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TRANSFER OF IMMOVABLE PROPERTY (Ss. 38-53A)

The following *eleven* topics are discussed in this Chapter :

A. Transfer by a person other than full owner : Ss. 38, 41 and 43.

B. Protection of third person's rights : Ss. 39-40.

C. Transfer by a person having authority to revoke a former transfer : S. 42.

D. Transfer by co-owners : Ss. 44 and 47.

E. Joint transfers : Ss. 45-46.

F. Priority of rights created by transfer : Ss. 48 and 78.

G. Transferee's right under a policy : S. 49.

H. *Bona fide* nolders under a defective title : Ss. 50-51.

I. Transfer of property pending suit relating thereto *(Lis Pendens)* : S. 52.

J. Fraudulent transfer : S. 53.

K. Part-performance : S. 53-A.

A. TRANSFER BY PERSON OTHER THAN FULL OWNER (Ss. 38, 41 & 43),

The following *three topics* will be discussed here, *viz.*—

(1) Transfer by a person authorised only under certain circumstances to transfer. (S. 38)

(2) Transfer by an ostensible owner. (S. 41)

(3) Transfer by an unauthorised person who subsequently acquires interest in the property transferred *(Doctrine of feeding the grant by estoppel)*. (S. 43)

(1) Transfer by a person authorised only under certain circumstances to transfer (S. 38)

When a person is authorised to dispose of immovable property only under certain circumstances (which are variable in nature), and he transfers such property,—

(a) for consideration,

(b) alleging the existence of such circumstances,

those circumstances are *deemed* to have existed as between the *transferee* on the one part, and the *transferor* and the *persons affected* by the transfer on the other part,—if the transferee, after using reasonable care to ascertain the existence of such circumstances, has acted *in good faith.*

Illustration.— *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.*

ESSENTIALS.— In order to make this section applicable, the following *six conditions* should exist :

(1) The transferor has a limited power of alienation over the property.

(2) The transferor is, under *special* circumstances (which are variable in nature), authorised to dispose of such property.

(3) The transferor transfers the property *for consideration.*

(4) The transferor must allege the existence of such *special* circumstances at the time of the transfer.

(5) The transferee must use reasonable care to ascertain whether these circumstances exist or not.

(6) The transferee must act in *good faith*, and must honestly believe in the existence of these circumstances.

So when a transfer is made and *all* these conditions are fulfilled, an *irrebuttable presumption* will arise in favour of the existence of the alleged special circumstances.

It will be seen that this provision is meant to protect the transferee, if it subsequently transpires that the alleged special circumstances did not exist as a matter of fact, and he has been deceived. It will be sufficient if the transferor *alleges* their existence *and* the transferee has *honestly satisfied* himself of such existence. The transferee will be protected if he exercises good faith, whether he is negligent or not. Thus, where the guardian of a minor mortgages the minor's property alleging necessity, and the mortgagee, after *bona fide* enquiry, is satisfied about such necessity, the latter will be protected,— even if he does *not* see to the application of the money.

The most common case of an alienation authorised under *special circumstances* is that of a Hindu widow disposing of the *corpus* of her husband's estate. In order to sustain an alienation by her, she must allege *legal necessity, e.g.*, her own maintenance, and it will be enough if the transferee, after reasonable enquiry, has believed in its existence.

This section appears to be based on the leading case of *Hanooman Persad* v. *Mst. Babooi.* It may be noted that the onus of justifying the circumstances referred to above is on transferee.

The circumstances under which the person is authorised to dispose of the property should be variable, and this includes such circumstances as constitute legal necessity, and which vary according to the status of the person and other surrounding circumstances. The persons covered by S. 38 are persons having a limited power to transfer. Thus, the *Karta* or manager of a Hindu joint family, the father of a Mitakshara son, the Shebait of a Hindu idol, or *mutt*, a woman holding a Hindu widow's estate; a mother and other natural or *de facto* guardian (*Hanooman Persad* v. *Babooi Munraj Koonwaree*, 6 M.I.A. 393) are all persons authorised to dispose of immovable property only under circumstances which are variable.

The first marriage of a member of a Hindu joint family is a lawful family necessity, and sometimes a second marriage also may be such for which alienation of family property will be justified. (*Bhagirathi* v. *Jokhu Ram*, 32 All. 575; *Sundrabai* v. *Shivnarayan*, 32 Bom. 81)

PROBLEM.— *A*, a natural guardian of a Hindu minor, sold the property of the minor to *D*. The minor sold his right in the property to *G* after attaining majority. *G* filed a suit against *D* for avoiding the sale and getting possession of the property. Can he succeed ?

Ans.— *G* can succeed only if *D* cannot prove any legal necessity *or* that he made reasonable inquiries.

(2) Transfer by an ostensible owner (S. 41)

(i) Where, with the consent (express or implied) of the persons interested in immovable property,

(ii) a person is the *ostensible* owner of such property, *and*

(iii) transfers the same for consideration,— the transfer is *not voidable* on the ground that the transferor was *not* authorised to make it.

However, in such a case, it is necessary that the *transferee*, after taking reasonable care to ascertain that the transferor had power to make the transfer, must *act in good faith.*

PRINCIPLE.— The principle of the rule contained in S. 41 is the same as that of *estoppel* contained in S. 115 of the Evidence Act. If someone makes a false representation and somebody else *acts* on the representation to *his detriment*, the person making such representation must stand by that representation, and *cannot* say otherwise.

This section is based on the principle that where one of two innocent persons must suffer from the fraud of a third party, the loss should fall on him who has created, or could have prevented, the opportunity for the fraud. In such cases, hardship is caused by the strict enforcement of the general rule that no one can confer a higher right on property than what he himself possesses. *Nemo dat quod non habet.*

It is a principle of equity and natural justice that where one man allows another to hold himself out as the owner of an estate, and a third person purchases it for value from the apparent owner, in the belief that he is the real owner, the man who so allows the other to hold himself out *cannot* be permitted to recover upon his secret title. In such cases, he can defeat the title of the purchaser by showing that either he (the purchaser) had a direct notice, *or* something which amounted to constructive notice of the real title, *or* that there existed circumstances which ought to have put him upon an inquiry, which if prosecuted, would have led to a discovery. (*Ram Coomar v. McQueen*, 18 W.R. 166)

OSTENSIBLE OWNER.— An ostensible owner is one who has all the *indicia* of ownership *without being the real owner.* He is a person who is *apparently* the *full* and *unqualified* owner as such, and *not* a person who is only a *qualified* owner, such as a mortgagee or a hirer of goods. He may be any person, a co-sharer, manager, agent or a complete stranger. The expression "ostensible owner" excludes such persons who hold possession of property *professedly* as agents, servants, guardians *or* in any other fiduciary character.

Benami transactions afford the best illustrations of the application of this section. A *benami* transaction is one where, for instance, *A* buys property in the name of *B*. Here the purchase price is paid by *A*, but the property officially stands in the name of *B*. When a *benamidar* sells the *benami* property for consideration, without disclosing the real owner, the latter, if he remains in the background, *cannot* avoid the alienation, without showing that the purchaser was tainted with notice of the *benami* nature of the transaction and that he had not acted in good faith.

Explain the principle underlying the doctrine of ostensible ownership. How far is a transfer by an ostensible owner binding on the persons interested in immovable property ?

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It may be noted that the section contemplates only transfers *for consideration.* Gratuitous transfers (*e.g.*, gifts) are altogether outside its scope. The case of *Sarat Chandra* v. *Gopal Chandra* (20 Cal. 226) is a stock illustration of an estoppel, and furnishes an instance of a transfer by the *ostensible* owner holding with the consent of the real owner.

The consent referred to in this section must be *free consent*, as defined in S. 14 of the Indian Contract Act. If it is brought about by a misapprehension of legal rights, S. 41 will *not* apply.

Elaborate the Doctrine of "Ostensible Ownership". How far is it binding on the persons interested in the property ?

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The consent of the true owner may be *express* or *implied;* but the acquiescence or absence of interference on his part, while another man asserts ownership in himself, will *not* defeat his claim. Express consent presents no difficulty. Whether consent is impliedly given or not is to be gathered from the circumstances of each case. No presumption of implied consent arises in a case where there is no question of estoppel. The conduct of the true owner should be such as to cause the transferee to do something which he would not have done, had not the true owner behaved himelf in that way.

The consent referred to here is the consent of the *true owner.* Therefore, consent of the owner's guardian may *not* suffice. A minor is incapable of giving consent, and therefore, the ostensible owner *cannot*

Explain fully the concept of "bona fide purchase for value without notice."

B.U. Oct. 98

transfer with his consent. The section is limited only to *voluntary* transfers, and does *not* extend to court sales.

WHEN PURCHASER WILL BE PROTECTED.—In order to obtain the protection afforded by this section, it is necessary for the transferee to prove (1) that he has given valuable consideration; (2) that he has acted in good faith; and (3) that he has taken reasonable care, or made reasonable inquiries, to ascertain that the transferor had power to make the transfer. Where any one of these essential elements is missing (*e.g.*, where the transferee omitted to make proper enquiries as to the transferor's title), the transferee is *not* entitled to the protection provided by this section.

This section makes it incumbent on the transferee to take *reasonable care* to ascertain that the transferor had the power to make the transfer and to act in good faith. The expression *" reasonable care"* means such care as an *ordinary man of business or* a *person of ordinary prudence* would take. It is obvious that the first step which the transferee is expected to take is to search the registration office to ascertain what transfers, if any, have been made by the transferor. When the transferee fails to do so, he *cannot* claim the benefit of this section.

Where the subsequent purchaser, while making a search in the Registry Office in the ordinary way, could not discover a mortgage, owing primarily to the negligence of the mortgagee in giving a proper description of the properties and consequent failure to enter it in the proper index, the subsequent purchaser was preferred to the mortgagee. (*Galliara* v. *U. Thet*, A.I.R. 1929 Rang. 117, 7 Rang. 118, 117 I.C. 500)

PROBLEMS

1. A husband entered his land in the revenue records in his wife's name and went on a pilgrimage. Before his departure, he had allowed her to mortgage the land. After his departure, she sold the land, and the buyer paid off the mortgage. On his return, the husband wished to recover the land or redeem the mortgage. Can he do so ?

Ans.— No, the case is covered by S. 41, and the husband can *neither* recover the land *nor* redeem the mortgage. (*Niras Purve* v. *Mst. Tetri Pasin*, 1916 20 Cal. W.N. 103)

2. *A*, a Hindu husband, purchased land in the name of his wife, *B*. The land was then entered in *B's* name in the revenue records. After *A's* death, *B* mortgaged the land to *C*, who took the mortgage after due inquiry, believing in good faith, that *B* was the owner. *C* obtained a decree for sale on his mortgage and purchased the land. However, at that time, *D* was in possession, as *D* had purchased the land in execution of a money decree against *A*. *C's* suit against *D* for possession was decreed. Who will get priority, *D* or the mortgagee ?

Ans.—*D* was the successor in interest of *A*, who had held out his wife as the ostensible owner, and *cannot* defeat the mortgagee who was a transferee in good faith from the ostensible owner. (*Annoda Mohan* v. *Nilphamari*, 1922, 26 Cal. W.N. 436)

3. *X*, a Hindu, dies leaving a daughter, *Y*, who takes a limited estate by inheritance. *Y* makes a statement to the revenue authorities that *X's* separated brother, *Z*, is the heir and allows *Z* to take possession of the estate. On *Y's* death, her son claims to succeed as the reversionary heir of *X*. Can *Z* claim protection under S. 41 of the Transfer of Property Act?

