent of the real owner, it is not sufficient to prove that he was silent, until it is also shown that he had a duty to speak. [See: *The Law of Evidence*, by *Vepa P. Sarathi*, p. 149]. It is not only the person holding out but also those claiming under him that are estopped. But the estoppel arises only as against the transferee from the ostensible owner. If, in the above illustration, the contest was between the court-auction purchaser and the ostensible owner himself, the purchaser will not be estopped from proving that the *benamidar* had no title to the property.

In *Ramrao Jankiram Kadam* v. *State of Bombay*[8], property of the appellant was brought to sale for recovery of excise dues. As there were no purchasers, by virtue of a Government Order, the Government purchased the lands at a nominal bid of Re. 1 at the next auction and sold the land for adequate consideration. In a suit by the appellant to set aside the sale, the purchaser relied upon Section 41. It was held:

> The basis for this argument was that some time after the sale the second defendant had purchased a plot from the Government while the fifth defendant similarly purchased plots and that the in-

7. AIR 1952 SC 207; *Jote Singh* v. *Ram Das Mahto*, AIR 1996, SC 2773; *Rameshwar* v. *Chief Settlement Commissioner*, (1998) 4 JT 466.

8. 1963 Supp (1) SCR 322.

action of the plaintiff in not taking proceedings to set aside the sale constituted a representation to the world that the Government were properly owners of the property which they had purchased for nominal bids; and this was the reasoning by which Section 41 of the Transfer of Property Act was sought to be invoked. *But the respondent did not rely on any representation or any act or conduct on the part of the appellant but on their belief* that Government had acquired title by reason of their purchase at the revenue sale. If the Government had no title to convey, it is manifest the respondents cannot acquire any. They would clearly be trespassers. In the circumstances we consider there is no scope for invoking the rule as to estoppel contained in Section 41 of the Transfer of Property Act.

We may compare this section with Section 43 :—

(1) Under Section 41 the transferee makes an independent inquiry while under Section 43, the transferee believes the transferor's representation.

(2) Under the former section the transferee gets a property which is not that of the transferor, but under the latter, he can get the property only if the whole or part of such property somehow becomes that of the transferor.

(3) Under both sections, it is the real owner who is estopped, in the former case by allowing the ostensible owner to deal, and in the latter by a future acquisition of the property.

(4) Under the former the transferee should not have notice of the real owner's title, whereas under the latter, the second transferee should not have notice of the existence of the option in the first transferee's favour. Also, under this section (Section 43), there is no obligation requiring the transferee to make enquiry as is found in Section 41.

A few more points may be noted with respect to Section 43. The right under this section is available to the transferee only if the contract subsists and he has not obtained any other redress as by filing a suit and obtaining a decree for damages. The transferee entitled to the right must have paid consideration. But, unlike in English law, where if the transferor acquires subsequently the interest or estate, it passes immediately to the transferee, under Section 43, the transferee must exercise the option. If before he does so, the property is transferred to another who has no notice of the earlier transfer and such subsequent

transfer is for consideration, the bona fide transferee for value without notice gets the prior claim. Except in the case of such a bona fide transferee, the first transferee's rights are available against everyone including the heirs of the transferor.

Transferee's right under Insurance Policy

Section 49 provides that:

> Where immovable property is transferred for consideration, and such property or any part thereof is at the date of transfer insured against loss or damage by fire, the transferee, in case of such loss or damage, may, in the absence of a contract to the contrary, require any money which the transferor actually receives under the policy, or so much thereof as may be necessary, to be applied in reinstating the property.

The section applies only when property is transferred, that is, not when there is a mere contract to transfer. Under Section 55(5)(*c*), in the case of a sale, the buyer is bound to bear the loss arising from the destruction or injury to the property. But if the property is insured, and *if the seller receives the insurance money*, the purchaser can invoke this section. Under Section 135, the policy could be assigned to the transferee of the property in which case the transferee can proceed direct against the insurance company. But if the policy is not assigned to the transferee, he cannot proceed against the insurance company, since there is no privity of contract between them but, the transferee can invoke this section and make the transferor pay.

In cases of destruction of property, Section 68(*b*) and Section 108(*e*) come into play when the property is mortgaged or leased. In the case of sale, the section operates only if the 'transferor actually receives the money'. Ordinarily, if the transferor sues the insurer, the latter can successfully defend itself by saying that since the contract of fire insurance is a contract of indemnity, and since the transferor has transferred the property, he has not suffered any loss. Equally, if the transferee sues, the insurer can say that it is not liable, because, there is no privity of contract between them. The safe course is for the transferor to take over the policy of insurance under Section 135.

Payments to holders with defective title

Section 50 provides that:

No person shall be chargeable with any rents or profits of any immovable property, which he has in good faith paid or delivered to any person of whom he in good faith held such property, notwithstanding it may afterwards appear that the person to whom such payment or delivery was made had no right to receive such rents or profits.

Illustration

A lets a field to *B* at a rent of Rs 50, and then transfers the field to *C*. *B*, having no notice of the transfer, in good faith pays the rent to *A*. *B* is not chargeable with the rent so paid.

This section may be compared with Section 109.

Improvements

Section 51 provides that:

When the transferee of immovable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee or to sell his interest in the property to the transferee at the then market value thereof irrespective of the value of such improvement.

The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of eviction.

When, under the circumstances aforesaid, the transferee has planted or sown on the property crops which are growing when he is evicted therefrom, he is entitled to such crops and to free ingress and egress to gather and carry them.

English law

The rule in English law is that a Court will not permit a man knowingly, though passively, to encourage another to spend money under a mistake regarding his title, because the passive looking on is equivalent to active encouragement. Therefore, if the real owner was ignorant of such expenditure no equity can be raised against him. The rule in English law is thus based on estoppel, though if the real owner wants to evict the person under a mistake, he will, in equity, be compelled to do equity by paying compensation.

Under the section, however, it is not necessary to show the passive or active encouragement by the real owner. It is sufficient if the *transferee believed in good faith* to be the owner and once that is established, he can always claim compensation from the real owner.

What is, good faith

Mere negligence in investigating title does not show want of good faith. But he must honestly believe that he had good title to the property and whether he had such honest belief is a question of fact depending upon the circumstances of each case.

Measure of compensation[9]

The real question is not the amount of expenditure incurred, but the rise in the market value of the property on *the date on which actual eviction is sought* to be enforced.

In a suit for possession it was found that the defendant, whose title was defective, had constructed a building on the property from which he was being evicted. The trial court gave the plaintiff the option either to sell the property to the defendant, or pay compensation for the building.

The plaintiff chose the latter alternative, but took possession 3 years later. The plaintiff will have to pay compensation valued on the date of actual eviction and not as on the date of his election.

The right to the crops is known as the right to away-going crops or emblements.

The section operates only in favour of a person believing to be 'owner', that is, one entitled to absolute title. Therefore, mortgagees, even in possession, and lessees—including permanent lessees—are not entitled to the right. In *Ramsden* v. *Dyson*,[10] a lessee claimed the right and the House of Lords rejected his claim holding that he could not invoke the doctrine of equitable estoppel. The principles of this doctrine are that a person, in ignorance of the defect in his title or his rights, spends money, and the real owner, knowing that the other is acting in ignorance, allows him to spend, either by silence or by encouraging him, then he will be estopped against putting forth his title. This is the rule corresponding to Section 51 of the Transfer of Property Act, in English Law. Whatever it may be in that Jurisprudence, as pointed out in *Madanappa* v. *Chandramma*,[11] by the Supreme Court of India that it is

9. *A.P. Wakf Board* v. *Bowlat*, AIR 1983 AP 57; *Narayana* v. *Basavarajappa*, AIR 1956 SC 757.
10. (1865-66) 1 HL 129.
11. AIR 1965 SC 1812.

doubtful while determining whether the conduct of a particular person amounts to an estoppel, that the Indian court could travel beyond the provisions of Section 115 of the Evidence Act and rely upon what is called " Equitable estoppel". In fact, the principles stated above are nothing more than what is provided in Section 115, Evidence Act.

In the case of a mortgagee in possession, *see* however Section 63-A of the Transfer of Property Act.

Further, unlike the case of estoppel, the conduct of the true owner is irrelevant.

Lis Pendens

Section 52 deals with the doctrine known as the doctrine of *lis pendens*. It provides that :

During the pendency in any Court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by the Central Government of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under the decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

Explanation.—For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.

English law

The object of the rule is to secure the property till litigation is over, so that if one of the parties deals with it, the decision of the Court will be binding on such transferees deriving title from a party to the proceeding by an alienation made *pendente lite*. (This phrase does not mean a chandelier as was once suggested by Punch). It means that, 'when litigation is pending'. Otherwise, 'the plaintiff would be liable in every case to be defeated by the defendant alienating before judgment or decree, and would be driven to commence his proceedings *de novo*, subject again to be defeated by the same course of proceeding'.

The English law on the doctrine of *lis pendens* is that: (*i*) an alienee with notice is bound by the decision of the Court; (*ii*) if the proceeding is registered as a *lis pendens* (that is, a pending litigation) even an alienee who had no notice would be bound. The Court had power to cancel the registration in certain cases.

Amendment

The section has been amended by Act 20 of 1929 and this section is not one of those mentioned in Section 63 of the Amending Act. The amended section is held to be retrospective, but pending proceedings are saved.

Pendency of suit or proceeding

If a suit is instituted in a Court not having jurisdiction, even if due to a *bona fide* error, it cannot be said that a lis has commenced. The pendency however continues during the appellate proceedings also. If a suit is dismissed for default and later restored the suit is deemed to be pending from the date of the first presentation of the plaint, so that, if there is an alienation between the dismissal and restoration, it is affected by the doctrine. Since review proceedings are not, like appeals, continuation of the suits, alienations before the review proceedings were commenced would not be affected by this doctrine. Perhaps, a revision also is not a continuation of a proceeding as there is no reference to a "revision" in the Explanation.

Suppose *A* has made a gift of property to *B*. Thereafter *C*, *A's* widowed sister-in-law filed a suit against *A* for maintenance and also claimed a charge on the property gifted. During the tendency of this suit, *B* sold the property to *D*. Because *A* died, *B* was impleaded in *C's* suit as *A's* legal representative and the suit was decreed. But *C* cannot claim the property because of *lis pendens* since the gift to *B* was before the suit and *B's* sale to *D* was before *B* was impleaded in the suit. As long as the decree is capable of being executed mere delay in taking execution proceedings would not enable the opposite party in suit to transfer the property and if such alienation takes place it is affected by the doctrine. If a deed of sale is executed after the commencement of a proceeding in pursuance of a contract entered into before, or if the deed is registered after the commencement of the proceeding but was executed before, the

doctrine may not apply. There is no *lis* if a petition for leave to appeal to Supreme Court is pending.[12]

Any other party

That is between one party and the person alienating there should be an issue for adjudication. Therefore, the doctrine, like the principle of *res judicata* will not apply between parties on the same side and between whom there is no issue requiring adjudication in the suit or pending proceeding.[13]

Though the Act applies to voluntary sales *inter vivos*, the doctrine of *lis pendens* applies to involuntary sales, because, what the vendor cannot do the Court will not do and defeat the result of the litigation.

Effect of a transfer pendente lite

The transfer is valid, but cannot affect the rights of a party arising out of the result of the suit or proceeding.

In *Nagubai* v. *Shama Rao*[14], a widow filed suits in *forma pauperis* in 1919, against her step son for maintenance and marriage expenses, and for a charge against the suit properties which were subject-matter of a mortgage. The suit was decreed in 1921. Meanwhile, in 1920, the step son sold the properties to the predecessor of the appellant and in 1926, the step son was adjudicated insolvent. In execution of the maintenance decree which also created a charge on the suit properties, the decree-holder purchased the properties in 1928, but the Official Receiver was not made a party to those proceedings. The widow contended that the

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12. *Rajendra Singh* v. *Santa Singh*, (1973) 2 SCC 705: AIR 1973 SC 2537; *Supreme General Films Exchange* v. *Brijnath Singhji*, (1975) 2 SCC 530: (1976) 1 SCR 237; *Nirupama* v. *Baidyanath*, AIR 1985 Cal 406; *Rukmani* v. *Thimmalai*, AIR 1985 Mad 283.