Ans.— *Z cannot* claim the protection of S. 41 of the Act, for his ostensible ownership has not been created by the real owner, *X*, but by the limited owner, *Y*. (*Sambhu Prasad* v. *Mahadeo Prasad*, 1933 55 All. 554)

4. A *tahsildar*, being forbidden by departmental rules from acquiring land within his *tahsil*, purchased land in the name of his minor sons, and entered their names in the revenue records. The sons afterwards sold and mortgaged the land to *X*, who acted in good faith and in reliance on the entries in the revenue papers. Are the purchasers and mortgagees entitled to the protection of S. 41?

Ans.— The purchasers and mortgagees are *not* entitled to the protection of S. 41, as they should *not* have been satisfied with entries in the revenue records. (*Partap Chand* v. *Saiyiaa Bibi*, 1901 23 All. 442)

5. *X* is the owner of property, which is entered in the revenue records in the name of *Y*, who mortgages the property to *Z*, who accepts the mortgage, relying on the revenue register. If *Z* had made further inquiries, he would have found out that *X* had objected to the entry of the property in *Y's* name, and that the property had been left to *X* under a will. Can *Z* claim the protection of S. 41 ?

Ans.— *No, Z cannot* in the circumstances, claim protection under S. 41. (*Nageshar Prasad* v. *Raja Pateshri*, 1915 20 Cal. W.N. 265)

(3) Transfer by an unauthorised person who subsequently acquires interest in the property transferred (S.43) *(Doctrine of feeding the grant by estoppel)*

Discuss fully the doctrine of "Feeding the grant by estoppel."

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Where a person—

—*fraudulently* or *erroneously* represents that he is authorised to transfer immovable property,

and

— proposes to transfer such property for consideration,

such transfer operates, at the option of the transferee, on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

This section does not, however, impair the right of a transferee in *good faith* for *consideration, without notice* of the said option.

Illustration.— *A*, a Hindu who has separated from his father *B*, sells to *C* three fields, *X*, *Y* and *Z*, representing that *A* is authorised to transfer the same. Of these fields, *Z* does not belong to *A*, it having been retained by *B* on the partition; but on *B's* dying, *A*, as heir, obtains *Z*. *C*, *not* having rescinded the contract of sale, may require *A* to deliver *Z* to him.

FEEDING THE GRANT BY ESTOPPEL.— The principle of law on which the provisions of the section rest is a well-known rule of estoppel, sometimes referred to as *feeding the grant by estoppel.* This means that if a man who has no title whatever to property grants it by conveyance, which would carry the legal estate, and he subsequently acquires an interest sufficient to satisfy the grant, the estate instantly passes. An *estoppel* arises against him by reason of his conduct, and the law obliges him to "feed" that estoppel by reason of his subsequent acquisition. This principle has, however, *no application to property which is inalienable by law.*

In cases falling under this section, the estoppel rests on the representation made by the transferor that he is authorised to transfer, which representation subsequently turns out to be erroneous.

There is some difference of opinion as to whether this section will be applicable *when the transferee knows the truth of the facts* reported to him. The Privy Council has *held* in *Mohori Bibi* v. *Dharmodas* (30 I.A. 114) that no estoppel can arise by reason of a false statement where truth is known to both parties. However, a Full Bench of the Allahabad High Court has *held* in *Rama Nand* v. *Champa Lal* (A.I.R. 1956 All. 225 (FB), that *even if the truth is known to the transferee, he can rely on this section.* In that case, *X* sold a shop to *Y,* who knew that *X* owned only a half-share in it. Later, *X* acquired the other half-share. The Court *held* that *Y* was entitled to this other half also, when it accrued to *X.* The Allahabad High Court was of the view that the principle in Section 43 was based on the maxim of equity that "equity treats that as done which ought to have been done."

The following are the *four main requisites* of this section :

(a) a fraudulent or erroneous representation of ownership;

(b) a transfer by such owner;

(c) the transfer should be for consideration; and

(d) a subsisting contract of transfer.

If these conditions are satisfied, he can exercise his option, *but only* during the continuance of the contract, *and only* with respect to the interest which the *fraudulent* or *erroneous* transferor may acquire in such property. So, when the contract has subsided because of the repayment of the purchase-money, the purchaser *cannot* exercise any option. If the contract does not subsist, *e.g.*, where it is cancelled by mutual agreement or by suit, the section becomes inapplicable.

The words "*at the option of the transferee*" in S. 43 show that such transferee *may* or *may not* take advantage of the provisions in his favour in S. 43. He has other remedies also. He may, for example, repudiate the contract or he may elect to sue for damages. Thus, the relief under S. 43 is *additional*, and *not exclusive.*

The *principle* of this section applies to a transfer by way of *lease, sale, mortgage, exchange;* and it also applies to Hindu as well as to Mahomedan conveyances.

But the rule has *no application* to the case of a compulsory sale, *i.e.*, a sale in execution of a decree.

This section also does *not* apply where there is a statutory prohibition to transfer the property on grounds of public policy. (*Sannamma* v. *Radhabhayi*, 41 Mad. 418)

There have been some conflicting decisions on whether the principle of this section applies to *spes successionis*. The Madras High Court had earlier *held* in *Official Assignee of Madras* v. *Sampat Naidu* (145 I.C. 456) that the doctrine of feeding the grant by estoppel would *not* be applicable, when a person transfers property to which he expects to succeed and to which he has no title at the time of the transfer, on the ground that if the section was allowed to be applied, it would defeat the provisions of section 6, Clause (a) regarding *spes successionis*.

However, the Supreme Court has *held*, in *Jumma Masjid* v. *Kadimaniandra Deviah* (1962) SUPP. 2 S.C.R., 554, that the section applies to *all* transfers which fulfil the conditions prescribed therein. According to the above decision of the Supreme Court, even where a person having a mere *spes successionis* represents that he is the owner thereof and transfers it to another, the section is applicable when he later succeeds to the property.

CASES AND PROBLEMS

Jagannath v. *Diboo* (31 All. 53)— *A*, representing himself to be the sole owner of property X, made a *gift* of it to *B* by a registered instrument. It was found that on the date of the gift, *A* had no title to the property; but it belonged to *C*. *A* subsequently purchased the property from *C*, and after the said purchase, *B* filed a suit against *A* for possession of the property. The Court *held* that *B's suit should be dismissed* since the transfer was without consideration, being a gift.

Problem.— *A* sells his land to *B* falsely representing to him that he is solely entitled to it. *B* believes *A*. If *B* had made a proper inquiry into the title, he would have discovered that *A's* cousin *C* is the owner of a share. *A* then inherits *C's* share. *B* claims this share from *A*. Will he succeed ?

Ans.— *B* will succeed, in spite of his negligence.

Hatikudur v. *Andar* (28 M.L.J. 44)— *X*, an owner of immovable property, died leaving behind him his widow, and a divided brother. In the life-time of the widow, the brother *B* sold the property to *A*, falsely representing that he was the owner of it. Two years after the sale, the widow died and *A* could not get possession of the property from the widow.

The Court *held* that *A* could require *B* to deliver the property to him.

Sulin Mohan v. *Raj Krishna* (25 Cal. W.N. 42).— *A*, *B* and *C* had equal shares in a piece of property. *A* and *B* leased out the property to *X*, representing that the entire property belonged to them. Later, *C* died, and under his will, his share accrued to *A* and *B*. The Court *held* that this perfected *X's* title as lessee of *the whole property*.

Mahadeo v. *Har Buksh* (1928 106 I.C. 489).— A Hindu wife executed a mortgage of her husband's property as if it belonged to her *five* years after he had disappeared. The mortgage was invalid, as the presumption of death does not arise until *seven* years. However, when the mortgagee filed a suit *when seven years had already elapsed*, the mortgage was *held* to be valid, as she had then acquired a widow's estate.

PROBLEM : *A*, a Hindu husband, purchased some land in the name of his wife, *B*. The land was then entered in *B's* name in the revenue records. After *A's* death, *B*, the widow, mortgaged the land to *C*, who took the mortgage after due inquiry, believing in good faith that *B* was the owner. *C* obtains a decree for sale on his mortgage and purchased the land. But *D* was then in possession, for *D* had purchased the land in execution of a money decree against *A*. *C* now wants to file a suit against *D* for possession. Can he succeed ?

Ans.— *C* will succeed. *D* was the successor of *A*, who had held out his wife as the ostensible owner, and cannot defeat the mortgagee who was a transferee in good faith from the ostensible owner.

Sale by ostensible owner distinguished from feeding the grant by estoppel

The following are the *seven* features which distinguish a sale by an ostensible owner (S. 41) from the doctrine of feeding the grant by estoppel (S. 43) :

1. In a sale by an ostensible owner, the transferee does *not* depend upon the representation of the transferor, but, in good faith, he must have taken reasonable care to inquire about the authority of the transferor to transfer. But, under the doctrine of estoppel, the transferee believes the statement of the transferor to be true, and pays consideration in that belief.
2. Under S. 41, the transferee gets a property which does not belong to the transferor, but to a person who allows the transferor to hold himself out as its owner,—whereas under S. 43, though the transferee gets a property which does *not* belong to the transferor, he cannot enforce that transfer against its owner until, by some chance in the future, such property, or any part thereof, falls to the lot of his transferor, when he can call upon him to deliver it to him.
3. Under S. 41, the estoppel works against the real owner, while under S. 43, it works against the transferor.
4. The transferee under S. 43 takes from an ostensible owner; the one under S. 43 takes from a real owner.
5. The transferee under S. 41 must inquire about the authority of the transferor, whereas the transferee under S. 43 has to pay consideration.
6. The transferee under S. 41 must not have notice of the true owner's title, whereas the one under S. 43 should have no notice of the option in favour of the first transferee.
7. Both must take the transfer in good faith, *i.e.*, the former must honestly believe that the ostensible owner has got an authority to transfer, and the latter must believe that his transferor transfers the property to him for the first time.

B. PROTECTION OF THIRD PERSON'S RIGHTS (Ss. 39-40)

Two topics will be considered under this head, *viz.* :

(1) Transfer where a third person is entitled to maintenance. (S. 39)

(2) Burden of obligation imposing restriction on use of land, *i.e.*, restrictive covenants. *(Covenants running with the land)* (S. 40)

(1) Transfer where a third person is entitled to maintenance (S. 39)

When a third person has a right—

(i) to receive maintenance, *or* | from the profits of immove-

(ii) to a provision for advance- | able property,

ment or marriage

and such property is transferred,—

—the right may be enforced against the transferee—

IF—

(i) he has *notice* thereof, *or*

(ii) the transfer is *gratuitous*;

BUT NOT—

(i) against a transferee *for consideration, and*

(ii) *without notice* of the right,

—*nor* against such property in his hands.

OBJECT AND SCOPE OF SECTION.— The *object* of this section, so far as it relates to maintenance, is to declare in what cases a right of maintenance may be enforced against transferees of the property from which the maintenance is recoverable.

The section lays down that where a *third* party has a right to receive maintenance *or* a provision for advancement or marriage out of the profits of a certain immovable property, which is subsequently transferred, the right of such *third* party can be enforced against the transferee (i) if the transferee had *notice* thereof, although the transfer was for valuable consideration *or* (ii) if the transfer was a *gratuitous* one, – irrespective of the question whether the transferee had or had not notice of the right. Thus, a *gratuitous* transferee has no protection against the maintenance holder; and a transferee for consideration has protection *only if* he takes the transfer without notice of the right of the person entitled to maintenance or for whom the provision for advancement has been made.

In order to apply this section, the right to receive maintenance should be *from the profits of immovable property;* it should go *with the property,* and *not* merely be a *personal right* against the owner or holder of the property.

Two other conditions should be noted in this connection : (1) The person protected by this section has no proprietary interest in the property, nor a charge upon it; he has a *mere right to be satisfied from the profits* of the property. (2) The person so protected is a *third* person, *i.e.*, a person other than the transferor and the transferee. When a widow's right of maintenance is made a charge for a fixed sum upon her husband's estate by a *decree*, it becomes a right *in rem*, and as such, is available against all the world, even against a *bona fide* transferee for valuable consideration without notice. However, if the maintenance is made a *charge* by agreement, sec. 100 applies.

This section does *not* deal with *charges*, but with a right which falls *short* of a charge. A charge does *not* arise until it is fixed by a decree, *or* by agreement, *or* by operation of law.

Even when a person is entitled to receive only a *part* of his maintenance from the profits of a particular village, the case is governed by this section, and such right *cannot* be enforced against a transferee for consideration and without notice of the right, – nor against such property in his hands. (*Kesho Prashad* v. *Upper India Bank*, A.I.R. 1933 Oudh 76)

The right protected by this section is a right of *maintenance;* but the claim of a Hindu widow to *reside* in the family house stands on much the same footing as a claim for *maintenance*, and *can* be claimed against a purchaser *with notice* of the claim for residence, (*Yamunabai* v. *Nanabhai*, 12 Bom. L.R. 1075), – but *not* where the property is sold to pay off her husband's debts.

PROVISION FOR ADVANCEMENT.— *Advancement* "is a payment to persons who are presumably entitled to, or have a vested or a contingent interest in, an estate or legacy before the time fixed by the will for their obtaining the absolute interest in a portion or the whole of that to which they would be entitled". It represents a sum paid out of capital to secure a permanent benefit or advantage in life for the person advanced.

The principle of English law is that when a property is purchased or a deposit is made in the name of a wife or a child, it would be presumed that the purchase or deposit was intended for her or its advancement. However, this rule does *not* hold good in India. (*Paul* v. *Gopal Nath*, A.I.R. 1931 All. 683). But in the case of *Europeans* and amongst *Parsees*, there *may be* a presumption of such advancement.

The section mentions "a provision for advancement". A person is said to receive an advancement when, for instance, a father purchases a property in the name of his child. Such a purchase is *not* to be regarded as colourable or *benami*. This kind of provision, however, is foreign to us. Under the English law, it is recognised that a child who receives an advancement must bring the amount into hotchpotch in case of the father's intestacy. *But there is no such rule in India*, and the presumption that would be raised in case of a father purchasing a property in the name of his child would not be raised here, – *except* in the case of Parsees and Europeans. Here, such a purchase would be treated as *benami*.

(2) Burden of obligation imposing restriction on use of land, *i.e.*, Restrictive covenants (Covenants running with the land) (S. 40)

Where, a third person—

(a) has for the more beneficial enjoyment of his own immovable property, and independently of—

(i) any interest in the immovable property of another, *or*

(ii) any easement thereon,

a right to *restrain the enjoyment* of the latter property in a particular manner; *or*

(b) is entitled to the benefit of an obligation—

(i) arising out of contract, *and*

(ii) annexed to the ownership of immovable property, but *not* amounting to an interest therein or easement thereon,—

such right or obligation may be enforced against—

(i) a transferee with notice thereof, *or*

(ii) a gratuitous transferee of the property affected thereby,

— *BUT NOT* against a transferee *for consideration* and *without notice* of the right or obligation, nor against such property in his hands.

Illustration.— *A* contracts to sell Sultanpur to *B*. While the contract is still in force, he sells Sultanpur to *C*, who has notice of the contract; *B* may enforce the contract against *C* to the same extent as against *A*.

SCOPE OF S. 40— This section protects certain rights of a *third* party (which *before* the transfer, were enforceable against the *transferor)* against the transferee *with notice* of the same and against a *gratuitous transferee*. The rights so protected are either—(i) the rights existing for the more beneficial enjoyment of the land of the person entitled and imposing restriction on the enjoyment of the land which is tranferred; *or* (ii) the rights arising out of a contract between the person entitled and the owner of the property which is transferred, and involving an obligation on the latter. But these rights should be independent of and should *not* amount to (a) interests in immovable property and (b) easements.

WHAT IS A COVENANT.— A covenant is an agreement in writing creating an obligation. It may be : (i) affirmative or positive, stipulating the performance of some act or the payment of money; *or* (ii) restrictive or negative, forbidding the commission of some act.

RESTRICTIVE COVENANT.— The first paragraph of this section deals with what are called *restrictive covenants*, which are enforced in equity in England on the ground that the person entitled to the right has an equitable interest in the land or a right in the nature of an equitable

easement. Now, a restrictive covenant is one which would entitle a third person to interfere with the free use which the transferee may choose to make of the property which is the subject-matter of the contract.

A *covenant which runs with the land* is a *restrictive covenant* because it is something which restricts the user of the land. *A positive covenant never runs with the land,* either in law or in equity. If there is a restrictive covenant and the purchaser takes the property *with notice of such covenant,* the person in whose favour the covenant is made can restrain the purchaser from acting contrary thereto. A covenant by a vendor not to build a beer-house or tavern on the plots of land remaining unsold is a restrictive covenant, and enforceable against the purchaser.

In one case, *M* was allowed by the *zamindar* of certain lands to build houses on the lands on condition that if *M* sold any of the houses so built, he should pay one-fourth of the purchase-money to the *zamindar. M* sold one of the houses to *R* who had notice of the covenant in favour of the *zamindar,* who thereupon sued *R* (as well as *M*) to recover one-fourth of the purchase-money. The Court *held* that the covenant was a restrictive covenant, binding *M* not to transfer its interest without the *zamindar* receiving his one-fourth share of the purchase-money; the covenant was therefore enforceable against *R* as much as against *M* (jointly and severally). (*Prabhu Narain* v. *Ramzan,* 41, All. 417)

Tulk v. *Moxhay* (2 Ph. 774).—In this case, *X,* the owner of vacant land and several houses surrounding it, had sold the vacant land to *E,* who covenanted that he would keep it in the same condition, *i.e.,* unburdened with buildings. *Y* then purchased the land from *E,* and *Y* wanted to construct a building thereon, although he had notice of the covenant. The Court *held* that *Y* could *not* do so. The decision in this case is familiarly referred to as *"the rule in Tulk* v. *Moxhay".*

COVENANT RUNNING WITH THE LAND.—When a person transfers his immovable property, the transferee is often required to enter into a covenant whereby the transferor imposes on the transferee conditions restraining the enjoyment of land transferred for the benefit of his adjoining land.

A covenant is said to run with the land, when either the liability to perform it, or the right to take advantage of it, passes to the assignee of the land. For example, a covenant in a lease for renewal thereof is one running with the land, and may be enforced against all transferees. Similarly, a covenant for title runs with land.

According to English law, a covenant may run with the land (i) at law or (ii) in equity.

(i) A covenant runs with the land *at law,* when the benefit of the covenant passes to the assignee of the covenantee, *or* where its burden passes to the assignee of the covenantor, and in either case, independently of notice. Under the Transfer of Property Act, covenants of which the *benefit* runs with the land are covenants for title implied in sales under S. 55(5), the covenants implied in mortgages under S. 56, and in respect of leases, the *covenant for quiet enjoyment* implied in S. 108(c). As these

covenants run with the land at law, they are enforceable by any person in whom the interest in the property of the covenantee is vested, irrespective of whether or not the third party had notice thereof.

(ii) A covenant runs with the land *in equity, when* the burden of the covenant can be imposed on the assignee of the covenantor under the rule in *Tulk* v. *Moxhay.* Under the Transfer of Property Act, covenants that run with the land in equity are the restrictive covenants referred to in the first part of S. 40; they *cannot* be enforced against a purchaser for value without notice.

All covenants are binding as between the transferor and transferee. Sometimes, they are enforceable even against the purchasers from the transferee, and they are then said to "run with the land" (*i.e.* such covenants are attached to the land, irrespective of who is the owner of such land). A covenant which runs with the land is one which binds the land in its inception, or which affects the nature, quality or value of the land; it must be one that touches or concerns the land, by which is meant that it must be imposed for the benefit, or to enhance the value, of the land retained by the transferor or some part of it.

A covenant running with the land must fulfil the following *two conditions* :

(1) it must be made with a covenantee who has an interest in the land to which it refers; *and*

(2) it must concern or touch the land, – *i.e.*, it must enhance the value of the land or benefit it in some other way.

If it does *not* fulfil these conditions, it is a *personal* covenant, and is binding only between the contracting parties and their personal representatives.

In the case of a covenant which runs with land, (1) the liability to perform it, or (2) the right to take the advantage of it, passes to the assignee of that land. It is enforceable against the purchaser from the transferee, whether he purchases *with or without notice of the covenant.* Instances of covenants running with the land under the Transfer of Property Act are—

(i) covenants for *title* implied in sales under S. 55(2);

(ii) covenants implied in *mortgages* under S. 65; and

(iii) covenants for *quiet enjoyment* of leases implied under S. 108(c).

PROBLEM : In an agreement between *R* and *S*, *R* stipulated that 'If *S* shall require a site in his property *H*, for erecting Mandir and Dharmshala and for doing repairs, etc., I and my heirs shall give land, stones and timber from property H. If I and my heirs refuse to give, in that case, *S* shall take the same of his own power. Subsequent to this agreement, *B* acquired a household interest in H and resisted *S* when he tried to erect a temple in a portion of H. *S* sued *B* on the strength of the agreement. Can he succeed ?

Ans.—The agreement conferred on *S* no present estate or interest in *R's* property H, and is not enforceable against *A* as a covenant, since it does *not* run with the land and it also infringes the rule against perpetuity.

COURT SALES.—A purchaser at a *Court sale* is a transferee *by operation of law*, and is therefore *not* covered by S. 40. As observed in *Nur Mahomed* v. *Dinshaw* (1922 45 Mad. L.J. 770), "Judicial sales would be robbed of all their sanctity, if vague references to antecedent contracts could be held to invalidate the buyer's title."

Covenants are either (i) affirmative or positive; or (ii) restrictive or negative.

An *affirmative or positive covenant* is one which stipulates the performance of some act or the payment of money. Such a covenant is collateral, and it *never runs with* the *land*, either at law or in equity; it *cannot* be enforced against a purchaser from the transferee.

Exception.—In the case of a lease, the covenant to pay rent is annexed to the land, and the benefit of this covenant passes to the lessor's assignees. (S.109) Similarly, the lessee's assignee is liable to the lessor by privity of estate. (S. 108(j))

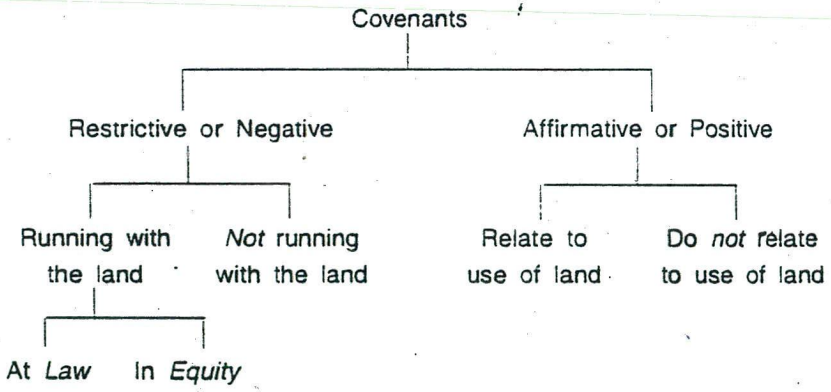
A *negative or restrictive covenant* is one which forbids the commission of some act, *e.g.*, a covenant *not* to erect buildings. A covenant to repair, which (as was once said) "can only be enforced by making the owner put his hand into his pocket," is a positive covenant, and *not* a restrictive one. Restrictive covenants are *not* binding upon purchaser without notice. They can be enforced only as against (i) transferees with notice, and (ii) gratuitous transferees (S. 40).

A restrictive covenant runs with the land, only if it is—

(1) created for the benefit of the land conveyed or of that of which the grantor remains the owner, *and*

(2) intended to be annexed to such land.