13. *Sohanlal* v. *Ragumall*, AIR 1981 All 235; *Parameswaran* v. *Podiyan*, AIR 1984 Ker 134

14. (1956) SCR 451; *Suraj* v. *Gajraj*, AIR 1981 All 149 (court-sale); *Sher Singh* v. *Md. Ismail*, AIR 1981 All 114; *Dev Raj* v. *Gyanchand*, (1981) 2 SCC 675: AIR 1981 SC 981; *Bg. Patil* v. *Vadilal*, AIR 1982 Bom 66; *Charanjit* v. *Ram Sarup*, AIR 1982 P&H 44 (Pre-emption); *Varkey Varkey* v. *Kurian*, AIR 1982 Ker 223; *Shankar* v. *Maruti*, AIR 1982 Bom 191; *Shanti* v. *Chhote*, AIR 1983 P&H 321; *Sagar* v. *Yasoda*, AIR 1983 Raj 161; *Ram Niwas* v. *Omakari*, AIR 1983 All 310; *Hema* v. *Sakuntalamma*, AIR 1983 AP 49; *Khemchand* v. *Vishnu*, (1983) 1 SCC 18: AIR 1983 SC 124; *Ram Lakhan* v. *Dy. Director*, 1986 Supp SCC 682.

sale of 1920 was hit by the doctrine of *lis pendens*, while the purchaser under the sale of 1920 attacked the sale of 1928 as null and void. It was held :

> Since the widow's suit praying for a charge was presented in 1919 and the sale was in 1920, it would *prima facie* be within the mischief of Section 52 of the Act....The estate of the step son had vested in the Official Receiver in 1926 when he was adjudicated insolvent, but the properties which were sold in 1928 did not vest in the Official Receiver as they had been transferred long prior under the sale deed of 1920 which formed the root of the appellant's title. That sale was no doubt *pendente lite*, but the effect of Section 52 is not to wipe it out altogether, but to subordinate it to the rights based on the decree in the suit. As between the parties to the transaction, it was perfectly valid and operated to vest the title of the transferor in the transferee....The words 'so as to affect the rights of any other party thereto under any decree or order which may be made therein', make it clear that the transfer is good except to the extent that it might conflict with rights decreed under the decree or order....It will be inconsistent to hold that the sale deed of 1920 is effective to convey title to the properties to the appellants, and that, at the same time, it was the insolvent step son who must be deemed to possess that title. We are, therefore, unable to accede to the contention that a transferor *pendente lite* must, for purposes of Section 52, be treated as still retaining title to the properties....It has been held by the Privy Council in *Kala Chand Bannerjee* v. *Jagannath Marwari*[15], that when in execution of a mortgage decree properties are sold without notice to the Official Receiver in whom the equity of redemption had vested prior to the sale, such sale would not be binding on him. But here it is not the Official Receiver, who impeaches the sale as bad....It is the purchaser *pendente lite* in the charge suit that now attacks the sale of 1928....The observations in *Wood* v. *Surr*[16], directly cover the point now in controversy and they embody a principle adopted in the law of this country as to the effect of a sale in execution of a decree passed in a defectively constituted mortgage suit. Such a sale, it has been held, does not affect the rights of redemption of

15. (1927) LR 54 IA 190.
16. (1854) 52 ER 465.

persons interested in the equity of redemption who have not been impleaded as parties to the action as they should have been under Order XXXIV, Rule 1, C.P.C., but it is valid and effective as against parties to the action. This rule has been affirmed even when the person in whom the equity of redemption had vested is the Official Receiver and he had not been made a party to the proceedings resulting in sale. Vide: *Inamullah Khan* v. *Shambhu Dayal*[17] and *Subbaiah* v. *Ramasami Goundan*[18]. We should accordingly hold that even assuming that the equity of redemption in the suit properties vested in the Official Receiver on adjudication of the step son, his non-joinder in the execution proceedings did not render the purchase by the widow in 1928 a nullity, and that under the sale she acquired a good and impeccable title, and it is not open to attack by the transferee *pendente lite* under the deed of 1920.

This decision also shows that the doctrine applies in cases where a wife or widow sues for maintenance and claims a charge on the husband's properties, if any item of the properties is transferred *pendente lite*. That is so even though 'a right to immovable property is not directly or specifically' strictly in question.

In *Kedarnath Lal* v. *Ganesh Ram*[19], a certain property was mortgaged to a Co-operative Society but was later released in 1931 on a condition. It was attached before judgment in a suit on April 23, 1934, and in execution of the decree the decree-holder obtained possession of it in 1935. Since the condition imposed on the mortgagor was not performed, both the mortgagor and the mortgagee (Co-operative Society) were under the impression that the property continued to be subject to the mortgage. On April 26, 1934, the Co-operative Society applied for a mortgage award and the Registrar of Co-operative Societies first passed a money award and later corrected it to a mortgage award and in execution of the award the Society purchased the same property. Later, the Society went into liquidation and the property was purchased by the appellant. The respondents were lessees from the decree-holder who purchased the property in 1935. On the question whether the appellant's purchase was hit by the doctrine of *lis pendens*, it was held:

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17. AIR 1931 All 159.
18. ILR (1954) Mad 80.
19. (1969) 2 SCC 787.

The first argument is that there could be no *lis pendens* till August 16 when the money award was issued (by the Registrar) because a money suit or proceeding cannot lead to the application of the doctrine of *lis pendens*....But the proceeding was to get a mortgage award, the equivalent of a mortgage decree. The Registrar made a mistake and treated it as a proceeding for a money decree. When the Registrar corrected the order, the mortgage award related back to the petition as made, and the whole proceeding must be treated as covered by the doctrine....

The second ground of attack is that before the proceedings commenced before the Registrar the property had been attached and, therefore, the doctrine of *lis pendens* again cannot apply. We are unable to accept this argument either. If the property was acquired *pendente lite*, the acquirer is bound by the decree ultimately obtained in the proceedings pending at the time of the acquisition. This result is not avoided by reason of the earlier attachment. Attachment of property is only effective in preventing alienation but it is not intended to create any title to the property. On the other hand, Section 52 places a complete embargo on the transfer of immovable property, right to which is directly and specifically in question in a pending litigation. Therefore, the attachment was ineffective against the doctrine. Authority for this clear position is hardly necessary but if one is desired it will be found in *Motilal* v. *Karrab-ud-Din*[20].

Lastly, it was contended that the sale was by Court-action (by the Registrar) and that the doctrine of *lis pendens* would not apply to such a sale. This point was considered in *Samarendra Nath Sinha* v. *Krishna Kumar Nag*[21], by one of us (Shelat, J.) and it was observed as follows: 'The purchaser *pendente lite* under this doctrine is bound by the result of the litigation on the principle that since the result must bind the party to it so must it bind the person deriving his right, title and interest from or through him. This principle is well illustrated in *Radhamadhub Haldar* v. *Manohar*[22], where the facts were almost similar to those in the instant case. It is true that Section 52 strictly speaking does not apply to involuntary alienations such as

20. LR 24 IA 170.
21. (1967) 2 SCR 18.
22. LR 15 IA 97.

Court sales but it is well established that the principle of *lis pendens* applies to such alienations.[23] This ground also has no validity.

Lastly, it was argued that if the fields were released from the operation of the mortgage they could not be made the subject of a mortgage-decree, and whatever was done in the mortgage proceedings was not of any consequence. To this there are two answers. First, the respondent before the Registrar (mortgagor) made no objection to the inclusion of the plots in the petition for a mortgage award. Secondly, the doctrine of *lis pendens* applies irrespective of the strength or weakness of the case on the one side or the other.[24] There is, however, one condition that the proceedings must be *bona fide*. Here no doubt the Society knew that the plots had been released from the mortgage but it is also clear that the release was to enable the mortgagor to dispose of some of the plots and make a payment to the Society. This amount was never paid and the Society must have *bona fide* felt that the plots still remained encumbered. In fact the attitude of the mortgagor in not claiming that these plots be removed from the mortgage award shows that he too felt that this was the true position. In *Gouri Dutt Maharaj case*[24] referred to by us, it was said that if the proceedings were *bona fide*, the applicability of Section 52 was not avoided.

In *Safali* v. *A.K. Dutta*[25], the Supreme Court held as follows:

The doctrine of *lis pendens* means that no party to the litigation can alienate the property in dispute so as to affect the other party and rests upon this foundation that it would be plainly impossible that any action or suit could be brought to a successful termination if alienations *pendente lite* were permitted to prevail. (Observation of Turner, L.J. in *Bellami* v. *Sabina*[26], quoted with approval by the Privy Council in *Faiyaz Hussain Khan* v. *Munshi Prag Narain*[27]). But a sub-tenant who avails of the provisions of Section 16(3) of the West Bengal Premises Tenancy Act which extinguishes the tenant's interest in the portion of the premises sub-let and confers on the sub-tenant the right to hold the tenancy directly

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23. *Nilakant* v. *Suresh Chander*, (1885) 12 IA 171 and *Motilal* v. *Karrab-ud-Din*, LR 24 IA 170; *Jayaram Mudaliar* v. *Ayyaswami*, (1972) 2 SCC 200: AIR 1973 SC 269. (Partition)
24. *Gouri Dutt Maharaj* v. *Sukur Mohammod*, LR 75 IA 165.
25. (1976) 3 SCC 602: AIR 1976 SC 1810; *Ram Harakh* v. *Hamid*, (1998) 7 SCC 484.
26. (1857) 1 DG&J 566 at 584; *Indu Kakkar* v. *Haryana State Industrial Dev. Corpn.*, (1999) 2 SCC 37.
27. (1970) LR 34 IA 102.

under the superior landlord cannot be said to have alienated the property *pendente lite*. Section 5 of the Transfer of Property Act defines transfer of property as an act by which a living person conveys property to another. When the Legislature in exercise of its sovereign powers regulates the relations of landlord and tenant altering or abridging their rights what it does is not a transfer of property attracting the doctrine of *lis pendens*.

The doctrine applies to suits for specific performance of a contract to sell immovable property and pre-emption suits.[28]

A suit decided *ex parte* or compromised is not tainted by fraud or collusion.

The next section, Section 53 deals with the doctrine of fraudulent transfer. It provides that:

The section does not apply to Government grants or transfers.

(1) Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.

Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration.

Nothing in this sub-section shall affect any law for the time being in force relating to insolvency.

A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor, shall be instituted on behalf of, or for the benefit of, all the creditors.

(2) Every transfer of immovable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee.

For the purposes of this sub-section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made.

English Law

The English law on the subject is based upon *Twyne's case*, Smith's Leading Cases 1. In that case Pierce was indebted to Twyne and also to *C.C* brought an action of debt against Pierce, and pending the writ, Pierce, being possessed of goods and chattels, in secret made a general

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28. *Ram Peary* v. *Gauri*, AIR 1978 All 318. The onus of proving fraud lies upon the person alleging it. (*Chandradip* v. *Board of Revenue*, AIR 1978 Pat 148).

deed of gift of all his goods and chattels, real and personal whatsoever to Twyne, in satisfaction of his debt; notwithstanding that Pierce continued in possession of the goods, and marked them with his own mark. Afterwards *C* had judgment against Pierce and when his goods were sought to be seized in execution of the judgment, Twyne and others resisted. On the question whether the gift in favour of Twyne was fraudulent, it was held:

(1) That this gift had the signs and marks of fraud, because the gift is general, without exception of his apparel, or of anything of necessity; for it is commonly said, *quod dolosus vesatur in generalibus.*

(2) The donor continued in possession, and used them as his own; and by reason thereof he traded and trafficked with others, and defrauded and deceived them.

(3) It was made in secret, *et done clandestine sunt semper suspiciosa.*

(4) It was made pending the writ.

(5) Here was a trust between the parties, for the donor possessed all, and had them as his proper goods, and fraud is always apparelled and clad with a trust, and trust is the cover of fraud.

(6) The deed contains, that the gift was made honestly, truly and *bona fide, et clausulae inconsuet semper inducunt suspicionen.*

Notwithstanding here was a true debt due to Twyne, and a good consideration of the gift, yet it was not made on a good consideration and *bona fide*, because, no gift shall be deemed to be *bona fide* which is accompanied with any trust (in favour of the donor).

The law was enacted in 13 Elizabeth c. 5 and 27 Elizabeth c. 4 and finally in Section 173 of the Law of Property Act, 1925, repealing the earlier laws.

Indian law

Section 53 of the Indian Act as it originally stood was based on the statutes of Elizabeth. The section is now recast and is in consonance with that of the English statute. The first part deals with transfers in fraud of creditors, the second in fraud of subsequent purchaser. The onus of proving fraud lies upon the person alleging it. (*Chandradip* v.

Board of Revenue[29],). A transfer though it may not offend this section could still be avoided either under Section 55 of the Presidency Towns Insolvency Act, or Section 53 of the Provincial Insolvency Act, and a provision saving insolvency law is introduced in the section. Such a provision is necessary because a transaction which prefers one creditor to another is not a transfer which defeats or delays creditors. It is only when property is removed from *all* the creditors for the benefit of the debtor that the section is attracted. Whether a transaction is of that nature would depend on the facts and circumstances of each case. If the transfer is fictitious there is no difficulty, but if it is supported by consideration then collusion with the transferee will have to be established.

This naturally raises the question as to the position when the consideration is good in part. Even in such a case if the transfer was for the purpose of delaying or defeating creditors, then, there being fraud the transaction will be set aside *in toto*. But if a part of the consideration is utilised for paying off a mortgage debt of the transferor (but not a money debt), then either the transfer would be treated as valid to that extent or if the transfer is set aside the vendee is given a charge on the property.

In *Abdul Shakoor* v. *Arji Papa Rao*[30], a sale deed was executed in 1949 with respect to a *part of the assets* of the vendors. A creditor of the vendors filed a suit for recovery of his debt and attached that very property before judgment. A claim petition by the purchaser was dismissed under Order XXI. Rule 63, C.P.C., and the attachment was confirmed. The purchaser filed a suit to have the summary order set aside and the creditor contended that the sale was for the purpose of delaying or defrauding creditors and that the purchaser was not a *bona fide* purchaser for value. It was held:

(1) The fact that the entirety of the debtor's property was not sold cannot by itself negative the applicability of Section 53(1) unless there is cogent proof that there is other property left sufficient in value and of easy availability to render the alienation in question immaterial for the creditors.

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29. AIR 1978 Pat 148

30. (1963) Supp (2) SCR 5; *Chogmal Bhandari* v. *Dy. C.T.O.*, (1976) 3 SCC 749.

(2) On the evidence, (*a*) the object of the transaction was to put the property out of the reach of the creditors; and (*b*) the plaintiff was not a transferee in good faith.

(3) A transfer which is voidable under Section 53(1) of the Transfer of Property Act can be avoided not only by a suit filed by a creditor impugning the transfer on behalf of himself and the other creditors, but also by way of defence to a suit under Order XXI, Rule 63, Civil Procedure Code, by a claimant whose application has been rejected in summary proceedings.

In coming to this conclusion their Lordships quoted extensively with approval from *Ramaswami Chettiar* v. *Mallappa Reddiar*[31], where the learned Judges of the Madras High Court, said:

> A creditor decree-holder, who is in most cases a stranger, cannot reasonably be expected to know of his own knowledge whether a transfer by his judgment-debtor is only fraudulent or is wholly nominal or partly nominal and partly fraudulent, and whether the transferee is in possession and if in possession, whether he is so for himself or for the judgment-debtor. He would therefore, usually both in the claim petition and in the suit which afterwards arises out of the order against the claimant be obliged to raise and be justified in raising alternatively all the pleas open to him, and the Court which decided the claim against the claimant might, in its conclusions on each of the points, be either right or wrong. To hold that a plea based on the transfer being voidable under Section 53(1) could not be raised in defence to a suit to set aside a summary order would mean that the creditor decree-holder would be in a much worse position for his success in the summary claim proceedings than if he had lost in these proceedings....If the creditor knowing of the transfer applies for attachment, the application is sufficient evidence of his intention to avoid it; if he only hears of the transfer when a claim petition is preferred under Order XXI, Rule 58, and still maintains his right to attach, that again is a sufficient exercise of his option to avoid and entitles him to succeed in the subsequent suit under Rule 63... .
>
> The suit under Rule 63 is by the unsuccessful party to the claim-petition to establish the right which he claims to the property in

31. (1920) ILR 43 Mad 760 (FB).

dispute. Whether this be instituted by the attaching decree-holder or by the transferee-claimant, it must equally be decided in favour of the former if the transfer is shown to have been fraudulent; because in consequence of the fraudulent character of the transfer and its avoidance by the judgment-creditor, the result is that the transferee has not the right which he claims, namely, to hold the property free from attachment in execution by the judgment-creditor.

In *Abdul Shakoor case*, the Supreme Court then examined if any change was brought about in the law as a result of the amendment by Act 20 of 1929 and held:

> In decisions rendered prior to the amendment, there were a large number in which it was held, following certain English cases decided with reference to 13 Eliz. c. 5 on which Section 53(1) was based, that suits by creditors for avoiding a transfer under Section 53(1) was a representative action. To that general rule however, an exception was recognised in a number of decisions when the suit was to set aside a summary order under Order XXI, Rule 63, and was brought by an attaching decree-holder against whom an adverse order has been made in the summary proceeding, it being held that such a suit need not be in a representative capacity. The decisions on this point were however not uniform. It was merely to have a uniform rule and to avoid these conflicting decisions that the third paragraph was inserted so that after the amendment the rule that a suit by a creditor, should be brought in a representative capacity would apply as much to a suit to set aside a summary order under order XXI, Rule 63, as to other suits. It was not suggested that there was anything in the terms of the amended Section 53(1) which referred to a defence to a suit and, in fact, learned counsel did not contend that if a defence under Section 53(1) could be raised by a defeated (successful?) attaching-creditor such a defence had to be in a representative capacity. From a provision as to how a plaintiff, if he filed a suit, should frame it we can see no logical process by which it could be held that a defendant cannot impugn the validity of the sale which is voidable at his instance.

In *Petherpermal Chetty* v. *Muniandi Servai*[32], in June 1895, a sale deed was executed, of land, in favour of the predecessor of the appellant.

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32. (1907-08) LR 35 IA 98.

The transaction was not real but *benami*. In September, 1895, an equitable mortgagee of the land sued to establish his lien on the ground that the sale was intended to defraud creditors and obtained a decree with the result that the equitable mortgagee was paid off and the mortgage was discharged. On the death of the vendor of the land, the respondent who was his heir sued the appellant, the legal representative of the purchaser for the recovery of the land. The defence raised was that the plaintiff, on account of his participation in the fraudulent attempt to defeat his creditor, was not entitled to recover possession of the land. It was held:

> Persons have been allowed to recover property which they had assigned away, where they had intended to defraud creditors, who, in fact, were never injured....But when the fraudulent or illegal purpose has actually been effected by means of the colourable grant, then the maxim applies, *in pari delicto potior est conditio possidentis*. The Court will help neither party. Let the estate lie where it falls....
>
> To enable a fraudulent confederate to retain property transferred to him in order to effect a fraud the contemplated fraud must, according to the authorities, be effected. Then, and then alone, does the fraudulent grantor, or giver, lose the right to claim the aid of the law to recover the property he has parted with.
>
> The principle of this case will not however apply if the transferor seeks for possession from the transferee before the fraud is effectuated.

In *Immani Appa Rao* v. *Gollappalli Rama Lingamurthi*[33], a sale of property was effected with the mutual consent of the vendor and vendee to defraud the creditors of the vendor. The transfer was not supported by any consideration and the transferee agreed to act as the *benamidar* until the transferor required him to reconvey the property to his sons. After the creditors had thus been defrauded, the transferor and his sons trespassed and occupied the property. The transferee thereupon filed the suit to recover possession. The transferor, in defence urged that the transferee could not claim the properties, because it was a fraudulent transfer. It was held:

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33. (1962) 3 SCR 739.

Reported decisions bearing on this question show that consideration of this problem often gives rise to what may be described as a battle of legal maxims. The transferors emphasised that the doctrine which is pre-eminently applicable to the present case is *ex dolo malo non oritur actio or ex turpi causa non oritur actio*. In other words they contended that the right of action cannot arise out of fraud or out of transgression of law; and according to them it is necessary in such a case that possession should rest where it lies *in pari delicto potior est conditio possidentis*. When each party is equally in fraud the law favours him who is actually in possession or when both parties are equally guilty the estate will lie where it falls....Said Lord Mansfield, C.J. in *Holman* v. *Johnson*[34] '...the objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed: but it is founded in general principles of policy which the defendant has advantage of, contrary to the real justice, as between him and the plaintiff, by accident if I may say so. The principle of public policy is this: *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise the cause of action appears to arise *ex turpi causa* or the transgression of a positive law of this country, then the Court says he has no right to be assisted. It is upon that ground the Court goes: not for the sake of the defendant, but because they will not lend their aid to such a plaintiff'. There can be no question of estoppel in such a case for the obvious reason that the fraud in question was agreed by both the parties and both parties have assisted each other in carrying out the fraud. When it is said that a person cannot plead his own fraud it really means that a person cannot be permitted to go to a court of law to seek for its assistance of relief and yet base his claim for the court's assistance on the ground of his fraud. In this connection it would be relevant to remember that the transferee can be said to be guilty of a double fraud; first he joined the transferor in his fraudulent scheme and participated in the commission of fraud the object of which was to defeat the creditors of the transferor, and then he committed another fraud in suppressing from the Court the

34. (1775) 1 Cowp 341.

fraudulent character of the transfer when he made out the claim for the recovery of the properties conveyed to him. The conveyance in his favour is not supported by any consideration and is the result of fraud; as such it conveys no title to him. Yet, if the plea of fraud is not allowed to be raised in defence the Court would in substance be giving effect to a document which is void *ab inito*. Therefore, we are inclined to hold that the paramount consideration of public interest requires that the plea of fraud should be allowed to be raised and tried, and if it is upheld the estate should be allowed to remain where it rests. The adoption of this course, we think, is less injurious to public interest than the alternative course of giving effect to a fraudulent transfer.

Whatever the rights between a transferor and a *benami* transferee may be when the transaction is entered into for the purpose of defeating creditors, a creditor himself can ignore a *benami* transaction and proceed against the property as if it was that of the transferor. The creditor need not have it set aside under this section, because, the transaction is not a transfer at all.

In *Bhandari* v. *Dy. Commercial Tax Officer*[35], a partnership of two partners stood dissolved in 1963. They executed a registered deed of trust by which properties mentioned therein were vested in the trustees for the purpose of paying off the creditors who were named therein. Subsequently, a business was started by the grandson of one of the partners and for the years 1966—1969 provisional assessments were made in his name. In 1971, the Sales Tax authorities made the assessments in the name of the Joint Hindu Family for the first time but found that the tax could not be realised from the assessees on account of the Trust Deed, and therefore, treated the Deed as void and fraudulent as having been brought about to defeat the debts of the Sales Tax Department in the shape of assessments made against the Joint Hindu Family. The facts found were : (1) that at the time when the Trust Deed was executed no assessment order against the Joint Hindu Family had been passed. Thus, there was no real debt due from one of the executants of the Trust at the time the Trust was executed; (2) the Trust did not have for its object any unlawful purpose; (3) the names of the creditors were clearly mentioned as also the properties some of which had been sold to liquidate the debts of the settlors; (4) under the Trust the executants did

35. (1976) 3 SCC 749.

not reserve any advantage or benefit for themselves; and (5) there was no material to show that the creditors had obtained collusive decrees or that they were aware of the debts owed by one of the executants to the Sales Tax Department before the execution of the Trust Deed. On the question whether the Trust Deed was hit by Section 53 of the Transfer of Property Act, the Supreme Court held:

> In the facts and circumstances of the case it cannot be said that the Trust Deed was executed to defraud the creditors namely the Sales Tax Department. Under the section a person who challenges the validity of the transaction must prove two facts: (1) that a document was executed by the settlor; and (2) that the said document was executed with a clear intention to defraud or delay the creditors. How the intention is proved would be a matter which would largely depend on the facts and circumstances of each case. It is well settled that a mere fact that the debtor chooses to prefer one creditor to the other either because of the priority of the date or otherwise by itself cannot lead to the irresistible inference that the intention was to defeat the other creditors.

In *Musahar Sahu* v. *Hakim Lal*[36], the Privy Council observed as follows:

> The transfer if defeats or delays the creditors is not an instrument which prefers one creditor to another but an instrument which removes property from the creditors to the benefit of the debtor. The debtor must not retain a benefit for himself. He may pay one creditor and leave another unpaid.[37] So soon as it is found that the transfer here impeached was made for adequate consideration in satisfaction of the genuine debts and without reservation of the benefit to the debtor it follows that no ground for impeaching it lies in the fact that the plaintiff who also was a creditor was a loser by payment being made to this preferred creditor there being in the case no question of bankruptcy. This decision was endorsed by the Privy Council in *Ma Pwa May* v. *S.R.M.M.A. Chettiar*[38], where the Judicial Committee observed as follows: "A debtor is entitled to prefer a creditor unless the transaction can be challenged in bankruptcy and

36. (1915) LR 43 IA 104.
37. *Middleton* v. *Collak*, (1876) 2 Ch D 104.
38. AIR 1929 PC 279.

such a preference cannot in itself be impeached as falling within Section 53....'' It may be noted that in Section 53 of the Transfer of Property Act if a transfer is made with intent to defeat or delay the creditors it is not void but only voidable. If the transfer is voidable then the Sales Tax authorities cannot ignore or disregard it but have to get it set aside through a properly constituted suit after impleading the necessary parties and praying for the desired relief.

In *Chutterput Singh* v. *Mahavir Bahadur*[39], the Privy Council observed as follows:

> No issue was stated in the suit whether the transfers were or were not liable to be set aside at the instance of Dhanput under Section 53 of the Transfer of Property Act and no decree has been made for setting them aside. Such an issue could be raised and such a decree could be made only in a suit properly constituted either as to parties or otherwise.

To the same effect is a latter decision of the Privy Council in *Zafrul Hussan* v. *Fariduddin*[40], where Lord Thankerton made the following observation:

Further, under Section 53, the *Wakfnama* would only be voidable at the option of the person so defrauded or delayed....Until so voided the Deed remains valid.

The basis of the section is that one ought to be just before being generous. (*a*) If the transfer is for valuable consideration and in good faith, that is, good faith of the transferee, the transfer will be unassailable; (*b*) if the transfer is for good consideration and in good faith, that is good faith of the transferor, the transfer will be protected; (*c*) if the transfer is a gift to a stranger, the transferee's good faith is irrelevant. It is the transferor's mind one has to consider for deciding whether he had an intention to defraud. Another important point to be noticed is that the section applies to creditors existing at the time of transfer as well as subsequent creditors. That is, where a person first transfers all his property and then acquires debts.

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39. 1904 LR 32 IA 1.

40. AIR 1946 PC 177; *Prasad* v. *V. Govindaswami*, (1982) 1 SCC 185: AIR 1982 SC 84; *Tangali* v. *Babban*, AIR 1982 All 316 (Sham transfer); *Phoolan* v. *Surendra*, AIR 1983 All 440; *Sushilabehn* v. *Anandilal*, AIR 1983 Guj 126; *Union of India* v. *Ram Peary*, AIR 1984 Cal 215; *Union of India* v. *Rajeswari & Co.*, (1986) 3 SCC 426: AIR 1986 SC 1748; *Hamda Ammal* v. *Avadiappa Pathar*, (1991) 1 SCC 715.

The two rules of insolvency law relevant for this section are: (*a*) A voluntary transfer other than in consideration of marriage will be invalid if a transferor becomes insolvent within two years; and (*b*) if one creditor is preferred to another within three months of the insolvency, the acts of preference will be set aside if, (*i*) they are voluntary, and (*ii*) insolvency was imminent at the time of the acts of preference.

Exercises

1. When is a transferee from the ostensible owner protected as against the real owner? (pp. 123, 124)
2. Explain the maxim—Nemo dat quod non habet. (pp. 123-126)
3. When can a holder under a defective title claim compensation for improvements made by him? (pp. 128-129)
4. What is the principle behind and the limits of the doctrine of lis pendens? (pp. 130-137)
5. What was decided in Twyne's case? (pp.137-138)
6. Explain the 'doctrine of fraudulent transfer'. (pp. 137-147)

8
Undivided Ownership

Joint Ownership

As I have already indicated the relevant sections are Sections 44 to 47. Their scope is as follows:

Section 44 deals with transfer by one co-owner. It provides:

Where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.

Co-owners

There are three types of co-ownership namely: joint tenancy, tenancy-in-common and coparcenary. Joint tenancy or co-tenancy arises when there is benefit of survivorship or *jus accrescendi* among the joint tenants, that is, if one of them died, his interest went to the co-tenants and not to the heirs and representatives of the deceased.