The following *tabular analysis* will further clarify the position :



C. TRANSFER BY PERSON HAVING AUTHORITY TO REVOKE A FORMER TRANSFER (S. 42)

Where a person transfers any immovable property, reserving the power to revoke the transfer, and subsequently transfers the property *for consideration* to another transferee, such

transfer operates in favour of such transferee as a *revocation* of the former transfer to the extent of the power.

Illustration.— *A* lets a house to *B*, and reserves the 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 *B's* use of the house having been detrimental to its value.

The *principle of the section* is that if a person has a right to transfer property, after exercising a right to revoke a previous transfer, a transfer of such property by him will *imply* an exercise of the right of revocation.

D. TRANSFER BY CO-OWNERS [Ss. 44 & 47]

1. Transfer by one co-owner [S. 44]

Where one co-owner of immovable property transfers his share, the transferee of such share acquires the transferor's right (*i.e.*, the co-owner's right)—

(a) to *joint possession* or other common or part-enjoyment of the property.

(This right, however, is *not available* in cases where such property is a *dwelling house* belonging to an undivided family, and the transferee is *not* a member of that family); and

(b) to enforce a *partition* of the same.

(This right, however, will be subject to the conditions and liabilities affecting the share so transferred.)

TRANSFER BY ONE CO-OWNER.— Where one co-owner of immovable property transfers his share, the transferee acquires, as to that share (1) the right of joint possession, and (2) the right to partition, to the extent enjoyed by the transferor. This would apply to a transferee of *all* kinds, including mortgagees and lessees. But where the transferee of a dwelling house belonging to an undivided family is *not* a member of the family, he is *not* entitled to joint possession or other common or part-enjoyment of the house.

This principle is deducible from the judgment of Westrop, C.J., where he observed : "We deem it a far safer practice, and less likely to cause serious breaches of peace, to leave a purchaser to a suit for partition, than to place him by force in joint possession with the members of a Hindu family, who may be not only a different caste from his own, but also different in race and religion".

This section is based on the principle of *subrogation* or *substitution*. Thus, *A*, *B* and *C* mortgage their field to *X*. *C* then transfers his share of the field to *D*. Under these circumstances, *D* will have the right to joint possession with *A* and *B*, and also a right to claim partition and separate possession of his share. But the recently acquired share of *D* is still subject to the mortgage.

2. Transfer by co-owners of share in common property (S. 47)

Where several co-owners of immovable property transfer a share in such property 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 owners 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, a one-anna share is taken from the share of *A*, and half-anna shares from each of the shares of *B* and *C*.

E. JOINT TRANSFERS (Ss. 45-46)

1. Joint transfer for consideration (S. 45)

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*, entitled to interests in such property, identical to the interest to which they were respectively entitled in the fund.

Where, however, such consideration is paid out of *separate funds*, they are entitled, *in the absence of a contract to the contrary*, to interests in such property in proportion to the share of the consideration advanced by them respectively.

Where there is *no evidence* as to— | the interests in the fund to which they were respectively entitled *or* the shares which they advanced,

such persons are to be *presumed* to be *equally* interested in the property.

2. Transfer for consideration by persons having distinct interests (S. 46)

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

—*proportionately* to the value of their respective interests, where such interests were of *unequal value*.

Illustrations.— (a) *A*, owing 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* 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.

F. PRIORITY OF RIGHTS CREATED BY TRANSFER (Ss. 48 & 78)

(1) Priority of rights previously created (S. 48)

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.

QUI PRIOR EST TEMPORE, POTIOR EST JURE.—Two successive transfers of the same property by sale or mortgage *cannot* co-exist: the later in date must give way to the earlier. Where there are two encumbrances on the same property, the first encumbrancer must be first satisfied, and if necessary, he can exclude the second.

The *principle underlying this rule* is one of natural justice, and has been well-expressed in the maxim of Equity, *"Qui prior est tempore, potior est jure," i.e.*, he who is prior in time shall prevail in law. This principle, it is to be remembered, will *not* apply unless the conflicting equities be otherwise *equal*, and special contracts (to bind earlier transferees) do *not* exist.

Firstly, it may be noted that the rule is invoked only when the interests created by transfer either at the same or at different times conflict with one other. Thus, a *mortgage* and a *sale* of the same property cannot conflict, because the first is the acquisition of a *limited interest* in the property, while the latter is an assignment of the mortgagor's *residuary right, viz.*, the equity of redemption. And therefore, the rule as to priority cannot be invoked. But where two mortgages of the same property are created, the above rule will apply. If they are created on the same day, the rule is applied by showing which of the two mortgages was *executed* first. If, for want of proper evidence, this cannot be proved, the two mortgages take as tenants-in-common or joint-tenants.

Secondly, the transfer creating such interests must be *valid* and *complete* transfers. Thus, if the first mortgage, being compulsorily registrable, is not registered and the second is, the second has priority over the first, because the first mortgage *cannot* be said to have been a complete transaction for want of registration. If, in the same case, the second mortgagee has got notice of the first, though unregistered

mortgage, he *cannot* claim priority over the first, because the case would then fall under S. 40. But if the second mortgage is executed and registered during the period between the execution and registration of the first mortgage, the second mortgage *cannot* have priority over the first mortgage, because registration operates retrospectively from the date of execution (S. 47 of the Registration Act).

There are, however, several *exceptions* to the above rule. The following are *eleven exceptions* to the rule that priority is determined by order of time :

1. Section 50 of the Registration Act, under certain circumstances, gives priority to a registered mortgage over an earlier unregistered deed of which registration is optional.
2. Another exception to the rule is *salvage lien, i.e.*, advances made for the purpose of protecting a priority from revenue sale, forfeiture or destruction.
3. When a mortgage is constituted a first charge, it takes precedence over prior mortgages by an order of the Court.
4. Land revenue falling in arrears subsequent to a mortgage takes precedence over it.
5. A debt owing to the Government (even if subsequent) takes precedence over all other debts, secured or unsecured, in accordance with statutory provisions.
6. When the prior encumbrancer misleads a subsequent encumbrancer by *fraud, misrepresentation or gross neglect*, his priority is postponed. (See Sections 3, 39 and 78.)
7. When the priority is barred by estoppel, a subsequent transferee takes precedence.
8. A mortgage executed by a receiver, for the purpose of preserving the property, takes precedence over all other loans.
9. Advances made to save a mortgaged property from loss or destruction are payable in priority to all other charges.
10. A transfer operates from the date of execution of the deed, although it may have been registered at a later date : S. 47, Registration Act.
11. A non-testamentary document, which is duly registered, has priority over any oral transfer, though made earlier, – *except* in the case of a mortgage by deposit of title-deeds : S. 48, Registration Act.

(2) Postponement of prior mortgage (S. 78)

1. Where through the *fraud, misrepresentation* or *gross neglect* of a prior mortgagee, a subsequent mortgagee is induced to advance money on the security of mortgaged property, the prior mortgagee is to be postponed to the subsequent mortgagee : S. 78.

2. When a mortgage is made by an order of the Court as a first charge, it takes precedence over a prior mortgage.

3. Land revenue falling in arrears subsequent to a mortgage takes precedence over it.

4. A debt due to the Government (even if subsequent) takes priority over all other debts, secured or unsecured.

[S. 78 is dealt with in detail in the Chapter on Mortgages.]

G. TRANSFEREE'S RIGHTS UNDER POLICY (S. 49)

Where immovable property is transferred *for consideration*, and—

—such property (or any part thereof) is, at the date of the transfer, insured against loss or damage by fire,—

—in the case of such loss or damage, the transferee 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.

Thus, if the transfer is a *mortgage*, the mortgagor, as the insured person, would receive the money, and the mortgagee has a right to require it to be applied in restoring the security. This right extends even as against a creditor of the mortgagor who has attached the insurance money. Otherwise, he would have a right under S. 68(h) to sue for his mortgage money.

Similarly, the *lessee* may require the lessor receiving the insurance money to restore the property. If the property is wholly destroyed or rendered unfit for the purposes for which it was leased, he has also an option to avoid the lease under S. 108(e). If he exercises this option, he *cannot* claim any right to the insurance money. In the case of a *sale*, the vendor is, in fact, a trustee for the purchaser in respect of the insurance money. Still, the purchaser can get its benefit under this section.

It may be noted that the right under S. 49 arises only when the transferor *actually receives* the insurance money. If he does *not* choose to enforce his claim against the insurance company, the transferee has no remedy either against the transferor or the insurance company. The safest course to follow, therefore, in all such cases, is to get the policy of insurance assigned to the transferee at the time of the transaction.

ENGLISH LAW.—The law on this point in England is very curious. There, the transferee can require the transferor to apply the insurance money in reinstating the property, *only if there is a provision in the contract to that effect.* Otherwise, the vendor, who has received full value of the property from the purchaser and *ex hypothesi* having suffered no loss, would be bound to refund the money to the insurance company. The *reason* for this rule is that a contract of insurance is one of indemnity, and is a personal contract.

(As for the law as to insurance of mortgaged property, see Ss. 72 and 76 below.)

H. *BONA FIDE* HOLDERS UNDER DEFECTIVE TITLE (Ss. 50-51)

This topic will be considered under the following *two heads* :

(1) Rent paid to holder under defective title (S. 50).

(2) Improvements made by *bona fide* holders under defective title (S. 51).

(1) Rent paid to holder under defective title (S. 50)

S. 50 provides that no person can be charged 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.

S. 50 of the Act protects payment of rent made in good faith to a holder of immovable property under a defective title. If a tenant or any other person, who has to make periodical payments in respect of an immovable property makes a payment *in good faith* to a person from whom he held the property, he *cannot* be compelled to make a second or further payment to another person,— *even if* it should turn out, later on, that the person who received the payment had no right to receive it.

S. 109 similarly provides that if the lessee, *not* having reason to believe that the lessor has transferred the property leased, pays rent to the lessor, the lessee is *not* liable to pay such rent again to the transferee.

(2) Improvements made by *bona fide* holders under defective title (S. 51)

When the transferee of immovable property makes an *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

(i) to have the *value* of the improvement estimated and *paid* or secured to the transferee,

or

(ii) 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 is to be the estimated value thereof at the time of eviction.

If the transferee has planted or sown (on the property) crops which are growing when he is evicted therefrom, he is entitled (i) to such crops, and (ii) to free ingress and egress to gather and carry them.

The law relating to improvements made on lands by *bona fide* persons holding under defective titles is laid down in Sec. 51 of the Act. The section involves *two main principles* of law, *viz.*, no person can pass off a greater interest than he himself actually possesses; *and* he who seeks equity must do equity. A transferee of an owner with a defective title acquires no real interest in the property. But if he makes improvements on the property, believing in good faith that he is *absolutely entitled* thereto, he will have *two alternate* remedies when the real owner seeks to evict him. *Either* he will be entitled to the cost of his improvements, *or* he will be entitled to have the property sold to him at the market price, irrespective of the value or cost of his improvements.

This section cannot, however, apply *unless* the transferee made the improvements *in good faith*. Carelessness to make enquiries about the title will not make his conduct *mala fide*.

This section is based upon the principle that *he who seeks equity must do equity*. In order to entitle a person to the benefit of this section (*i.e.*, to the improvements made by him or to their value) *four things* are necessary :

Firstly, he must be a "transferee".—A mere stranger or a trespasser is *not* entitled to the benefit of this section.

The word "transferee" does *not* include an auction-purchaser of the property, in view of clause (d) of section 2.

Secondly, he must believe himself to be absolutely entitled to the immovable property.—A person who is aware of his imperfect title, *or* who knows that his title is terminable, such as a lessee or a tenant or a mortgagee, is *not* entitled to the benefit of this section. (*Gokulapathi* v. *Venkatarama Sharma* (1971) 2 M.L.J. 320)

Thirdly, he must believe in good faith.—If a person has made improvements in good faith, as a *bona fide* occupant of the land and in the belief the land is his own, he may be entitled in equity to recover the value of the improvements. A person in wrongful possession *cannot* recover the costs of improvement.