Joint tenancy in English law has the characteristics known as unity of possession, unity of interest, unity of title and unity of time. The unity of possession is described in old French as *seisin per my et per tout*, that is, possession of every piece and the whole. Unity of interest indicates identity of interest; unity of title arises when all the co-tenants derive their title by the same instrument and unity of time arises when the interest vests in them at the same moment of time. The right of survivorship which is its chief characteristic is such that, though a co-tenant could transfer his interest *inter vivos* he could not do so by will, because, at the moment of death survivorship operates, taking precedence over the will. Under modern English law, there can be only four joint tenants. If a conveyance is made to more than 4 persons say *A*, *B*, *C*, *D*, *E*, and *F*, then *A*, *B*, *C*, and *D* will hold the property at law jointly as trustees for sale, in trust for all the six persons jointly in equity. Both

under common law and modern law, in England, one joint tenant cannot convey his *interest at law* to a stranger.

In the case of coparcenary, it could arise by custom or common law in England. The custom was recognised in the tenure known as Gavelkend but is now abolished. Under common law it arose only among female heirs and their descendents, and the position is the same in modern law. The *jus accrescendi* was not recognised among coparaceners, nor was the unity of time since the descendents could hold with ancestors.

In tenancy-in-common, there is only unity of possession, that is, such a tenant holds property *per my* but not *per tout*, There is obviously no *jus accrescendi.*

All these kinds of co-ownership could be put an end to by partition.

The position in Hindu Law (customary) is: (*i*) that there is no joint tenancy of the English kind at all. But by use of appropriate words a joint family property with right of survivorship could have been created but not now. But even in such a case, sons of the members of the family have rights and widows of such members have substantial rights of maintenance. Therefore it is that the Judicial Committee said in *Jogeshwar Narayan* v. *Ramchand Datt*,[1] that the principle of joint tenancy as obtaining in England is quite foreign to Hindu law. In spite of this categorical statement, we find Mr. Justice V. Krishnaswami Iyer stating in *Chinnu Pillai* v. *Kalimuthu Pillai*[2], while dealing with a joint Hindu family coparcenary: 'The fluctuating character of a joint tenant's interest ceases in the hands of his alienee, *Williams* Real Property, 20th Edn. p. 138' as if it is the same as a joint tenancy in the English law of Real Property. The nearest we have is, when, under the Mitakshara School, an estate is inherited by two or more widows or daughters, they hold the property as co-tenants with rights of survivorship.

The joint Hindu family is however called a coparcenary in India. It has to some extent the unities of possession and title, but not those of time and interest, and unlike the English coparcenary, survivorship is its prominent characteristic.

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1. (1896) LR 23 IA 37.
2. (1910) ILR 35 Mad 47, 59; *Crown* v. *Ibrahim*, AIR 1980 Ker 94; *Neelvathi* v. *N. Natarajan*, (1980) 2 SCC 247: AIR 1980 SC 691; *Balaram* v. *Arbind*, AIR 1981 Cal 266.

Tenancy-in-common is very common in India. Whenever there is undivided ownership without right of survivorship, when the members of a Mitakshara Hindu family are divided in status but hold the property in common without a partition by metes and bounds, and finally under the Dayabhaga system, the members of the Hindu family hold as tenants-in-common, because, there is no right of survivorship among them.

Under the Act there can be any kind of co-ownership provided it is not opposed to the personal law of the parties. Since the words 'undivided family' are general they are not restricted to Hindus only. In the case of a sale of a dwelling-house therefore the purchaser's remedy is only to sue for partition and the other co-owners will be entitled to purchase the stranger's share at a price fixed by the court.[3]

Joint Transferees

Section 45 provides that:

> Where immovable property is transferred for consideration to two or more persons, and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the fund; and, where such consideration is paid out of separate funds belonging to them respectively, they are in the absence of a contract to the contrary, respectively entitled to interests in such property in proportion to the shares of the consideration which they respectively advanced.
>
> In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property.

This section does not apply to gifts.

It is submitted that if the transferees are Hindus they take the property as tenants-in-common because joint tenancy other than a co-parcenary is foreign to Hindu Law (*see* p. 149).[4] However the presumption of joint tenancy is drawn among Christians and Parsees.

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3. *Bhim Singh* v. *Ratnakar*, AIR 1971 Ori 198; *Khirode Chandra* v. *Sanoda Prasad*, (1910) 7 IC 436 (Cal).
4. *Debaraj* v. *Ghanshyam*, AIR 1979 Ori 162; *Mohanlal* v. *Board of Revenue*, AIR 1982 All 273.

Transfers by Persons having distinct interests

Section 46 provides that:

Where immovable property is transferred for consideration by persons having distinct interests therein, the transferors are, in the absence of a contract to the contrary, entitled to share in the consideration equally, where their interests in the property were of equal value, and, where such interests were of unequal value, proportionately to the value of their respective interests.

Illustrations

(*a*) *A*, owning a moiety, and *B* and *C* each a quarter share, of mauza Sultanpur, exchange an eighth share of that mauza for a quarter share of mauza Lalpura. There being no agreement to the contrary, *A* is entitled to an eighth share in Lalpura and *B* and *C* each to a sixteenth share in that mauza.

(*b*) *A*, being entitled to a life-interest in mauza Atrali and *B* and *C* to the reversion sell the mauza for Rs 1000. *A's* life-interest is ascertained to be worth Rs 600, the reversion Rs 400. *A* is entitled to receive Rs 600 out of the purchase-money, *B* and *C* to receive Rs 400.

Transfers by Co-owners of a share

Section 47 provides that:

Where several co-owners of immovable property transfer a share therein without specifying that the transfer is to take effect on any particular share or shares of the transferors, the transfer, as among such transferors, takes effect on such shares equally where the shares were equal, and where they were unequal, proportionately to the extent of such shares.

Illustration

A, the owner of an eight-anna share, and *B* and *C*, each the owner of a four-anna share, in mauza Sultanpur, transfer a two-anna share in the mauza to *D* without specifying from which of their several shares the transfer is made. To give effect to the transfer one-anna share is taken from the share of *A*, and half an anna share from each of the shares of *B* and *C*.[5]

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5. *Taraknath* v. *Sushil Chandra*, (1996) 4 SCC 697.

9
Doctrine of Part Performance

Part Performance

Section 53-A deals with the doctrine. It provides:

Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty:

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

In *Sheth Maneklal Mansukhbhai* v. *Hormusji Jamshedji Ginwalla*[1], there was an agreement to lease evidenced by the correspondence between the parties. The lessee (defendant) was put in possession and rent was accepted from him for several years. No formal lease deed was

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1. 1950 SCR 75: AIR 1950 SC 1, *Durga Prasad* v. *Kanhiyalal*, AIR 1979 Raj 201 (tenant in possession of a part of the property); *Chinna Thevar* v. *G. Ammal*, AIR 1979 Mad 47; *Anweerappa* v. *Shetty Thammanna*, AIR 1979 AP 156 (Mortgage in possession). *Narayan Reddy, C.V.* v. *Katanguru*, AIR 1980 AP 89 (Alienation prohibited); *Narendra* v. *Shankar*, (1980) 2 SCC 253: AIR 1980 SC 575; *Bishwanath* v. *Biska Maya*, AIR 1980 Sikkim 1 (Not a rule of justice, equity and good conscience); *Ekadasi* v. *Ganga*, AIR 1981 All 373; *Ramiah* v. *Mohammadunnissa*, AIR 1981 AP 38; *Bhamabhai* v. *Collector*, AIR 1981 Goa 25; *Krishnamoorthy* v. *Paramasiva*, AIR 1981 Mad 310; *Tshering* v. *Sonam*, AIR 1981 Sikkim 1; *Chaman Lal* v. *Surinder Kumar*, AIR 1983 P&H 323; *Venkat* v. *Vishwanath*, AIR 1983 Bom 413; *Appalanaidu* v. *Appayamma*, AIR 1983 AP 177; *Sishmal* v. *Harak*, AIR 1983 Raj 189; *Barun* v. *Raj Kishore*, AIR 1983 Ori 107; *Jumbamal* v. *Kapoor Chand*, AIR 1983 Raj 139; *Teja Singh* v. *Ram Prakash*, AIR 1984 P&H 95; *Marappa* v. *Sathyanarayana*, AIR 1984 Kant 50; *Gopal* v. *State*, AIR 1984 Raj 174; *Goswami* v. *Purshottam*, AIR 1984 Cal 797.

however executed. In a suit by the plaintiff to eject the defendant on the ground that he was a trespasser, it was held:

Section 53-A is a partial importation in the statute law of India of the English doctrine of part performance. It furnishes a statutory defence to a person who has no registered title deed in his favour to maintain his possession if he can prove a written and signed contract in his favour and some action on his part in part performance of that contract.

What is the English doctrine

Take a parol contract of sale of land. Suppose the purchaser has paid the purchase money, the vendor puts him in possession and the purchaser spends money on costly structures and leases out the land to lessees. In fact both sides have done everything except the execution of the deed of conveyance. If at that stage the vendor brings an action in ejectment alleging that the purchaser got no title, the court has to choose between strict adherence to law setting aside all that has been done, or, give relief to the defendant on the basis that the required formality has been complied with; and an English court of equity deeming the first alternative unjust has chosen the second. Certain limitations are however placed before the defendant is given relief. They are—

(*i*) the act of part performance must be referable to the alleged contract and must not be referable to any other title;

(*ii*) it must be by the party seeking to avail himself of the equity and not the act of the other party;

(*iii*) it must constitute fraud in either the plaintiff or defendant to take advantage of the want of formalities in the contract;

(*iv*) the contract must be enforceable by court that is, performance of the formalities prescribed should not make such contract or transfer illegal or of no avail in law, for any purpose;

(*v*) the terms of the contract must be capable of being ascertained;

(*vi*) the contract must be respecting land; and

(*vii*) the formalities should be merely prescribed, that is, it should not be stated in the enactment prescribing the formalities that absence of the formalities makes the contract illegal or of no avail for any purpose.

These limitations are derived from the case of *Maddison* v. *Alderson*[2].

Generally, putting the purchaser in possession has been considered as an act of part performance, but if the purchaser was in possession under some other antecedent title, *mere* continuance in possession would not be regarded as such an act.

The Law of Property Act, 1925, has now recognised the doctrine in England.

Indian law

The Privy Council has at one stage[3] decided that this equitable doctrine was not applicable in India as it would have the effect of setting at nought the provisions of the Indian statute law, especially the Registration Act, 1908. For example, Section 54 provides that a sale of immovable property of value more than Rs 100 can be made *only* by a registered instrument; whereas in English law, the contract was merely not enforceable without a memorandum of the contract. The Indian Legislature, therefore, introduced Section 53-A by Act 20 of 1929. The section requires unlike the English law, a contract in writing duly signed and containing the terms of the transfer couched in language of reasonable certainty. Also, putting the vendee in possession and, where he is already in possession—some further act in execution of the contract—are necessary to constitute an act of part performance. When the transferee is not in possession, there must be a transfer of possession in part performance of the contract and no other act, however unequivocal it may be, would suffice. Another requirement is that the transferee must have either performed his part of the contract or is willing to do so. The section is not retrospective, that is, in transactions before April 1, 1930, Indian law does not recognise the doctrine.

There are two matters which may be noticed in connection with this doctrine. They are: (*i*) the doctrine in *Walsh* v. *Lonsdale*[4], and, (*ii*) Section 27-A of the Specific Relief Act, 1877, omitted in the Specific Relief Act, 1963.

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2. 8 AC 467.
3. *Ariff* v. *Jadunath*, AIR 1931 PC 79.
4. (1882) LR 21 Ch D 9.

The case of *Walsh* v. *Lonsdale* was a case of lessor and lessee. It was held that a tenant holding under an agreement to lease, if he could enforce specific performance, of the contract, then such a right is a good defence in an action in ejectment. The scope of the doctrine is explained thus in *Manchester Brewery Company* v. *Coombs*[5]:

> It applies only to cases where there is a contract to transfer legal title, and an act has to be justified or action maintained by force of the legal title to which such contract relates. It involves two questions: (*i*) Is there a contract of which specific performance can be obtained? (*ii*) If yes, will the title acquired by such specific performance justify at law the act complained of or support at law the action in question? It is to be treated as though before the Judicature Acts there had been, first, a suit in equity for specific performance, and then an action at law between the same parties: and the doctrine is applicable only in those cases where specific performance can be obtained between the same parties in the same court, and at the same time as the subsequent legal question falls to be determined.
>
> The doctrine is of general application and has been invoked in the case of sales, exchanges and mortgages etc. though the case is in one of lease.[6]

Section 27-A of the Specific Relief Act is in the following terms:

> Subject to the provisions of this chapter where a contract to lease immovable property is made in writing signed by the parties thereto or on their behalf, *either party may*, notwithstanding that the contract though required to be registered, has not been registered, *sue the other* for specific performance of the contract if: (*a*) where specific performance is claimed by the lessor, he has delivered possession of the property to the lessee in part performance of the contract; and (*b*) where specific performance is claimed by the lessee, he has, in part performance of the contract, taken possession of the property or being already in possession continues in possession in part performance of the contract, and has done some act in furtherance of

5. (1901) 2 Ch 608.
6. *S.C. Apte* v. *C.H. Patwardhan*, (1976) 4 SCC 112 (case of person holding under power of attorney, section held not applicable)

the contract: Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

Under this section both the lessor and lessee can invoke the doctrine of part performance but under Section 53-A of the Transfer of Property Act, it is only the transferee that has the right to rely on the doctrine. The doctrine of *Walsh* v. *Lonsdale*[7] and the conditions laid down therein namely that the contract must be capable of specific performance are not applicable to cases coming under Section 53-A.

The scope of the section is explained in *Achayya* v. *Venkata Subba Rao*[8]. In that case, a sale deed of land was executed in favour of the plaintiffs by the second defendant. The plaintiffs were put in possession, the consideration having been paid; but the document was not registered. The first defendant who was interested in the property paid the taxes due and filed a suit for recovery of the amount against the second defendant. The suit was decreed and the land was brought to sale as that of the second defendant. Plaintiffs filed the suit for a declaration that the land belonged to them and relied on Section 53-A. It was held:

> If the conditions of the section are fulfilled the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of that property....The section does not either expressly or by necessary implication indicate that the right conferred on the transferee thereunder can only be invoked as a defendant and not as plaintiff....In *Veera Raghava Rao* v. *Gopala Rao*[9], it was observed: 'The limits of the application of the doctrine of part performance have now been defined in Section 53-A of the Act and it is plain that the provision only entitles a person in possession to invoke the doctrine as a shield to protect such possession if the conditions therein referred to are satisfied and does not enable a person who has lost possession to sue for recovery of it....In *Probodh Kumar* v.

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7. (1882) LR 21 Ch D 9.
8. (1956) An WR 830; *Narasa* v. *Collector*, AIR 1982 AP 1; *Sitoram* v. *Chunilal*, AIR 1982 Raj 73; *Raghavendra* v. *Motilal*, AIR 1982 All 304 (Plaintiff invoking doctrine); *Baburam* v. *Basdeo*, AIR 1982 All 424.
9. AIR 1942 Mad 125.

Dantmara Tea Co.[10]; the Judicial Committee observed: Their Lordships agree with the view expressed by Mitter, J., in the High Court that "the right conferred by Section 53-A is a right available only to the defendant to protect his possession". They note that this was also the view of their late distinguished colleague Sir Dinshah Mulla, as stated in the second edition of his treatise on the Transfer of Property Act at page 262. The section is so framed as to impose a statutory bar on the transferor; it confers no active title on the transferee. Indeed any other reading of it would make a serious inroad on the whole scheme of the Transfer of Property Act'.

No doubt, the observations are rather wide and, if literally understood they support the appellants' (first and second defendant) contention that Section 53-A can be relied upon by a transferee as a defendant and not as a plaintiff. But, we do not think that the Judicial Committee intended to lay down, irrespective of the nature of the relief claimed, that, under no circumstances, could the transferee rely upon the provisions of the Act as a plaintiff. We respectfully accept the statement of law that the section imposes a statutory bar on the transferor but it confers no active title on the transferee . . . . In *Ram Chander* v. *Maharaj Kunwar*[11], the learned Judges observed: 'Now, in the present case, what is it that the plaintiff is attempting to do? He is not attempting to set up a transfer which is invalid; he has not instituted a suit for the declaration of the validity of the transfer; he has not instituted a suit in which he claims an order against the defendant directing him to perform any covenant of the transfer. What he is seeking to do is to debar the defendants from interfering with his possession into which he has entered with the consent of his transferor after the execution of a transfer in his favour. He is, in other words, seeking to defend the rights to which he is entitled under Section 53-A of the Transfer of Property Act....It is the defendants who are seeking to assert rights covered by the contract. The plaintiff seeks merely to debar them from doing so; the plaintiff is seeking to protect his rights. In a sense, in the proceedings he is really a defendant and

10. ILR (1940) 1 Cal 250 (PC); *Sevak Nayak* v. *Ramakrishan*, AIR 1978 Ori 82; *Madhu Singh* v. *State*, AIR 1978 Pat 172; *Wali Md.* v. *Faqir Md.*, AIR 1978 J&K 92 (Not applicable in J&K); *Prabhat* v. *Tabark*, AIR 1978 Ori 219 (Oral contract); *Setaramrao* v. *Bibhisano*, AIR 1978 Ori 222.

11. ILR 1939 All 809.

we see nothing in the terms of Section 53-A of the Act to disentitle him from maintaining the present suit'. We respectfully agree with the aforesaid observations.[12]

In *Ewaz Ali* v. *Firdaus Jehan*[13], the Court made the following observations on the observations of the Judicial Committee in *Prabodh Kumar case*; 'We are unable to consider that Their Lordships of the Privy Council by the use of the word "defendant" intended to mean that the right conferred by Section 53-A was not available to a person in the position of the respondent and that the mere position of a party in the heading of a suit would determine whether he is or he is not entitled to the benefits of the section. The subsequent sentence makes this clear. When they use the word "defendant" they use it to describe the position of a person who pleads Section 53-A and they say 'his position must be that of a person who invokes it for defending himself against his transferor.'.... It is not necessary to multiply cases. It is settled law that under Section 53-A of the Transfer of Property Act, no title passes to the transferee. He cannot file a suit for a declaration of his title to the property or seek to recover possession of the same on the basis of any title conferred on him. But, if the conditions laid down in the section are complied with, it enables the transferee to defend his possession if the transferor seeks to enforce his rights against the property. This statutory right he can avail himself of both as a plaintiff and as a defendant provided that he is using his right as a shield and not as a sword. Or to put it in other words, he cannot seek to enforce his title, but he can resist the attack made by a transferor.

The doctrine does not ordinarily apply to family settlements (*M.P. Raddiar* v. *Amina*[14]) but applies to transfers in lieu of dower under Muslim Law (*H.M. Mondal* v. *D.R. Bibi*[15]). It also applies in case of exchange (*Rajendra Nath* v. *Gour Gopal*[16]).

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12. *Chaitan Das* v. *Murali Dalai*, AIR 1971 Ori 41.
13. ILR 19 Luck 566.
14. AIR 1971 Mad 187; *M. Pocaham* v. *Agent*, AIR 1978 AP 242 (Case of a contract forbidden by law); *Chandevarappa* v. *Karnataka*, (1995) 6 SCC 309.
15. AIR 1971 Cal 162.
16. AIR 1971 Cal 163; *Taibai* v. *Anna Saheb*, (1996) 1 SCC 585 (transferor had no title).

In *Shankar* v. *Goyabai*[17], certain lands originally belonged to the respondent's husband. After his death the respondent executed a power of attorney in favour of the appellant. By a letter written by the appellant to the respondent the former agreed to undertake the duties specified in the power of attorney, namely, to manage the respondent's lands and to pay her a sum of Rs 2000 annually from the net income and retain the rest as his honorarium. Within two or three weeks of the execution of the power of attorney the appellant succeeded in obtaining possession of the lands and continued in possession from year to year paying the respondent the agreed sum. Later, however, he got his name entered in the record of rights as a tenant of the respondent and thereafter put forth a claim to purchase the property under the Bombay Tenancy and Agricultural Lands Act. The respondent disputed the appellant's claim and filed a suit for accounts and for injunction to restrain the appellant from obstructing her in the enjoyment of the property and alternatively for a decree for possession of the lands. Though the appellant's main defence was that he was in possession of the lands as a tenant, at the hearing of the suit he put forth a claim that he was in possession of the lands under an agreement of sale and was, therefore, entitled to protect his possession under Section 53-A of the Transfer of Property Act. The suit was decreed by the trial court and the High Court. Dismissing the appeal to it, the Supreme Court held:

> The first and foremost difficulty in the appellant's case is that there is no written contract at all under which the respondent can be said to have agreed to sell the property to the appellant. The letter said to have been written by the respondent's brother to the appellant on which the appellant relied on as constituting a written contract of sale only refers to an oral agreement between the appellant and the respondent under which the latter had agreed to sell the lands to the former. At best the letter is a written evidence of an oral contract of sale but is not a written contract itself. Besides, many a condition of the section is unfulfilled. The terms necessary to constitute the transfer cannot be ascertained with reasonable certainty from the letter. The respondent was obviously unwilling to perform her part of the contract and the appellant was not put in possession in part performance of the contract. Admittedly he obtained possession under the power of attorney and there is nothing on record to show

17. (1976) 4 SCC 112: AIR 1976 SC 2506; *Patel Natwarlal* v. *Kondh Group*, AIR 1996 SC 1088.

that the character of his possession ever changed as a result of the contract of sale. The appellant continued to remit the agreed annual sum of Rs 2000 to the respondent which is entirely inconsistent with his character as potential purchaser of the lands.

In *Technicians Studio Private Ltd.* v. *Lila Ghosh (Smt.)*[18], the predecessor-in-interest of the first respondent filed a suit against his tenants for their ejectment and impleaded the appellant who was a sublessee as a defendant. The suit was decreed against all the defendants and when the matter reached the High Court in revision, ended in a compromise. The terms of the compromise were, (1) the appellant would become a direct tenant at a monthly rent of Rs 1000, and (2) the lease would be for a period of 16 years from May 19, 1954. But no lease deed was executed nor the compromise petition registered. The property devolved on the respondent as the sole owner and she on the expiry of the period of the lease mentioned in the compromise served a notice on the appellant to quit and thereafter filed a suit for recovery of possession. The appellant's defence was that by payment and acceptance of rent during the period of 16 years a monthly tenancy has been created in their favour and though no payment was made thereafter, monthly tenancy was continued even after the expiry of the period of 16 years. The trial court found that the petition of compromise required registration and was therefore not effective as a lease. The compromise would, however, protect the possession of the appellant for a period of 16 years under Section 53-A of the Transfer of Property Act. It further held that the payment and acceptance of rent made in terms of the unregistered compromise petition did not give rise to a right of tenancy and the payments by the appellant to the respondent were made only in part performance of the contract of lease contained in the unregistered compromise petition. The trial court accordingly decreed the suit. The decree was confirmed by the first appellate court and the High Court.

Dismissing the appeal the Supreme Court, held:

(1) The petition of compromise seeking to create a lease for 16 years was required to be registered and since it was not registered it would not affect the immovable property to which it related; but it was admissible as evidence of part performance of the contract for the purpose of Section 53-A of the Transfer of Property Act. In order to be

18. (1977) 4 SCC 324; *State of U.P.* v. *District Judge*, (1997) 1 SCC 496.

entitled to the protection of that section the transferee must perform or must be willing to perform its part of the contract. In this case one of the terms was that the appellant should pay a monthly rent of Rs 1000 and the payment, therefore, should be related only to the contract as found by the lower courts. A person who is let into possession on the strength of a void lease does not acquire any interest in the property but only gets a right to defend his position under Section 53-A. From the fact that the appellant had performed his part of the contract it is not possible to conclude that the tenancy was brought into existence.

(2) It does not, however, mean that there cannot be relationship of landlord and tenant in every case where the transferee has taken possession of the property under void lease or in part performance of a contract and is entitled only to protection of Section 53-A. Whether the relationship of a landlord and tenant exists between the parties depends on whether the parties intended to create a tenancy.

In *Ranchhoddas Chhaganlal* v. *Devaji Supdu Dorik*[19], there was an oral agreement to sell the agricultural land for Rs 17,000. The respondent buyer who was also in possession of the property, from time to time, paid Rs 12,000. On failure to pay the remaining amount, the plaintiff-appellant filed the present suit, for possession or in the alternative for Rs 5000 with interest.

The trial court found Rs 17,000 to be the agreed price and passed a decree for possession. The High Court substituted a decree for Rs 5000 with interest and refused the prayer for possession.

The Supreme Court held that the respondent has never been ready and willing to perform the agreement alleged by the appellant.The respondent relied on the doctrine of part performance.

One of the limbs of the doctrine of part performance is that the transferee has in part performance of the contract taken possession of the property. The most important consideration here is the contract. The true principle of the operation of the acts of part performance seems to require that the act in question must be referred to some contract and

19. (1977) 3 SCC 584; *Sardar Govindrao* v. *Devi*, (1982) 1 SCC 237: AIR 1982 SC 989; (Payment of money) *Amrao Singh* v. *Sanatana Dharma Sabha*, AIR 1985 P&H 195; *Mahendra* v. *Abani*, AIR 1985 Cal 108; *Chander Mohan* v. *Biharilal*, AIR 1986 P&H 226; *Delhi Motor Co.* v. *Basurkar*, AIR 1968 SC 794; *Thakamma* v. *Azamathulla*, AIR 1993 SC 1120; *Mohan Lal* v. *Mirza*, AIR 1996 SC 910.

must be referred to the alleged one; that they prove the existence of some contract, and are consistent with the contract alleged. The doctrine of part performance is a defence. It is generally not a sword but a shield. It is a right to protect his possession against any challenge to it by the transferor contrary to the terms of the contract. The appellant is right in the contention that there was never any performance in part by the respondent of the contract between the parties.

Section 53-A requires a positive act of readiness and willingness on part of the transferee to perform the agreement.

In *Maneklal* v. *Hormusji*[20], there was a contract of permanent lease for building a factory. The building of the factory was construed by the Supreme Court as an act of part performance. The Court may spell out an agreement from the correspondence to infer a contract to lease in writing. But, the construction of a building will amount to an act of part performance by the lessee already in possession, only, if the lease contemplates such a building.

Exercises

1. What condition must be satisfied before the doctrine of Part Performance can be applied? (pp. 152, 154-162)
2. What is the difference between English and Indian law in relation to the doctrine of Part Performance? (pp. 153-154)
3. Compare S. 53-A with the doctrine in *Walsh* v. *Lonsdale*. (pp. 154-158)

10
Sale of Immovable Property

Sale

The relevant sections in the Act are Sections 54 to 57.

Section 54 provides:

"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 one 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.

Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

Contract for sale—A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property.

The rest of the Act except Section 129 applies to Mohammedans also.

Tangible property

By "tangible property" is meant lands, buildings *etc.*, which immediately or through the medium of tenants may be the *subject of possession* which can be delivered by the vendor to the purchaser. It is something capable of being touched and therefore capable of being possessed. The phrase 'reversion or other intangible thing' means the various interests which are included under the head of immovable property *without involving possession*; for example a vested interest. Reversion is, however, dealt with specially as intangible property, because, ordinarily the lessor is deemed to be in possession of property through his tenant and should be treated as tangible property. These principles are not however easy of application.[1]

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1. *Ramaswami Pattar* v. *Chinnar Asar*, ILR 24 Mad 449; *Sohan Lal* v. *Mohan Lal*, ILR 50 All 986; *Tukaram* v. *Atmaram*, 40 Bom LR 1192.