Lastly, property must not have been claimed by inheritance.—Thus, in *Topanmal* v. *Chanchalmal*, (A.I.R. 1940 Sind 77), *A*, believing that he had become the owner of a property by inheritance, made improvement in the property and spent about Rs. 2000. *A* was subsequently evicted by a person having a better title. The Court *held* that *A* had no remedy inasmuch as S. 51 does not, in terms, apply to a person who claims

property by inheritance, because S. 51 of the Transfer of Property Act relates to conveyances between *living* persons.

PROBLEM : *A* builds on land which he thinks is his, but is really *B's*. *B*, knowing of *A's* mistake, encourages *A* to build. Discuss the rights of *A* and *B*.

Ans.—The owner of land cannot sue for ejectment where he sees another person erecting a building upon it, and knowing that such other person is under the mistaken belief that the land is his own purposely abstains from interference. *A* cannot be evicted by *B*, and the question of *A's* right to claim compensation under S. 51, which arises only on eviction does *not* arise.

CASE.—Durgozi v. *Fakeer Sahib.* (30 Mad. 197) : The mother of a Mohamedan minor, acting as the *de facto* guardian, sold the minor's property to *A*, believing in good faith that she had authority to do so. When *A* was evicted by the minor, *A* was entitled to compensation for the improvements made by him.

I. TRANSFERS OF PROPERTY PENDING SUIT RELATING THERETO *(LIS PENDENS)* : (S. 52)

An interesting conflict of rights between two innocent parties can arise in the following way. Suppose a litigation is pending between *A* and *B* with regard to the ownership of certain property. If *A* wins the suit, he would be entitled to the property, and conversely, if the suit goes in *B's* favour, he would get the property. But suppose that pending this suit, *B*, styling himself as the owner of the property, sells it to *X*, who does not know anything about the suit pending between *A* and *B*. Ultimately, the suit ends in *A's* favour. The question that will arise is : Between *X* and *A*, who is to be preferred ? It is precisely this question that is answered by S. 52 of the Act, which contains the *doctrine of lis pendens*.

Doctrine analysed

During the pendency in any Court—

having authority in India (excluding 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 any decree or order which may be made,—	*except*	under the authority of the Court, and on such terms as it may impose.

Pendency, when deemed to commence

The pendency of a suit or proceeding is deemed to commence from the date of—	the presentation of the plaint, or the institution of the proceeding—	in a competent Court.

Continuance of pendency

Such pendency is deemed 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—	(i) been obtained, *or* (ii) become unobtainable, by reason of the expiry of the period of limitation.

LIS PENDENS (PENDING LITIGATION).— This section embodies the doctrine of *lis pendens*, as expressed in the maxim, *"ut lite pendente nihil innoveteur,"* which means that *nothing new should be introduced in a pending litigation.*

Discuss the doctrine of lis pendens.
B.U. Nov. 95
Oct. 98

Where a suit or proceeding is pending between two persons with respect of an *immovable* property, and one of the parties thereto sells, or otherwise transfers, the subject-matter of the litigation, then the transferee will be bound by the result of the suit or proceeding,— whether or not he had notice of the suit or proceeding. This rule is known as the *rule of lis pendens*. This rule affects the purchaser, not because the pending suit or proceeding amounts to notice, but because the law does *not* allow litigants to give to others, pending the litigation, any right to the property in dispute, so as to prejudice the other party.

Thus, *the rule of lis pendens is based on the necessity for final adjudication;* it aims at the prevention of multiplicity of suits or proceedings. A transaction entered into during the pendency of a suit *cannot* prejudice the interests of a party to the suit who is not a party to the transaction. The *object of the rule* is to protect one of the parties to a litigation against an act of the other.

The *principle of the doctrine* is thus explained by Turner L.J. in the leading case of *Bellamy* v. *Sabine*, (1857) I De G. & J. 566 : "It is, as I think, a doctrine common to the Courts both of Law and Equity, and rests, as I apprehend, upon the foundation—that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations *pendente lite* were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendent's alienating before the judgment or decree, and would be driven to commence his proceeding *de novo*, subject again to be defeated by the same course of proceedings."

The doctrine of *lis pendens* cannot be availed of by the transferor and it is really intended for the protection of the other party, *i.e.*, the party in the suit other than the transferor. (*Rabindranath* v. *Sarat Chandra*, A.I.R. 1971, Cal. 159)

The rule of *lis pendens* will apply *between co-defendants* if the relief claimed in the suit involves a decision between them. (*Krishnappa* v. *Mallya*, 41 Mad. 458)

Suits decreed *ex-parte* also fall within the scope of the doctrine of *lis pendens, provided* they are *not* collusive. (*Krishnappa* v. *Shavappa*, 31 Bom. 363)

Compromise decrees.—A *compromise decree* also falls within the scope of the doctrine of *lis pendens, — provided* the compromise is *not* the result of a fraud. (*Annamalai Chettiar* v. *Malayandi*, 26 Mad. 426)

The Rajasthan High Court has also *held* that the doctrine of *lis pendens* applies in cases where pending litigation is ultimately compromised by the parties and a decree is passed by the Court in terms of the compromise. (*Mohammad Aleem* v. *Maqsood Alam*, A.I.R. 1989 Raj. 43)

Involuntary transfers.—Although the section applies only to transfers by act of parties, and S. 2(d) makes the whole Chapter inapplicable to transfers by operation of law, it is now settled law that the doctrine of *lis pendens*, as laid down in the section, applies to *involuntary* transfers also. Therefore, a purchaser of a property at an execution sale during the pendency of a suit in respect of the same property is affected by the doctrine.

"During litigation, nothing new should be introduced". Discuss critically the basis of this doctrine.

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As seen above. S. 52 does *not*, in terms, apply to *involuntary sales* like Court-sales. But though the section itself may *not* apply to involuntary alienations, the *principle of lis pendens* applies to such alienations. Here, the transfer is made, not by an act of one of the parties to the litigation, *but* at the instance of a third person *and* through the instrumentality of the Court and the rule of *lis pendens* applies with equal force.

In *Radha Madhub* v. *Munshur* (15 I.A. 97), *A* mortgaged his property to *B*. Later *B* sued *A* on the mortgage and obtained a decree for sale. Whilst this suit was pending, a third party, *C*, obtained a money decree against *A*, and the property was sold to *C* in execution of this money

decree. In these circumstances, the Privy Council *held* that *C's* purchase was subject to the doctrine of *lis pendens*.

The rule of *lis pendens* does *not* apply to a transfer by a person who, *subsequent* to the transfer, is added as a party to the pending suit. A transfer by a person before he is made a party is *not* affected by the rule of *lis pendens*.

It may be noted that the *effect* of the rule of *lis pendens* is not to invalidate or avoid the transfer, but to make it subject to the result of the litigation. And this provision would operate even if the transferee *pendente lite* had no notice of the pending suit or proceeding at the time of the transfer.

PROBLEM.—*A* agrees to sell immovable property to *B* in 1996. *B* files a suit in 1997, against *A* for the specific performance of the contract to sell and for the recovery of the said property. Pending the suit *A* sells the property to *C* in 1997 by a registered deed. In 1998, *B's* suit is dismissed on the ground that he had committed a breach of a contract of sale. In 1999, *C* files a suit against *A* for recovering possession of the property sold to him by *A* in 1997. *A* resists *C's* claim on the ground that the sale to *C* was effected during the pendency of the suit of *B* against *A*. How would you decide ?

Ans.—S. 52 does not invalidate transfers *pendente lite*. It only enacts that the purchaser *pendente lite* is bound by the result of the litigation. As *B's* suit, pending which *A* sells the property to *C*, has been dismissed, *C's* suit for possession must be decreed.

Its essentials.—In order to constitute a *lis pendens*, the following *six elements* must be present :

(i) There should be a *suit* or a *proceeding*.

(ii) The suit or proceeding must be one in which a right to immovable property is *directly* and *specifically* in question.

(iii) The suit or proceeding must *not* be a *collusive* one.

(iv) The suit or proceeding must be *pending*.

(v) The suit or proceeding must be pending in a Court of competent jurisdiction.

(vi) The property in a suit must be transferred during such pendency.

Pending Litigation.—The most important condition is that a suit or proceeding must be pending. The meaning of the expression *"pendency* of a suit or proceeding" is given in the *Explanation* added to the section. This *pendency* continues from the time the plaint is presented to the proper Court till it is finally disposed of, and complete satisfaction or discharge of the decree is *either obtained or has become unobtainable* because it is time-barred.

Thus, if the plaint is presented in a wrong Court, and a transfer of an immovable property to which the plaint relates is made during the pendency of the suit in such a Court, the doctrine of *lis pendens* would *not* apply. If the plaint is returned for being presented to another Court

of competent jurisdiction, the pendency of the suit does not begin until the plaint is presented to the proper Court.

Similarly, if a plaint is presented with insufficient Court-fee and is returned by the Court, and the plaintiff presents it again after paying the proper fee, and then the plaint is registered as admitted on the later date, it is the *later date* which must be taken as the date of institution of the suit. A transfer of property made between the date of the original presentation and the later date is *not* affected by *lis pendens*, as no suit was pending at that time (*Mahendra Nath* v. *Parmeshwar*, 60 I.C. 439).

In a pauper suit, the pendency commences as soon as the application for leave to sue *in forma pauperis* is made to the Court. (*Ambika Pratap* v. *Dwarka Prasad*, (1908) 30 All. 95)

It may also be noted here that the pendency of the suit must be in a competent Court *in India*. The *reason* behind this rule is that in foreign Courts, not only the *procedure*, but even the *remedy* may be different from that prevailing in India.

PROBLEM.—*A* sells land to *B* in respect of which *C* has a right of pre-emption. *C* files a suit to pre-empt the land against *A* and *B*. A week after the institution of the suit, *B* re-sells the land to *A*, and files a written statement that *C* has no cause of action. How will you decide the suit ?

Ans.—A suit for pre-emption involves a right to specific immovable property and is, therefore, within S. 52. No dealing with the property after pre-emption suit has been filed can affect the rights of the plaintiff. The resale by *B* to *A* was *pendente lite*, and it *cannot* affect *C's* right. *C's* suit will be decreed.

Bona fide litigation.— The suit or proceeding must *not* be *collusive*. A collusive suit is not a real suit at all, but a sham fight. Although the result in such a suit is binding on the immediate parties, it does *not* bind their transferees. The doctrine of *lis pendens* does *not* apply where the proceeding is tainted with fraud. But a suit, *bona fide* at its inception, may become collusive by reason of a collusive compromise subsequently arrived at between the parties. But the *mere fact of compromise* is no warrant for presuming that the entire proceeding is sham and collusive.

Right to property must be in dispute.—The right to an immovable property must be *directly* and *specifically in issue* in the suit or proceeding. This will happen in a suit for specific performance of a contract to transfer immovable property.

Thus, if the suit is on a promisory-note, it *cannot* be regarded as a suit which specifically affects the defendant's property, although it may happen that the money decree will ultimately have to be satisfied out of the defendant's property. Similarly, a suit for damages in tort or contract is *not* a suit specifically affecting the immovable property of the defendant.

But, a *mortgage suit* is one in which a right to immovable property is directly and specifically in question. So also, a *suit for specific performance of a contract* for the sale or lease of land would fall under S. 52.

In a case where there is a claim for maintenance, coupled with a prayer for a declaration of a charge on specific immovable property, the doctrine of *lis pendens* is applicable. The transfer of such property by the defendant would attract the application of section 52. (*Varadammal* v. *Ambalal J. Vyas*, (1971) M.L.J. 65)

The leading Indian case on the doctrine of *lis pendens* is *Faiyaz Husain Khan* v. *Prag Narain*, (34 IA 102). In this case, a mortgagee sued to enforce his mortgage, but before the summons were served, the mortgagor effected a subsequent mortgage. The prior mortgagee continued his suit and obtained a sale-order from the Court, without making the subsequent mortgagee, a party to the suit. The Court *held* that the sale extinguished the subsequent mortgagee's right to redeem the prior mortgage.