What is Price

The transfer *must be for money* (price), for if it is in return of anything else, it would be exchange. It would be exchange even if there was part payment of money and the rest in something else.[2]

There is a difference between a transfer of property as dower and a transfer in lieu of dower already due. In the former case there is no transfer for any price; but in the latter case, property is exchanged for a price. Therefore, an oral sale by a Muslim husband to his wife in consideration of the discharge of the dower debt due to her would be a "sale" and hence invalid for want of a registered document. The same principle applies in the case of arrears of maintenance and future maintenance.

Suppose *A* executes a usufructuary mortgage in favour of *B* and puts *B* in possession. He then orally sells the property to *C*. In such a case, the right of redemption in *A* is immovable property, but it is intangible. Therefore, it can only be transferred by a registered document and hence the sale in favour of *C* is invalid.

When there is delivery of property of less than Rs 100 and also an unregistered document of sale, there are three views: (*i*) if the sale and document are simultaneous there could not be any proof of the sale as the document is inadmissible under Section 91 of the Evidence Act and hence the sale fails. (*ii*) In such a case, the unregistered instrument can be used for the collateral purpose of proving the character of possession though not the transfer of ownership. (*iii*) If the oral sale and the document can be dissociated, the non-registration of the document would not be fatal to the validity of the sale.

A stipulation in a sale deed, that if the price is not paid within a prescribed time, the sale will be void, is ineffective. If a sale has taken place, the only rights of the vendor are either a charge on the property for unpaid purchase money or a suit for the unpaid purchase money.[3]

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2. *Gavadayamma* v. *Suryanarayana*, AIR 1978 AP 1 (case of consideration being adulterous intercourse); *Bimal Kumar* v. *Calcutta Municipality*, AIR 1978 Cal 419; *ITC* v. *Siddique*, AIR 1978 Pat 197 (transfer in lieu of dower); *Munnan* v. *Ashrafunnissa*, AIR 1983 All 363; *Inder* v. *Anandilal*, AIR 1983 All 23; *Giodhan* v. *Ramnaik*, AIR 1983 All 84.

3. See *Arumugha Chattier* v. *Rowaman Bee*, AIR 1994 SC 651; *Hamda Ammal* v. *Avadiappa Pathar*, (1991) 1 SCC 715; *Balbir Singh* v. *Gurbachan Kaur*, 1994 Supp (2) SCC 545; *Bishundeo* v. *Anmol Devi*, AIR 1998 SC 3006 (Intention of Parties).

Similarly, a contract of sale would not become a sale, by the payment of money because sale requires a registered document.

An oral transfer to an idol or a temple would be valid, because, it is not a transfer within the meaning of the Act since it is not a living person.

Suppose *A* sells his house to *B*. The sale deed provides that *B* gets a life estate and the remainder to *C*. *B* sells the property to *D*. On *B's* death there is a conflict between *C* and *D*. One view is that since it is a sale deed, *B* was full owner and so *D* got a better title. Another view is that a sale deed of ownership can give part of the ownership (life estate) to *B* and the rest (remainder) to *C* and so *C* has the better title.

Trusts

In the case of trusts the trustee is deemed to be the owner of the property and the title of the beneficiary would be complete only when the trustee transfers his ownership to such beneficiary.

Transfer of ownership how made

Only two methods of transfer of ownership are recognised: (*i*) Registration; and (*ii*) Delivery, where it is permitted under the section. In the case of registration the ownership is deemed to pass not on the date of registration but on the date of the instrument. (*See* Section 47 of the Registration Act, 1908). But in a case where the vendor refused to deliver the property or the registered deed, because he had not been paid the price, it may be inferred that there was no transfer of ownership, because there was no intention to transfer. In the case of delivery, it must be actual and not constructive.[4] Where actual physical delivery is not possible as when a house is in possession of a tenant delivery of title deeds is sufficient. Actual delivery is made, in the case of lands by entering the land and in the case of any empty house by handing over the

4. But see *Muthukaruppan* v. *Mutthu*, ILR 38 Mad 1158; *Sohan Lal* v. *Mohan Lal*, ILR 50 All 986; *Siberdrapada* v. *Secy. of State*, ILR 34 Cal 207; *Triveni* v. *Basdeo*, AIR 1980 Pat 220; *Seshamal* v. *Harak*, AIR 1983 Raj 109; *Kokila* v. *Balakrishna*, AIR 1984 Ori 111; *Kalicharan* v. *Sudhir*, AIR 1985 Cal 66; *Ganesh* v. *Devanandan*, AIR 1985 Pat 94; *K.V. Swamynathan* v. *E.V. Padmanabham*, 1990 Supp (3) SCR 709; *Ishwari Devi* v. *Sarala Devi*, 1995 Supp (2) SCC 86; *Ram Bilas* v. *Jagatnarayan*, 1994 Supp (2) SCC 113 (non – participation of owner unheard of for more than 7 years); *Bishundeo* v. *Anmol Devi*, AIR 1998 SC 3006.

keys. Suppose, however, a case where there is an unregistered sale deed of property worth less than a hundred rupees and there was no actual delivery of property. In such a case the purchaser cannot rely on the unregistered document to prove delivery. Therefore, he cannot sue for title on such a document. But if there is delivery, a subsequent purchaser under a registered deed does not get any right, because, the purchaser's possession is deemed to be notice under Section 3. Therefore, ordinarily, ownership passes, when registration is compulsory, on the execution of the sale deed and where delivery is the proper method by delivery of possession of the property.

Contract for sale

This does not create any interest in the prospective purchaser and is one of the important aspects on which Indian and English laws differ. Such a contract does not therefore require registration, even when it relates to immovable property worth over Rs 100. Sale itself is some times described as contract *of* sale to distinguish it from a contract *for* sale. The contract *for* sale, like any other contract can be enforced by a suit for specific performance in appropriate cases, and in case of breach, damages can be recovered.[5]

In *Radhakishan Laxminarayan Toshinwal* v. *Shridhar Ramchandra Abhi*[6], the vendors executed an agreement to sell in April 1943, and executed the sale deed in 1944, in favour of the appellant. In September 1943, before the sale deed was executed, the respondent filed a suit for pre-emption. It was held:

> The transfer of property where the Transfer of Property Act applies has to be under the provisions of the Transfer of Property Act only, and the Mohammedan Law of transfer of property cannot override the statute law. Mahmood, J., in *Janki* v. *Giradat*[7] though in a minority, was of the opinion that a valid and perfected sale was a

5. *Baldev Singh* v. *Dwarika*, AIR 1988 Pat 97.
6. (1961) 1 SCR 248; *Sukhilal* v. *Augrohit*, AIR 1950 Pat 18; *Mannelal* v. *Kashva*, AIR 1983 All 51; *Sujan Singh* v. *Mohan*, AIR 1983 Pat 180; *Shafiq Ahmad* v. *Sayeedan*, AIR 1984 All 140; *Ramswarup* v. *Ratiram*, AIR 1984 All 369; *Khetalal* v. *Md. Jahiruddin*, AIR 1984 Pat 239; *Namdeo* v. *Collector*, (1995) 5 SCC 598; *K. Basavarajappa* v. *Tax Recovery Commr.*, (1996) 11 SCC 632; *Dev Raj* v. *Harbans*, AIR 1996 SC 1566; *Sadasivam* v. *Doraiswamy*, AIR 1996 SC 1724.
7. ILR (1885) 7 All 482.

condition precedent to the exercise of the right of pre-emption and *until such sale had been effected* the right of pre-emption could not arise....Under Section 54 of the Transfer of Property Act a contract of (for) sale does not of itself create any interest in or charge on immovable property and consequently the contract in the instant case created no interest in favour of the vendee and the proprietary title did not validly pass from the vendors to the vendee and until that was completed no right to enforce pre-emption arose.[8]

In a lease one has the right only to enjoy the property, but in a sale one has the right to take it away.[9]

Rights and liabilities of buyer and seller

These are set out in Section 55 which is as follows:

In the absence of a contract to the contrary, the buyer and seller of immovable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold:

(1) The seller is bound—

(*a*) to disclose to the buyer any material defect in the property or in the seller's title thereto of which the seller is, and the buyer is not, aware and which the buyer could not with ordinary care discover;

(*b*) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power;

(*c*) to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto;

(*d*) on payment or tender of the amount due in respect of the price, to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place;

(*e*) between the date of the contract of sale and the delivery of the property, to take as much care of the property and all documents of title relating thereto which are in his possession, as an owner of ordinary prudence would take of such property and documents;

(*f*) to give, on being so required, the buyer or such person as he directs, such possession of the property as its nature admits;

(*g*) to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest on all encumbrances on such property due on such date, and, except where the property is sold subject to encumbrances, to discharge all encumbrances on the property then existing.

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8. *Jhandoo* v. *Ramesh Chandra*, AIR 1971 All 189.
9. *Tulsa Singh* v. *Board of Revenue*, AIR 1971 All 430 (FB).

(2) The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same:

Provided that, where the sale is made by a person in a fiduciary character he shall be deemed to contract with the buyer that the seller has done no act whereby the property is encumbered or whereby he is hindered from transferring it.

The benefit of the contract mentioned in this rule *shall be annexed to and shall go with, the interest* of the transferee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

(3) Where the whole of the purchase-money has been paid to the seller, he is also bound to deliver to the buyer, all documents of title relating to the property which are in the seller's possession or power:

Provided that, (*a*) where the seller retains any part of the property comprised in such documents, he is entitled to retain them all, and, (*b*) where the whole of such property is sold to different buyers, the buyer of the lot of greatest value is entitled to such documents. But in case (*a*) the seller, and in case (*b*) the buyer of the lot of greatest value, is bound, upon every reasonable request by the buyer, or by any of the other buyers, as the case may be, and at the cost of the person making the request, to produce the said documents and furnish such true copies thereof or extracts therefrom as he may require; and in the meantime the seller, or the buyer of the lot of greatest value, as the case may be, shall keep the said documents safe, uncancelled and the undefaced, unless prevented from so doing by fire or other inevitable accident.

(4) The seller is entitled—

(*a*) to the rents and profits of the property till the ownership thereof passes to the buyer;

(*b*) where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer, any transferee without consideration or any transferee with notice of the non-payment, for the amount of purchase-money, or any part thereof remaining unpaid, and for interest on such amount or part from the date on which possession has been delivered.

(5) The buyer is bound—

(*a*) to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest:

(*b*) to pay or tender, at the time and place of completing the sale, the purchase-money to the seller or such person as he directs; provided that, where the property is sold free from encumbrances the buyer may retain out of the purchase-money the amount of any encumbrances on the property existing at the date of the sale, and shall pay the amount so retained to the persons entitled thereto;

(*c*) where the ownership of the property has passed to the buyer, to bear any loss arising from the destruction, injury or decrease in value of the property not caused by the seller;

(*d*) where the ownership of the property has passed to the buyer, as between himself and the seller, to pay all public charges and rent which may become payable in respect of the property, the principal moneys due on any encumbrances, subject to which the property is sold, and the interest thereon afterwards accruing due.

(6) The buyer is entitled—

(*a*) where the ownership of the property has passed to him, to the benefit of any improvement in, or increase in value of, the property, and to the rents and profits thereof;

(*b*) unless he has improperly declined to accept delivery of the property to a charge on the property, as against the seller and all persons claiming under him to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in *anticipation of the delivery* and for interest on such amount: and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission.

An omission to make such disclosures as are mentioned in this section, paragraph (1) clause (*a*), and paragraph (5), clause (*a*), is fraudulent.

The rules set out in this section are derived with modifications from the Latin maxim *caveat emptor*; *qui ignorare non debuit quod jus alienum emit*, which means, let a purchaser, who ought not to be ignorant of the amount and nature of the interest which he is about to buy, exercise proper caution. When Scarlett O'Hara, the sexy heroine of 'Gone with the Wind' who believed in doing anything for money decided to change the name of her store, she asked Rhett Butler to think of a name that would include the word 'emporium'. Rhett suggested—'Caveat Emptorium' assuring her that it would be a title most in keeping with the type of goods sold in the store.

In the absence of a contract to the contrary, Scope of

This clause shows that the liability under or the operation of the section could be excluded by such a contract. It may be express or implied, but it should be clear and unambiguous. If there is any ambiguity it will be resolved in favour of the purchaser. If, therefore, there is no contract to the contrary, the rights and liabilities of the seller and purchaser are those set out in the section. This is sometimes

expressed by saying that when the contract for sale is open (that is, when there is no contract to the contrary), the rights and liabilities of the parties as set out in the section will be implied as terms of such a contract.

Clause (1)(*a*)

This is a seller's liability to disclose latent defects known to him, *before the completion* of the execution of the sale deed. Such a latent defect should be material, that is, it should be such as would influence the buyer's decision if he knew about it. A latent defect is one which a purchaser would not be able to discover by ordinary diligence. If it could be then it is a patent defect and there is no obligation on the vendor to disclose it. In one sense a defect in title is also a defect in property but in practice one differs from the other. A defect in property prevents the purchaser from enjoying the property fully, for example, as easement of right of way across the property in favour of a third party. A defect in title may subject the purchaser to claims by third parties, for example, an encumbrance or charge on the property. If the buyer discovers the defect himself before the completion of the sale he can rescind the contract, and if the vendor files a suit for specific performance he can successfully resist it. If he discovers it after the completion of the sale he can claim damages, or sue for having the sale set aside, because under the last clause of the section such non-disclosure amounts to the vendor perpetrating a fraud on the purchaser.[10]

Other examples in defects in title are (*a*) restrictive covenants; (*b*) liability to compulsory acquisition; (*c*) allotment of property to another co-owner under a partition deed not known to the purchaser; (*d*) voidable title. If *A* agreed to sell a property to *B* and puts *B* in possession, but *B* discovers a defect in *A's* title before the sale deed is executed, *B* may (*a*) have the contract rescinded under Section 27, Specific Relief Act 1963; (*b*) oppose a suit for specific performance; (*c*) sue for damages for breach; and (*d*) enforce a charge on the property for any prepaid purchase money.

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10. *Haji* v. *Dayabhai*, ILR 20 Bom 522; *Eastern Mortgage and Agency Co.* v. *Mohd. Fazal Karim*, ILR 52 Cal 914; *Lallabhai Rupchand* v. *Chimanlal*, ILR 59 Bom 83 and *Bai Dosibai* v. *Bai Dhanbai*, ILR 49 Bom 325.

Clause (1)(*b*)

This duty to produce title deeds is a seller's liability *before the completion* of the execution of the sale deed but only if the purchaser requests. It is for the purpose of enabling the purchaser to *examine* the deeds and satisfy himself about the vendor's title. As regards their delivery *see* Section 55(3). The clause is however silent as to the place of production. But in practice it is given at the place of the vendor or his lawyer. If the purchaser insists on any other place, he has to pay the expense.

It is however respectfully submitted that the Legislature may prescribe the place of production of title deeds.

Clause (1)(*c*)

This is also the seller's liability *before the completion* of the sale deed. If the seller does not answer such *relevant* questions, the buyer can cancel the contract. This duty is imposed on the seller because he must make out a good title in himself. The documents produced by him may show that he has a good title but if doubts arise and questions are asked, the vendor must answer them if they are relevant and then only he makes out a good title in himself.

Clause (1)(*d*)

This liability is necessarily *before the completion* of the sale deed, because it is only after the execution of the conveyance that the sale is complete. The clause requires the purchaser to tender the instrument. The question naturally arises what would happen if there is unreasonable delay on either side. The purchaser may not pay the price or tender the document even though the vendor has made out his good title, or the purchaser might tender the document and the vendor does not take steps to execute and register it.

In *Jamshed* v. *Burjorji*[11], the respondent agreed to sell to the appellant certain land for Rs 85,000 and Rs 4000 was paid as earnest money. It was agreed; (1) Rs 80,500 would be paid on the signing of the conveyance which was to be prepared within two months of the date of the agreement; (2) Rs 500 to be paid on transfer after registration; and (3)

11. (1916) LR 43 IA 26.

if the amount is not paid within the time fixed, the earnest money could be forfeited. As the vendee failed to perform his part within the two months, the vendor forfeited the earnest money. Therefore, the vendee filed a suit for specific performance. It was held:

> Under the law of England, Equity, which governs the rights of parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, *notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time.* The principle may be stated concisely in the language used by Lord Cairns in *Tilley* v. *Thomas*[12]. "The construction is and must be in equity the same as in a court of law. A Court of Equity will indeed relieve against and enforce specific performance, notwithstanding a failure to keep the dates assigned by the contract; either for completion or for the steps towards completion, if it can do justice between the parties, and if as Lord Justice Turner said in *Robert* v. *Barry*[13] there is nothing in the 'express stipulations between the parties, the nature of the property, or the surrounding circumstances' which would make it inequitable to interfere with and modify the legal right. That is what is meant, and all that is meant, when it is said that in equity time is not of the essence of contract. Of the three grounds mentioned by Lord Turner 'express stipulations' requires no comment. The nature of the property is illustrated by case of reversions, trusts or trades. The 'surrounding circumstances' must depend on the facts of each particular case."
>
> Their Lordships will add to the statement just quoted these observations. The special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to the contract are to be taken as having really and in substance intended as regards the time of its performance may be excluded by the plainly expressed stipulation. But to have this effect the language of the stipulation must show that the intention was to make the rights of the parties depend on the observation of the time limits prescribed in a fashion which is unmistakable.

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12. LR 3 Ch 61.
13. 3 DM & G 284.

In the absence of a contract to the contrary the place of execution of the deed is the vendor's place or that of his advocate. The costs of execution are generally made subject to the terms of the contract between the parties. After the execution of the deed it is the purchaser who presents the document for registration, but the vendor must also appear before the Registrar and answer the questions put by him. But a conveyance is liable to stamp duty even if it is not registered.[14]

Clause (1)(*e*)

This also should be considered as a seller's liability before completion of the sale deed. But since the obligation of the vendor subsists till *delivery* of the property, the seller's liability under this clause continues even after the execution of the sale deed. If any damage is caused to the property between the dates mentioned in the section, the purchaser can make an appropriate deduction in the price to be paid by him and he can also sue for damages, after taking delivery of the property, for breach of the original contract for sale. Though the section uses the words "contract of sale", they have been understood only as meaning a contract *for sale*.

Clause (1)(*f*)

The seller's liability to give possession arises ordinarily immediately *after the completion of the execution of the sale deed.* The vendor cannot refuse to do so on the ground that the price was not yet paid. (*See* Section 54—Transfer of ownership, how made). If the purchaser sues for possession without paying the price the question has arisen as to whether the purchaser could also be compelled by court to pay the price when the vendor is being compelled by the court to deliver possession. The High Courts have taken different views, one view being that it is equitable to make delivery of possession conditional on payment of price; and the other, that the plain language of the section must be given effect to without importing equitable considerations. The possession contemplated is such as its nature permits. If the purchaser has paid the price and does not get possession and the ownership has not passed to him, he can enforce his charge under Section 55(6)(*b*). If ownership passes, he can

14. *Anna Rao* v. *Bandappa*, AIR 1971 Mys 63 (FB).

sue the seller for delivery of possession or he can rescind the contract and sue for the price paid by him.[15]

Clause (1)(*g*)

This also is a seller's liability *before completion of the sale*, and can be enforced by the purchaser after completion, under Section 69 of the Contract Act.[16] Knowledge of the vendee about the existence of an encumbrance does not absolve the vendor from his duty to discharge it, unless the property is sold subject to the encumbrance.

Clause 2

This is known as the covenant for title, and the vendor's liability with respect to this covenant arises *after the completion of the sale*. It is an implied covenant. Under Section 55(1) the purchaser can satisfy himself whether the vendor has a good title. If, even after he so satisfies himself, he is dispossessed on account of a defect in title, which the vendor professed to have, under Section 55(2), he can claim back from the vendor the purchase money and sue him for damages, whether or not the purchaser was aware of the defect. What the vendor covenants is that he has in law the estate he claims to have, that he has the title which he professes and that the title is marketable. A title is said to be marketable when it is free from reasonable doubt, not only that it is good but that it is indubitable; a title, reasonably free from such doubts as would affect the market value of the property. A purchaser is liable to pay interest on the sale price from the time when a good title is *shown*; and the vendor will be liable to pay costs of inquiry into the vendor's title, also upto that time. Generally, time is not considered to be the essence of the contract in the case of sales of immovable property. Unlike the covenant for title in English law, there is no covenant for quiet enjoyment in Indian law. But the English covenant is available only against any acts of the vendor, whereas, the covenant under the section comes into play when the purchaser is evicted by any one on account of a defect in the title. But since it is a covenant for title the purchaser cannot sue the vendor when he is evicted by trespassers.

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15. *Chaudhary* v. *Dalip*, AIR 1981 MP 158; *Babu Lal* v. *Hazari Lal*, (1982) 1 SCC 525: AIR 1982 SC 818.
16. *Bhagwati* v. *Banarsi Das*, ILR 50 All 371 (PC).

Implied covenants no doubt give place to express covenants, but whether the implied covenant is thus superseded by an express covenant would depend upon the circumstances of the case and the language used in the document.

The proviso shows that the implied covenant is available against a trustee to the extent that he is deemed to covenant only that he has not done any act whereby the property is encumbered or whereby he is hindered from transferring it. But if the trustee does not disclose his real character, but sells it as an ordinary owner, he would be subject to the implied covenant for title.

Therefore, before completion of sale, under Section 55(1), the buyer could make sure that the title offered by the vendor is free from doubt. After completion, the buyer can rescind the contract, because, the non-disclosure of the defect would amount to fraud. He can also sue for damages under clause (2). If the seller has no title at all the purchaser can get the contract annulled.[17]

The 3rd paragraph shows that it is a covenant running with the land.

If *A* buys a property from *B* but is dispossessed because of a defect in title, *A* can sue for damages for breach of the contract. If *A* is unable to get possession, because the property is in the possession of *C*, *A* can have the sale set aside only if he can prove *B's* fraud. Otherwise, his remedy is only to sue for damages for breach of covenant.

Clause 3

The liability of the vendor to deliver title-deeds to the purchaser on the receipt of the purchase-price from him is a liability arising *after the completion of the sale*. Before the sale he was obliged to produce the title-deeds for inspection by the purchaser; and after the sale a duty is cast on him to deliver the title-deeds to the purchaser, *if the purchase price is paid*. He must deliver not only those in his possession but also those which he has power to produce. The proviso consists of two cases when the vendor is not under the obligation to deliver title-deeds.

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17. *Mativahoo* v. *Vinayak*, 12 Bom 1 (a contract providing for 'such title as the vendor has', implies some title); *Bhagyathammal* v. *Dhanabagyathammal*, AIR 1981 Mad 303.

Clause 4(*a*)

This clause deals with the seller's right to rents and profits of the property, *before the completion of sale*, because, the contract for sale does not create any right in the purchaser and the vendor continues to be the owner.

Clause 4(*b*)

This deals with the vendor's right, known as vendor's lien and this right arises *after the completion of the sale*. As the last phrase in the section indicates possession of the property must have also been delivered before the vendor can have his lien. This is not a possessory lien and the vendor cannot insist on retaining possession until the price is paid.

In *Webb* v. *Macpherson*[18], the question involved was whether the appellants as representing their testator were entitled to a lien or charge on certain property belonging to the respondent, for the balance of principal and interest said to be due on account of unpaid purchase money, or whether there was a contract to the contrary. It was held:

> With reference to the conveyance a number of English cases were cited. No doubt English cases might be useful for the purpose of illustration, but it must be pointed out that the charge which the vendor obtains under the Transfer of Property Act is different in its origin and nature from the vendor's lien given by the Courts of Equity to an unpaid vendor. That lien was a creation of the Court of Equity and could be modified to the circumstances of the case by the Court of Equity. But in the present case there is a statutory charge. The Law of India, speaking broadly, knows nothing of the distinction between legal and equitable property in the sense in which that was understood when equity was administered by the Court of Chancery in England, and the Transfer of Property Act gives a statutory charge upon the estate to an unpaid vendor unless it is excluded by contract. Such a charge, therefore, stands in quite a different position from a vendor's lien. You have to find something, either express contract, or at least something from which it is a necessary implication that such a contract exists, in order to exclude

18. (1903) LR 30 IA 238.

the charge given by the statute. In Their Lordships' opinion there is no ground whatever for saying that that charge is excluded by a mere personal contract to defer payment of a portion of the purchase-money, or to take the purchase-money by instalments, nor is it, in Their Lordships' opinion, excluded by any contract, covenant, or agreement with respect to the purchase-money which is not inconsistent with the continuance of the charge. It is quite clear that the agreement of the purchaser to pay the balance of the purchase-money in *three annual instalments* with interest *was in no way* inconsistent with the existence of a charge to the vendor for the amount of the instalments with interest to become due from time to time.

But there is another point which seems to have found favour with the High Court in Bengal. It was said that no charge ever arose because the purchase was not in consideration of a sum of money, part of which was paid down and the payment of the balance of which was deferred, but it was a purchase in consideration of a particular covenant. *There is no doubt, both principle and authority, that a conveyance or sale in consideration of a covenant to pay a sum of money in future is different from a sale in consideration of money which the purchaser covenants to pay.* The distinction may seem fine, but it is a real distinction, and it is one which, if made out, might have had the effect which the High Courts have given to it. But is that the form of his conveyance? The conveyance, as already pointed out, is made in consideration of a sum of money. The agreement is expressed to be an agreement to sell for a sum of money, of which part is to be paid and the rest is to be secured by an instrument of even date, and the operative part of the conveyance is in consideration of the part paid down, and of a balance which is identified as being the sum secured by the agreement. Their Lordships, therefore, think that, that point also fails, and that there is no contract excluding the operation of the charge.

The distinction between a sale in consideration *of a covenant to pay* money in future and a sale in consideration *of money* which the purchaser covenants to pay is very subtle but must be carefully noted because, in the former case there is no vendor's lien. Such a lien arises only in the latter case. The distinction between the two is this: In the first case, the consideration is the *covenant*, whereas in the latter case the consideration is the *money*. Whether in a particular case it is one or other depends

on the intention of the parties to be gathered from all the circumstances of the case.

The charge referred to in clause 4(*b*) is enforceable under Section 100 of this Act.

The circumstances in which the vendor's lien is lost and is not lost are set out by an eminent Judge of the Madras High Court, Sir Vepa Ramesam, with great clarity in *Swamintha Odayar* v. *Subbarama Ayyar*[19]:

(1) A mere *direction* by the vendor to the vendee *to pay* the whole or a part of the purchase money to *a third person* does not extinguish the lien.

(2) If such a direction is followed by mere payment to the third person but not by *a fresh contract* by the vendee *with the third person* so as to effect a complete innovation, the lien is not lost.

(3) Where it was intended that the vendee should *execute a mortgage deed and extinguish the lien but the mortgage deed was not completed* by registration and remained a simple bond, the lien is not extinguished.

(4) Where the vendor obtained *a promissory note*, not from the vendee but from a third person at the instance of the vendee and the third person did not pay, even then, if the third person's note or bond was only *an additional security to the vendee's liability and not in substitution of it*, the lien is not lost.

(5) Where the *vendor himself takes a promissory note* or bond and where the right in it was *assigned by him to a third person* or where his right was attached in execution of a decree and purchased by a third person, the vendor's right to the lien passes to the third person under Section 8 of the Transfer of Property Act and is available to the assignee or purchaser.