Transfer during pendency of the litigation only.—For the purpose of this doctrine, the transfer must be made only during the pendency of the suit or proceeding. Naturally, therefore, a transfer *before* the suit will *not* be affected by *lis pendens*. It does *not* matter that the deed is registered *after* the suit is filed, *provided* it was executed *prior* to its institution.

The decree of the first Court does *not* always put an end to the litigation. Therefore, even after the dismissal of a suit, a purchaser is subject to *lis pendens* if an appeal is thereafter filed. Thus, the rule of *lis pendens* applies to a transfer made *after* the decree of the Court but *before* the filing of an appeal.

Transfer by a party to the litigation.— Another important element for the application of the doctrine is that property must be transferred or otherwise dealt with by any of the parties to the suit or proceeding. Therefore, a transfer by a person whose title is paramount to that of the parties to the suit, or whose title is *not* in any way connected with them, is *not* affected by the doctrine. Similarly, the doctrine does *not* apply where the transfer was made pending the suit by a person who was *not* a party to the suit at the time of the transfer and who was subsequently made a party as a representative of the defendant.

Exception.— In spite of the doctrine, however, it is quite open to the Court to permit any party to the suit to transfer the property on terms which it may think fit to impose. Such order should *not* have been obtained by fraud; otherwise any transfer made under it will fall under the doctrine.

PROBLEM.—*A's* suit is dismissed for default on March 15, 1999. On March 27, 1999, *A* transfers the property in suit to *B*. On June 5, 1999, the suit is restored to file. Is the transfer in *B's* favour subject to *lis pendens* ?

Ans.—If a suit is dismissed for default and then restored, the order of restoration relates back, and a transfer after dismissal and before restoration is subject to *lis pendens*.

LIS PENDENS AS CONSTRUCTIVE NOTICE.— In England, formerly *lis pendens* was itself regarded as good notice, but by a recent enactment (The Conveyancing Act), the law has been altered. Now, *lis pendens* will

not bind a purchaser or mortgagee unless express notice is given thereof. As observed by *Lord Cranworth* in *Bellamy* v. *Sabine*, it is *not* a prefectly correct mode of stating the doctrine, when one states that *lis pendens* is based on the principle of implied notice. If *lis pendens* could be held as implied notice to all the world, the result would be that even a stranger to a suit will be supposed to have constructive notice of every fact appearing in it, but that would be rather absurd; there is an infinite number of suits, and every man *cannot* be expected to have such vigilance as to take notice of all of them.

In short, *lis pendens* is founded, *not* on the doctrine of notice, but upon the broad principle that otherwise there would be no finality in litigation.

In Greater Bombay, however, it is necessary to register the notice of *lis pendens* under Section 18 of the Indian Registration Act. Otherwise, a pendency does *not* affect any transaction.

PROBLEM.—*A* makes a gift of land to *B*. *C* sues *A* for possession of the land. While this suit is pending, *B* transfers the land to *D*. *A* dies, and *C* obtains a decree for possession against *B*, as the legal representative of *A*. Is *D's* title affected by the rule of *lis pendens*, so as to be subject to *C's* decree ?

Ans.—No, for *two reasons, viz.—*

(a) *A's* gift was before the suit; *and*

(b) *B* was *not* a party to the suit at the time of transfer of the property from *B* to *D*. (*Bala Ramchandra* v. *Daula*, 27 B.L.R. 38)

Illustrations of application of S. 52

(1) *A* mortgaged his property to *B*. *B* sued and obtained a *decree nisi* for foreclosure. Before the decree was made absolute by the Court, *A* sold the property to *X*. When the decree was made absolute, it was *held* that *X* was *not* entitled to redeem the mortgage, because his purchase was *pendente lite*, and he was bound by the decree. If he had purchased the property *before* the suit was filed, he could have redeemed the mortgage, though *not* a party to the suit.

(2) *A* mortgaged his property to *B*. *B* filed a suit on the mortgage and obtained a decree for sale. While this decree was being executed, *A* leased the property to *X* for ten years. At the sale of the property, *B* purchased the property himself. As the lease to *X* was affected by the rule contained in S. 52, the Court *held* that *B* was entitled to evict *X*.

(3) *A* mortgages his property to *B* in 1998, and to *C* in 1999. *C* sues *A* on the mortgage and pending this suit, *A* sells the property to *B*. As the sale is made *pendente lite*, it is subject to the decree of the Court in *C's* suit. However, *B's* right under the prior mortgage is *not* affected.

J. FRAUDULENT TRANSFER (S. 53)

S. 53 deals with *two* types of fraudulent transfers.

Under the first rule, if immovable property is transferred to *defeat* or *delay* the creditors of the transferor, such transfer is *voidable* at the option of any such creditor.

The above rule does *not,* however,—

(i) impair the rights of a transferee in good faith and for consideration; *or*

(ii) affect any law relating to insolvency.

Discuss : Fraudulent transfer.

Write a short note on : Fraudulent transfer.
B.U. Apr. 95
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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 a transfer on the ground that it has been made with intent to defeat or delay the transferor, must be instituted on behalf of *all* the creditors.

In other words, a suit instituted by a creditor to set aside a fraudulent transfer should be instituted on behalf of *all* the creditors. Thus, it is competent for *one creditor* to sue, but he must sue, *not* in his individual capacity, *but* in a representative capacity, and the decree will accrue to the benefit of *all* the creditors.

Discuss exhaustively the law relating to "Fraudulent Transfer".
B.U. Dec. 96
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Under the second rule, every transfer of immovable property made without consideration, with intent to defraud a *subsequent transferee,* is *voidable* at the option of such transferee.

For the above purpose, no transfer made without consideration is to be deemed to have been made with intent to defruad, by reason only that subsequently, a transfer for consideration was made.

As far as the *first rule* is concerned, when the *consideration* for the transfer and *good faith* on the transferee's part are present, the *intention* of the transferor to defeat or delay his creditors is immaterial. A mere fraudulent intention on the part of the grantor will *not* invalidate the transfer, if it is for valuable consideration and there is no want of good faith on the part of the grantee. The transaction may defeat or delay; the transferor may intend that it should; the transferee may know that it will; the consideration may be inadequate; and yet, *unless the transferee himself has been wanting in good faith,* his rights will not be impaired. (*Bhagwant* v. *Kedari,* 26 Bom. 202).

The doctrine of constructive notice given in Sec. 3 should *not* be imported into this section. So, the *mere knowledge* of an impending execution of a decree against the transferor is *not* sufficient to make the transferee a transferee otherwise than in good faith, when he *does not share the intention* of the transferor to defeat or delay his creditors nor does he participate in the commission of the fraud. (*Ishan Chander* v. *Bishu Sardar,* 24 Cal. 825)

Under this clause, *good faith is more essential than consideration*, so that if the element of good faith is *not* present, the transaction will be avoided even when there is consideration. It is *not sufficient* to render a deed valid that it should be made upon good consideration; it must also be proved that it was made in good faith.

SCOPE OF S. 53.— The section is restricted to *immovable property*, and has no application to movables. The benefit of this section is *not* restricted to existing creditors alone, but it extends to subsequent creditors as well. This section does *not* render a transaction *void ab initio, but only voidable*, and that too, only at the option of any person defeated, delayed or defrauded.

The Madras High Court has *held* that the essential ingredient for invalidating a transfer under S. 53 of the Act is a fraudulent intention to *defeat* or *delay* the creditors. The Court observed that the transferee must share the fraudulent intent, and must actively aid and assist the transferor in carrying out this intention. (*Saroj Ammal* v. *Sri Venkateswara Finance Corp.*, A.I.R. 1989 NOC 4 Mad.)

There is a distinction between a *fictitious* and a *fraudulent* transfer. In the former, there is *no transfer* at all, *e.g.*, a *benami* transaction. In the latter, there *is* a transfer, but as it is the result of a conspiracy between the transferor and the transferee to defeat the claim of others, it can be avoided by those others *if* they wish to avoid it.

Under the Transfer of Property Act, a transfer of immovable property by a debtor *may* be set aside by his creditor—

(1) if the transfer is made with intent to defeat or delay the transferor's creditor; *and*

(2) if the transferee is *not* a transferee in good faith and for consideration.

A transferee from such debtor will be protected—

(a) If he acquires property for value and in good faith, *i.e.*, without being a party to any design on the part of the transferor to defeat or delay his creditors, even if the debtor's intention may have been fraudulent; *or*

(b) if he himself is a creditor and the transfer is made in satisfaction of his pre-existing debt.

The *English rule* on the point is also similar, and there too, each case is decided on its merits. In England, as in India, mere absence of consideration is not positive proof of an intent to deceive. However, the embarrassed circumstances of the transferor, the hurried nature of the transaction and other circumstances (such as secrecy, or the relationship between the parties) would serve as indications of an intention to deceive.

Ex parte Mercer (17 Q.B.D. 290).—In this case, *X* broke his engagement, and married another girl. His former sweetheart sued him for damages for breach of promise. At about the same time, *X* got a legacy, which he immediately settled on his wife. The outcome of the suit

was that he had to pay £ 500, but *X* could not do so. He had no assets. He satisfied the Court that at the time he made the settlement on his wife, he was able to pay his debts, and that the settlement was *not*, in any way, influenced by the pending suit. In these circumstances, the Court refused to set aside the settlement, *i.e.*, the Court ruled that there was *no fraudulent transfer.*

Ebrahim Bhai v. *Fulbai* (26 Bom. 577).—In this case, a person who was leading a life of dissipation transferred all his property to his wife, so that he might not be tempted to lead such a life in the future. But unfortunately, he drifted back to his old ways, and began to contract heavy debts. In a suit by his creditors to set aside the transfer to his wife, it was *held* that there was no indebtedness at the time of the transfer, the consideration involved was natural love and affection, and therefore, no *mala fides* could be presumed, *merely because* the transfer might have prejudiced the claims of *subsequent creditors.*

CREDITOR'S REMEDIES.—The following *three* remedies are open to a creditor against the transferee of the debtor's properties for consideration, who has notice of the fraudulent intent of the debtor to defraud his creditors :

1. The creditor may institute a suit to avoid the transfer under S. 53 of the Transfer of Property Act. This suit must be on behalf of, or for the benefit of, all the creditors. This would be a representative suit filed under Order I, Rule 8 of the Civil Procedure Code.

2. The creditor may manifest an intention to avoid the transfer otherwise than by filing a suit, *e.g.*, by attaching the property, if he is a judgement-creditor.

3. The *suit* to set aside a fraudulent transfer is *not* the only remedy; S. 53 of the Transfer of Property Act can also be pleaded as a *defence* to a suit brought by the transferee. Although a creditor *cannot* sue only on his own behalf, he is *not* obliged to *defend* a suit on behalf of the whole body of creditors. S. 53 may be pleaded as a *personal defence*, by a defeated or delayed creditor, although he has *not* himself filed a representative suit to avoid the transfer.

WHETHER PREFERENCE TO ANY PARTICULAR CREDITOR IS FRAUDULENT UNDER S. 53.—There is nothing in S. 53 to prevent a debtor from paying debts in any order he pleases, and consequently from preferring the creditor of his choice. Apart from considerations of bankruptcy law, a debtor may make preference among his creditors, — even to the extent of transferring *all* his property to one creditor to the exclusion of the others. Such a preferential transfer *cannot* be declared fraudulent, even though the debtor, in making it, intended to defeat the other creditors and though the favoured creditor had knowledge of such intention.

PROBLEM.—A obtains a decree for his debt against his debtor, *B*. In execution of the decree, the debtor's property is attached on the 23rd of August and sold to *C*. Before the attachment, *B* had, on the 13th July, deliberately sold the property to his relative, *D*, in part satisfaction of a

debt due to her. Discuss *D's* rights as against *C* (1) if at the time of the transfer in her favour, *D* was not aware of the decree passed in *A's* favour and (2) if *D* was so aware.

Ans.—*B* has deliberately given preference to *D*, a creditor, who is his relative. But this is not a fraudulent under S. 53, for a debtor may pay his *debts* in any order he pleases and prefer any creditor.

But a transfer which is *not* hit by S. 53 because it amounts to an assignment of all the transferor's property for the benefit of a particular creditor, may be void as amounting to a fraudulent preference within the meaning of Sec. 56 of the Presidency-towns Insolvency Act and Sec. 54 of the Provincial Insolvency Act. Therefore, it has now been expressly provided that nothing contained in S. 53 (1) shall affect the law of insolvency.

CASE.—A creditor sued a Mohamedan, his debtor, and obtained a money-decree against him. Soon thereafter, the debtor transferred his property to his wife for her dower. As the Court found that the dower debt was due to the wife at the time of the transfer, it was *held* that the case was merely one of *preference*, and that the transfer was therefore *not voidable*.

Problems

1. *A*, being in embarrassed circumstances, wished to convert his property into cash, so as to conceal it from his creditors. *B*, being aware of *A's* object, assisted him by purchasing the property. Is the sale valid ?

Ans.—*No*, the sale is *voidable* under S. 53. (*Palamalai* v. *South Indian Export Co.*, 1910 33 Mad. 334)

2. A man of extravagant and dissolute habits was persuaded to reform, and make a settlement of his property on his wife and children. He subsequently relapsed and incurred debts. Is the settlement voidable under S. 53 at the instance of the subsequent creditors ?

Ans.—*No*, the settlement is *not voidable* under S. 53 of the Act. (*Ebrahimbhai* v. *Fulbhai*, discussed above.)

3. *A*, a trader at Jabalpore, was in embarrassed circumstances. He purchased a stamp paper at Agra, and secretly executed a usufructuary mortgage of all his property to his uncle, *B*, the consideration being a fictitious bookdebt. One of the terms of the mortgage was that *B* should, out of the usufruct, pay allowances to the wife and children of *A*. Is the mortgage valid ?

Ans.—The mortgage is *voidable* under S. 53, as it put all of *A's* property out of the reach of his creditors and reserved a benefit for *A*. Also, the secrecy with which the transaction was effected is evidence of *A's* fraudulent intention. (*Ghansam Das* v. *Uma Pershad*, 1919 21 B.L.R., 472)

4. *A* sued *B* for a debt. *B* obtained an adjournment, and during the adjournment, sold her land to her sister, *C*. *B* allowed the suit to be decreed *ex parte*, and when *A* attached the land, *C* objected that it was hers. *B* professed to have sold the land to raise money to pay a debt, but it was shown that no demand had been made for payment of the debt, and *B* was not solely liable for its payment. Is the sale valid ?

Ans.—No, the sale is *voidable* under S. 53. as being in fraud of the creditors. (*R.R.O.O. Chettyar Firm* v. *Ma Sein Yin*, 1927 5 Rang. 588)

5. *A* sells property to *B* in fraud of his creditors. One of the creditors, *C*, attaches the property in execution of a decree against *A*. *B* objects to the attachment, and *C* maintains that he has a right to attach the property. *B's* objection is dismissed. *B* then sues for a declaration of his right to the property. Can *C* plead S. 53 in defence ?

Ans.—Yes, *C* can plead in defence that the transfer to *B* was in fraud of *A's* creditors. (*Ramaswami Chettiar* v. *Mallappa Reddiar*, 1920 43 Mad. 760)

K. PART PERFORMANCE (S. 53A)

Where any person contracts to transfer—	(i) *for consideration*, (ii) any *immovable property*, (iii) *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—	(i) has, in part performance of the contract, *taken possession* of the property (or any *part* thereof), *or* (ii) being *already* in possession, continues in possession in *part performance of the contract*, and *has done* some act in *furtherance* of the contract, *and* has performed or is willing to perform his part of the contract,
then notwithstanding that —	(a) the contract though required to be registered, has *not been registered, or* (b) the instrument of transfer (if any) has *not* been *completed* in the manner prescribed by law for the time being in force, -

Discuss exhaustively the Doctrine of Part Performance. B.U. Oct. 95 June 96 Oct. 98

the *transferor* (or any person claiming under him) is *debarred* from enforcing against the transferee (and persons claiming

under him) any right in respect of such property, *other than* a right expressly provided by the terms of the contract.

The above rule does *not*, however, affect the right of a transferee for consideration who has no notice (i) of the contract, *or* (ii) of the part performance thereof.

"An act of part performance must be done in performance of the contract." Discuss.
B.U. Apr. 95
Apr. 98

HISTORY OF THE SECTION.—Before S. 53A was introduced into the Act, in an old case decided in Madras (*Kurri Veerareddi* v. *Kurri Bapireddi*, 1906 29 Mad. 336), a Full Bench of the Madras High Court had ruled that the English doctrine of part performance was *not* applicable to Indian law.

However, in a later case, the Privy Council, in 1914, in *Md. Musa* v. *Aghore Kumar Ganguli* (42 I.A.I.) *held* that the doctrine of part performance *was* applicable in India on principles of justice, equity and good conscience.

Write a short note on : Doctrine of part performance.
B.U. Apr. 97
Apr. 99

But in a subsequent decision [*Ariff* v. *Jadunath* (1928, 55 Cal. 1990)] the Privy Council, distinguishing *Md. Musa's* case, *held* that the doctrine of part performance was inconsistent with the imperative statutory provisions of the Indian Registration Act and the Transfer of Property Act (S. 54) and could not be imported in India, thus going back to the view of the Madras High Court in *Kurri Veerareddi's case.*

To remedy the situation created by this decision of the Privy Council, the 1929 Amendment Act introduced S. 53A into the Act, to incorporate the equitable doctrine of part performance in a modified form.

DOCTRINE OF PART PERFORMANCE.— Section 53A gives statutory recognition to what had hitherto been regarded as the Doctrine of Part Performance, and applied by the Indian Courts to cases where the transfer was *not* effected by a registered instrument. The general ground upon which the doctrine is based is *prevention of fraud.* It is clear that where one party has executed his part of the agreement in the confidence that the other party would do the same, it is obvious that if that latter should refuse, it would be a fraud upon the former to allow this refusal to work to his prejudice. When a transferee has, in the faith that the transfer would be completed according to law, taken possession, it would be inequitable to allow the transferor to treat the transferee as a trespasser.

At the same time, care is taken in framing Sec. 53-A that the law of registration is *not* evaded, and that the introduction of the doctrine does *not* lend to perjuries and frauds which it is the object of the doctrine to prevent.

This section merely lays down, that by reason of part performance, the transferor will not be entitled to eject the transferee; but it does *not* give any *title* to the transferee. In order that the transferee may acquire a perfect and marketable title, *execution and registration of the deed of transfer would still be necessary.* The unregistered document is received in evidence only for the purpose of proving part performance. The benefit of this section does *not* extend to oral agreements. Under the present section, the doctrine *cannot* be applied *unless* there is a *written* document evidencing the transaction with reasonable certainty.

The doctrine of part performance *cannot* also be applied to void agreements. No amount of part performance can validate a void agreement.

Its principle:—The principle on which the doctrine of part performance rests is that if a man has made a bargain with another, and allowed that other to act upon it, he will have created an equity against himself, which he cannot resist by setting up the want of a formality in the evidence of the contract out of which the equity in part arises.

REQUISITES OF THE DOCTRINE.— The defence of part performance, as embodied in S. 53-A, requires the following *four conditions* to be fulfilled :

(1) There should be a *contract* to transfer, for *consideration*, any *immovable* property by a *writing signed* by the transferor or on his benalf, from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty.

It will be noticed that a person who has entered into an oral contract *cannot*, under this section, invoke the doctrine of part performance. The agreement must be *in writing*, and signed by the person (or his agent) whom it is sought to bind. Thus, where the transferee under the contract seeks protection under S. 53-A, the contract *must be in writing*.

For this purpose, an incomplete deed of transfer, though not registered or even attested, is regarded as a contract in writing. But such a deed must have been signed by the transferor or his agent. And it is now admissible evidence as a contract under S. 49 of the Registration Act. This section says that an unregistered document affecting immovable property and required by the Registration Act, or the Transfer of Property Act to be registered, may be received as evidence of a contract in the suit for specific performance or as evidence of part performance of a contract for the purpose of S. 53-A, or as evidence of any collateral transaction not required by a registered instrument.

In a *recent case*, the Allahabad High Court has *held* that when the vendor denies having signed the Agreement, and the hand-writing expert is also of the view that the thumb-impression appearing on the Agreement is *not* that of the vendor, the doctrine of part performance will *not* apply. (*Hamida* v. *Humer*, A.I.R. 1992, All. 346)

The Orissa High Court has *recently held* that if parties execute an unregistered sale deed without prior permission of the competent authority, the transaction is *void*, and the benefit of S. 53-A *cannot* be claimed. (*Sadhu Meher* v. *Rajkumar Patel*, A.I.R. 1994 Orr. 26)

(2) The transferee should, in *part performance* of the contract, have taken possession of the property or any part thereof, — or, if already in possession, should have continued in possession in part performance of the contract, *and* should have done some act in furtherance of the contract.

It is of the essence of the section that the transferee must be in possession of the property in dispute. His possession under a contract or an incomplete deed of transfer alone would induce the transferor to file a suit for ejectment against him, treating him a trespasser—a right

which would *not* be within the terms of the contract. And therefore, if at all, the transferee does *not* succeed in procuring a regular conveyance from the transferor, or if his right for specific performance is time-barred, he must stick to the possession of the property, and repel all illegal attempts of the transferor to eject him.

Further, such possession must be referable only to the contract which is pleaded, and to nothing else. And the contract, in turn, must be such that its terms can be ascertained with reasonable certainty. If, however, the transferee is in possession when the contract is entered into, some further act in pursuance of the contract is necessary, as for instance, payment of an increased rent under the terms of the new agreement.

(3) The transferee should have *performed*, or should be willing to perform, *his* part of the contract.

No equities can arise in favour of a party who is not willing to perform his part of the contract. A prospective vendee who has taken possession *cannot* resist dispossession if he is not willing to pay the price agreed upon. In considering whether a person is willing to perform his part of the contract, the sequence in which the obligations under a contract are to be performed must be taken into account. If, therefore, under the terms of the contract, the obligations of the parties have to be performed in a certain sequence, one of the parties to the contract cannot require compliance with the obligations by the other party without in the first instance performing his part of the contract which in the sequence of obligations is to be performed by him earlier. (*Nathu Lal* v. *Phool Chand*, A.I.R. 1970 SC 546)

(4) The rights of any other subsequent *transferee for consideration without notice* should not be affected.

If all the above conditions co-exist, in spite of the fact that—

(i) the contract though required to be registered, has not been registered; *or*

(ii) the instrument of transfer has not been completed in the matter prescribed therefor by law, *e.g.*, where it is not *attested* or *registered*, though required to be attested and registered.—

the transferor (or any person claiming under him) will be debarred from claiming any relief, in respect of the property as against the transferee which is inconsistent with the terms of the contract.

EXCEPTION.—As seen above, an exception is made in the case of a transferee for consideration, who has no notice of the contract or its part performance. It is to be noted, however, that ordinarily, possession will constitute notice of the title of the person in possession.