(6) But if in the last case the vendor took a negotiable instrument and the instrument is not assigned under the Law Merchant, it

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(1927) ILR 50 Mad 548; *M. Lakshmidevamma* v. *Land Acquisition Officer*, AIR 1985 AP 200.

is doubtful if Section 8 of the Transfer of Property Act will apply and the endorsee will be entitled to the lien.

(7) Where a complete innovation *is effected and a new contract between the vendee and a third person was effected* in substitution of the vendee's liability to the vendor, this amounts to a contract to the contrary within the meaning of Section 55 of the Transfer of Property Act and the lien is extinguished....Even in such a case if the document taken is not a negotiable instrument but only a bond and if it is taken *benami* for the benefit of the vendor so that he may still sue on it, the arrangement being known to the vendee, the vendor's lien remains, provided he is not prejudiced. And where the document taken is a negotiable promissory note so as to disable the vendor from suing even if he is the person beneficially interested in the money after its recovery, the lien must be held to be *lost*, as ostensibly the payee of the note is the only person entitled to sue. The note might have been endorsed not to the vendor but to any other third person. To say that the note in the hands of the payee has got the lien attached to it involved anomalous positions.

If two persons *A* and *B* sell their property to *C*, *D* and *E* and part of the purchase money is paid by the purchasers, but for the balance two promissory notes were executed by one of the purchasers, the promissory notes must be treated as part of the purchase money, and therefore the vendors do not have an enforceable charge.

If part of the sale consideration is cash and the balance, shares in a company, and the shares were not transferred, the vendor cannot claim his charge because, the transaction is not a sale, since the sale consideration was not price (money).

Clause 5(*a*)

This clause deals with the buyer's liability to disclose facts which might increase the value of seller's interest in the property, *before the completion of the sale*. Though the section is couched in wide terms, it has been judicially interpreted and confined to facts regarding the seller's title. Under the last clause, the non-disclosure is deemed to be fraudulent. For example, the buyer may have to disclose to a woman selling her property that she is the absolute owner and not a limited owner. But he

need not disclose to her that there is a mine in the property because the buyer's duty only relates to facts concerning title. But if the purchaser sues for specific performance, the court may refuse to exercise its discretion in his favour. Compare with clause (1)(*a*).

Clause 5(*b*)

This clause deals with the buyer's duty to pay the price *before the completion of the sale*. Under Section 55(1)(*d*) the seller has to execute a proper conveyance when the purchaser pays or tenders the price. Under this clause, Section 55(5)(*b*), the duty is imposed on the purchaser to pay or tender the price. Where money is retained by the purchaser to pay off an encumbrance the section provides that he shall pay the amount so retained to the persons entitled thereto. But there may be circumstances when there is no such obligation to pay the amount retained to the vendor. In *Mohd. Siddiq* v. *Muhammad Nasirullah*[20], part of the purchase price was retained by the vendee in order to pay off an encumbrance . The encumbance was not paid off and in fact it was for an amount larger than the amount retained. In a suit by the vendor to recover the amount retained with interest it was held:

> The amount was not left with the vendees simply as a deposit of the money of the vendor. They were to retain it as a security that the property sold should be freed from the encumbrances upon it and that they should have a good title. They were entitled to retain it until the vendor provided the rest of the money necessary for this purpose. Unless this was done, a payment of the amount retained would leave the property still encumbered as the mortgagee would only receive it, if he did so, in part payment of what was due. From the nature of the transaction it was not a deposit upon which the vendees would be liable to pay interest unless they refused or omitted to pay the money when they were informed by the vendor that he was prepared to pay the balance necessary to satisfy what was due to the mortgagee. Without that balance they were not bound to pay or tender to him the amount retained.

When the purchaser retains the encumbrance money, the mortgagee can sue him to recover the amount, as the purchaser is under statutory

20. (1898) 21 All 223 (PC).

duty (*shall* pay) to pay the amount to the mortgagee. The mortgagee can also sue the vendor in which case the vendor, can sue the purchaser.

Clause 5(*c*)

This clause deals with the buyer's liability to bear any loss caused to the property after *completion of sale*. [*See* Section 49]

Clause 5(*d*)

This clause also deals with the buyer's liability *after the completion of sale*. Under Section 55(1)(*g*) it was the vendor's liability before completion of sale and under this clause it is the purchaser's liability *after completion of sale*.

Clause 6(*a*)

This clause deals with the buyer's right *after the completion of sale* to any increase in the value of the property. In *Izzat-un-nizza Begum* v. *Kunwar Pratap Singh*[21], property was sold subject to two mortgages and the purchaser retained part of the purchase money for paying off the mortgages. After the sale, however, the mortgages were declared invalid and the vendor sued for the unpaid purchase money. It was held:

> It seems to depend on a very simple rule. On the sale of property subject to encumbrances the vendor gets the price of his interest, whatever it may be, whether the price be settled by private bargain or determined by public competition together with an indemnity against the encumbrances affecting the land. The content of indemnity may be express or implied. If the purchaser covenants with the vendor to pay the encumbrances, it is still nothing more than a contract of indemnity. The purchaser takes the property subject to the burden attached to it. If the encumbrance turns out to be invalid, the vendor has nothing to complain of. He has got what he bargained for. His indemnity is complete. He cannot pick up the burden of which the land is relieved and seize it as his own property. The notion that after completion of the purchase the purchaser is in some way a trustee for the vendor of the amount by which the existence, or supposed

21. (1909) LR 36 IA 203.

existence, of encumbrances has led to a diminution of the price, and liable, therefore, to account to the vendor for anything that remains of that amount after the encumbrances are satisfied or disposed of, is without foundation. After the purchase is completed, the vendor has no claim to participate in any benefit which the purchaser may derive from his purchase. It would be pedantry to refer at length to authorities. But Their Lordships, under the circumstances, may perhaps be excused for mentioning *Tweddel* v. *Tweddel*[22], *Butler* v. *Butler*[23] and *Waring* v. *Ward*[24].

If, however, the property is sold *free* from encumbrances, the vendee retains the vendor's money to pay off the encumbrances, and hence, the vendee is an agent of the vendor and accountable to him for any surplus.

Clause 6(*b*)

This clause deals with the counterpart of the vendor's lien under Section 55(4)(*b*). The buyer's charge can also be enforced under Section 100. This is a buyer's right, *before completion* of the sale, that is, when he had paid the price but the vendor has not given the document giving the purchaser ownership.

As regards the nature of the earnest money and the vendor's right to forfeit the earnest money, it was held in *Maula Bux* v. *Union of India*[25]:

> According to Earl Jowitt in 'The Dictionary of English Law' at p. 689, 'giving an earnest or earnest money is a mode of signifying assent to a contract of sale or the like, by giving to the vendor a nominal sum (for example, a shilling) as a token that the parties are in earnest or have made up their minds'. As observed by the Judicial Committee in *Kunwar Chiranjit Singh* v. *Har Swarup*, earnest money is part of the purchase price when the transaction goes forward; it is forfeited when the transaction falls through by reason of the fault or failure of the vendee'....Forfeiture of earnest money under a contract of sale of property—movable or immovable *if the amount is reasonable*, does not fall within Section 74 of the Contract

22. (1787) 2 Bro CC 151.
23. (1800) 5 Ves 534.
24. (1802) 7 Ves 332.
25. (1969) 2 SCC 554.

Act. That has been decided in several cases: *Kunwar Chiranjit Singh* v. *Har Swarup*; *Roshanlal* v. *The Delhi Cloth and General Mills*[26]; *Mohd. Habibullah* v. *Mohd. Shafi*[27], and *Bishan Chand* v. *Radhakishandas*[28].

In *Shri Hanuman Cotton Mills* v. *Tata Aircraft*[29], it was observed:

From a review of the decision cited above, the following principles emerge regarding 'earnest':

(1) It must be given at the moment at which the contract is concluded.

(2) It represents a guarantee that the contract will be fulfilled or, in other words 'earnest' is given to bind the contract.

(3) It is part of the purchase-price when the transaction is carried out.

(4) It is forfeited when the transaction falls through by reason of the default or failure of the purchaser.

(5) Unless there is anything to the contrary in the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the earnest.

....In this view, it is unnecessary for us to consider the decision of this Court in *Maula Bux* v. *Union of India*.... The learned Attorney General has pointed out that the decisions referred to (in that case) do not lay down that the test of reasonableness applies to an earnest deposit and its forfeiture. He has also referred us to various decisions, wherein, according to him, though the amounts deposited by way of earnest were fairly large in proportion to the total price fixed under the contract, nevertheless the forfeiture of those amounts was not interfered with by the courts. But we do not propose to go into those aspects in the case on hand.

A comparison of the seller's charge under Section 55(4)(*b*) and a buyer's charge under this section shows that the former arises on delivery of possession in relation to the unpaid purchase price, and the latter arises

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26. ILR 33 All 166.
27. ILR 41 All 324.
28. ILR 19 All 490.
29. (1969) 3 SCC 522; *Saidun* v. *Calcutta Vyapar*, AIR 1978 Cal 285; *ITO* v. *Govindaswamy*, AIR 1978 Mad 186; *Bali Ram* v. *Bhupendra*, AIR 1978 Cal 559; *Basantlal* v. *Dwarka*, AIR 1978 All 436.

when the price or part of it is paid in anticipation of delivery. The former subsists till the price is paid and the latter till conveyance is executed *and* possession delivered.

Unlike Section 100 below, the purchaser's charge for money paid is available even against persons without notice.[30]

The passing of title is according to the intention of the parties and does not depend upon payment of consideration.[31]

The next two sections, Sections 56 and 57 also deal with sales. Section 56 provides:

> If the owner of two or more properties mortgages them to one person and then sells one or more of the properties to another person, the buyer is, in the absence of the contract to the contrary, entitled to have the mortgage debt satisfied out of the property or properties not sold to him, so far as the same will extend, but not so as to prejudice the right of the mortgagee or persons claiming under him or of any other person who has for consideration acquired an interest in any of the properties.

Marshalling

In marshalling, if several properties are subject to a mortgage and one of them is sold free from the encumbrance, the mortgagee is required in the first instance to satisfy his debt from the other property subject to the mortgage. This may be compared with contribution, in which, if several properties are subject to a mortgage and the mortgagee is paid out of one of them, the others are required to make a contribution. Where there are more than one purchaser neither has any superiority of right or equity over the other and both contribute rateably to discharge the encumbrance.

This is so, because, robbing Peter to pay Paul is not, as Lord Macnaughten, said, a principle of equity.[32]

Suppose two properties *X* and *Y* are mortgaged to *A*. *X* is thereafter sold to *B*, and *Y* sold to *C*. If *A* proceeds against *X*, *B* will suffer. If he proceeds against *Y*, *C* will suffer. Therefore, the liability will be distributed proportionately. This follows from the words 'the mortgagee or other person who has acquired an interest in the property'.

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30. *Trimbak Narayan* v. *Babulal Motaji*, (1973) 2 SCC 154: AIR 1973 SC 1763.
31. *Gumburi* v. *Dulani*, AIR 1971 Ori 147.
32. *See* Ghosh, *The Law of Mortgage in India*, 7th Edn., p. 512.

Suppose *A* mortgages his properties *X*, *Y* and *Z* to *B* and thereafter sells *X* to *C* and mortgages *Y* to *D*. *D* can claim marshalling against *B* but not against *C* because he is a person who has for consideration acquired an interest in *X*.

Discharge of Encumbrance on Sale

Section 57 provides that:

(*a*) Where immovable property subject to any encumbrance, whether immediately payable or not, is sold by the court or in execution of a decree, or out of court, the court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into court,—

(1) in case of an annual or monthly sum charged on the property, or of a capital sum charged on a determinable interest in the property—of such amount as, when invested in securities of the Central Government the court considers will be sufficient, by means of that interest thereof, to keep down or otherwise provide for the charge, and

(2) in any other case of a capital sum charged on the property—of the amount sufficient to meet the encumbrance and any interest due thereon.

But in either case there shall also be paid into court such additional amount as the court considers will be sufficient to meet the contingency of further costs, expenses and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the court for special reasons (which it shall record) thinks fit to require a larger additional amount.

(*b*) Thereupon the court may, if it thinks fit, and after notice to the encumbrancer, unless the court, for reasons to be recorded in writing, thinks fit to dispense with such notice, declare the property to be freed from the encumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in court.

(*c*) After notice served on the persons interested in or entitled to the money or fund in court, the court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

(*d*) An appeal shall lie from any declaration, order or direction under this section as if the same were a decree.

(*e*) In this section "court" means (1) a High Court in the exercise of its ordinary original civil jurisdiction, (2) the court of a District Judge within the local limits of whose jurisdiction the property or any part thereof is situate, (3) any other court which the State Government may, from time to time, by notification in the Official Gazette, declare to be competent to exercise the jurisdiction conferred by this section.

Under this section the Court can act only when there is an application of any party to the sale. Different rules are provided in

clauses (*a*)(1) and (2) for the discharge of encumbrance, according as it is an annuity or monthly sum, or when it is a capital sum. The power of the court is however discretionary as shown by the words 'may, if it thinks fit'.[33]

Exercises

1. Distinguish between a contract of sale and a contract for sale. (pp.163, 166)
2. What are the duties of a seller before completion of the sale? (pp. 170-173)
3. What are the duties of a buyer before completion of the sale? (pp. 180-181)
4. Explain 'covenant for title'. (pp. 174-175)
5. What are the duties of a buyer and seller after completion of the sale? (pp. 173-175, 181, 182)
6. What is the safeguard for a seller who has not been paid the full price? (pp. 180-183)
7. Explain vendor's lien. (pp. 176-179)
8. What is the scope of the buyer's charge for his pre-paid earnest money and purchase money? (pp. 182, 183)

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33. *Narayanan* v. *Pamkutty*, AIR 1982 Ker 53 (Salvage lien).