The doctrine of part performance *cannot* defeat the right of a *transferee for value and without notice* of the previous contract or of its part performance. Under S. 40, such a transferee would acquire a good title to the property, and the previous transferee holding possession under his contract must deliver possession to him. In other words, a person

claiming the benefit of S. 53-A is protected from ejection by the transferor or any person claiming under him, but *not* from dispossession by a *bona fide* transferee for value from the transferor. The doctrine can, however, be availed of against a gratuitous transferee and also a transferee for value if he has notice of the contract or of its part performance.

BASIS OF THE DOCTRINE.—S. 53-A is based on the following *three maxims of equity* :

(1) He who seeks equity must do equity.

(2) Equity treats that as done which ought to have been done.

(3) Equity looks to the intent rather than to the form.

In the leading English case, *Walsh* v. *Lonsdale* (1882 21 Ch. D. 9), *L* agreed in writing to grant a seven years' lease of a mill to *W* at a rent payable quarterly in arrear, but with a year's rent payable in advance, if demanded. *W* entered into possession without any lease-deed having been executed, and paid his rent quarterly. Subsequently, *L* demanded a year's rent in advance, and on *W* refusing to pay, put in a distress. *W* claimed an injunction and damages for illegal distress, on the ground that, at law, he was tenant from year to year at rent not payable in advance, and that the legal remedy of distress was therefore not open to *L*. The Court *held* in favour of *L*, and observed that a tenant who had entered on the land and enjoyed the benefits of the lease would be prevented by equity from taking advantage of the absence of a deed to repudiate the covenants of the lease.

The *difference* between the *English* equitable doctrine of part performance and the provisions of Indian law section 53-A :

(1) *Under English Law,* as equity treats that as done which ought to have been done, even an *oral agreement* is sufficient to attract the application of the doctrine.

This rule is known as the equity in *Walsh* v. *Lonsdale:* but *in India,* it is specifically provided that the agreement must be contained in a *written document.*

(2) *Under English Law,* the doctrine can be used both by the plaintiff and the defendant. If a person has been dispossessed of the property in question, he can base his action on the strength of the doctrine.

But *in India,* it is only the defendant who can plead the provisions of Section 53-A. It is said that the equity of part performance in India is *a negative equity,* but not a positive equity. *It can be used as a shield, but not as a sword.* The equity of part performance is *negative,* because it gives only a right of possession, which has already been obtained. It does not give any other right, *e.g.,* to sue the other party. By virtue of S. 53-A, the defendant, if already in possession, may hold on to the possession.

In one surprising decision of the Bombay High Court, *Sulleman* v. *Patel* (35 B.L.R. 722), this section was allowed to be used as a ground of attack, and the important legal principle on which the section is based was apparently overlooked. It is submitted that such a decision fails to realize the limited scope of S. 53-A.

To the rule that an unregistered written agreement *cannot* be used by a plaintiff, there are *two exceptions* :

(a) If a person has been evicted, but such eviction is *not* in due course of law, then under Section 6 of the Specific Relief Act, the evicted person can claim possession of the property.

(b) The written agreement can be the basis of a suit for the specific performance of the contract.

4

SALE OF IMMOVABLE PROPERTY
(Ss. 54-57)

"Sale" defined (S. 54)

"Sale" is *a transfer of ownership* in exchange for a *price* paid or promised, or part-paid and part-promised.

ESSENTIALS OF A VALID SALE.—The following are the *eight essentials* of a valid sale :

1. The seller must be a person competent to transfer : see S. 7.
2. The buyer must be a person competent to be a transferee. He may be any person who is not disqualified to be a transferee under S. 6.
3. The subject-matter must be transferable immovable property : see S. 6.
4. There must be a transfer of ownership.
5. The transfer must be in exchange for a price.
6. The price must be paid or promised, or partly paid and party promised.
7. There must be a registered conveyance in the case of—
   (i) tangible immovable property of the value of Rs. 100 and upwards; or
   (ii) a reversion of an intangible thing of *any* value.
8. In the case of tangible immovable property of a value less than Rs. 100, there must *either* be—
   (i) a registered conveyance, *or*
   (ii) delivery of property.

Sale how effected (S. 54)

1. In case of—
   (i) tangible *immovable* property of the value of Rs. 100 and upwards, *or*
   (ii) a reversion, *or*
   (iii) any other intangible thing :

   ] a sale can be made only by a *registered instrument.*

Define "sale". Explain the modes of transfer by sale.
B.U. Nov. 95
Oct. 99

2. In case of tangible immovable property of a value less than of Rs. 100: a sale can be made (i) by a registered instrument, *or* (ii) delivery of the property.

Delivery of tangible immovable property takes place when the seller places the buyer, (or some other person as the buyer directs) in *possession* of the property.

"Contract for sale" defined (S. 54)

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.

Distinguish between : Sale and agreement to sell.
B.U. Apr. 95

DIFFERENCE BETWEEN INDIAN AND ENGLISH LAW.—The English law as to a contract for sale is quite different from that in India. *Under the English law*, the purchaser, by virtue of the contract for sale, becomes, in equity, the owner of the property from the date of the contract. (*Walsh* v. *Lonsdale*, 21 Ch. D. 9). But, under the Transfer of Property Act, a contract for sale does *not*, of itself, create any interest in, or charge upon, the property. *In India*, under such a contract, the intending purchaser acquires no interest in the property: he has only the right to get a conveyance in the terms of the contract; the vendor's ownership over the property remains unaffected.

As seen above, *in India*, a contract for the sale does *not*, of itself, create any interest in, or charge on, such property and the title in the property passes only upon the delivery of possession or registration of the document. The *result* is that in case of accidental loss of the property, the buyer is *not* affected. The case is different *under the English law*, where the buyer is the equitable owner of the property from the date of the contract. Hence, he is liable to pay the consideration money, although before the execution of the conveyance, the property is accidentally destroyed.

Define 'sale' of immovable property. How is sale effected ? What is a contract for sale ? Discuss the essentials of a valid sale.
P.U. Apr. 96

DIFFERENCE BETWEEN *SALE* AND *CONTRACT FOR SALE* :

1. A sale of immovable property is a *transfer of ownership*. A contract for the sale of immovable property is *a mere agreement* that a sale of such property is to take place in the future on *terms settled* between the parties. It does not, of *itself*, create any interest in or charge on such property. Even after the contract for sale, the ownership remains in the vendor.

2. *Passing of property*—A sale passes an *absolute* interest in the property to the purchaser; that is, it conveys a *legal* title to the purchaser.	A contract for sale does not, of itself, create any interest in, or charge upon, the property, in favour of the buyer. It does *not* convey any *title* to the purchaser

3. A sale creates a right *in rem*.	A contract for sale creates a right *in personam*, *i.e.*, *only the promisee* can compel the promisor (as well as a subsequent purchaser *with notice*) to execute the promised conveyance.
4. *Registration*—A sale must be evidenced by a registered instrument in case of— (i) tangible immovable property of the value of Rs. 100 or more; (ii) a reversion; and (iii) any intangible thing.	A contract for sale need not be registered at all (Explanation to S. 17, Indian Registration Act)

RIGHTS AND LIABILITIES OF BUYER AND SELLER (S. 55)

The rights and liabilities of the parties to a sale can be discussed under the following heads :

I. Buyer's rights :
   (a) Before completion of sale.
   (b) After completion of sale.

II. Buyer's liabilities :
   (a) Before completion of sale.
   (b) After completion of sale.

III. Seller's rights :
   (a) Before completion of sale.
   (b) After completion of sale.

IV. Seller's liabilities :
   (a) Before completion of sale.
   (b) After completion of sale.

I.—BUYER'S RIGHTS [S. 55(6)]

(a) *Before* completion of sale, *i.e.*, where ownership has *not* passed to him [S. 55(6)(b)]

The buyer (*unless* he has improperly declined to accept delivery of the property) is entitled to—

1. *A charge* on the property for the purchase-money properly paid by him in anticipation of the delivery.

2. *Interest* on such purchase-money.

3. The earnest, and costs awarded to him in a suit to compel specific performance of the contract or to obtain a decree for its rescission—in case he *properly* declines to accept delivery.

The following points may be noted in connection with the buyer's rights under a contract for sale :

(i) If he has already paid the purchase-money, he can acquire a charge on the property.

(ii) If he has obtained *possession* of the property agreed to be sold, his possession will, under S. 3, operate as 'notice' to all subsequent transferees of the property, who will be bound by it.

(iii) He may enforce execution of the agreement to sell.

(iv) In case of a breach of contract, he can bring a suit for specific performance against the seller.

(v) If he succeeds in showing that by a re-sale of the property, he would have made a fair profit, he will be entitled to such profit.

(b) *After* completion of sale, *i.e.*, where ownership has passed to him [S. 55(5)(a)]

The buyer is entitled to—

(i) the benefits of any improvement in, or increase in value of, the property, *and*

(ii) the rents and profits thereof.

II.—BUYER'S LIABILITIES [S. 55(5)]

Discuss the rights and liabilities of the buyer of immovable property.

B.U. Oct. 97

(a) *Before* completion of sale [S. 55(5)(a) & (b)]

The buyer is bound—

1. 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. (An omission to make such disclosures amounts to *fraud*.)
2. To *pay* or *tender* the *purchase-money* to the seller or such person as he directs. 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 pay the amount so retained to the person entitled thereto.

(b) *After* completion [S. 55(5)(c) & (d)]

The buyer is bound—

1. To bear any loss (*not* caused by *seller*) arising from destruction, injury, or decrease in the value of the property.
2. To *pay public charges* and rents 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.

III.—SELLER'S RIGHTS [S. 55(4)]

(a) *Before* completion of sale [S. 55(4)(a)]

Define "sale". Discuss the right; and liabilities of the seller under a contract of sale of immovable property. B.U. Apr 99

The seller is entitled to rents and profits till ownership passes to buyer.

(b) *After* completion of sale [S. 55(4)(b)]

The seller is entitled to a charge upon the property in the hands of (i) the buyer, *or* (ii) any transferee without consideration, *or* (iii) any transferee with notice of non-payment, for the amount of the unpaid purchase-money.

The seller is entitled to such charge, only when the whole or part of the purchase-money is unpaid, and the ownership of the property has passed to the buyer.

IV.—SELLER'S LIABILITIES [S. 55(1), (2) & (3)]

(a) *Before* completion of sale [S. 55(1)(a) to (g)]

The seller is *bound*—

1. To disclose to the buyer any material defect in (i) the *property* or (ii) 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. (An omission to make such disclosures amounts to fraud.)
2. 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.
3. To answer, to the best of his information, all relevant questions put to him by the buyer with respect to the (i) *property* or (ii) the *title* thereto.
4. On payment or tender 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.
5. 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, as a man of ordinary prudence would take.

6. To pay all public charges and rent accrued due in respect of the property upto 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 when existing.

(b) ***After* completion [S. 55(1)(f), S. 55(1), (2) & (3)]**

1. The seller is bound to give to the buyer, or to such person as he directs, such possession of the property as its nature admits.
2. 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.
   (a) Where the seller retains any *part* of the property comprised in such documents, he is entitled to retain all the documents.
   (b) Where the *whole* of such property is sold to *different* buyers, the buyer of the lot of the *greatest* value is entitled to such documents.

The seller, or such buyer of the lot of the greatest value, (as the case may be) is bound, upon the buyer's request, to produce the said documents, and furnish true copies thereof, and in the meantime, the seller or the buyer of the greatest value, as the case may be, must keep the said documents *safe, uncancelled* and *undefaced,* unless prevented from so doing by fire or other inevitable *accident.*

3. *Covenant for title.*—The seller is 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.

When the sale is made by a person in a fiduciary character, he is further 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 is *annexed to,* and *goes with, the interest of the transferee as such,* and may be enforced by *every person in whom that interest is vested.*

COVENANT FOR TITLE.—The above clause lays down an important *rule of presumption* for the benefit of all purchasers of immovable property. It says that in every coveyance, the seller is to be deemed to contract

with the buyer that the interest which he professes to transfer to the buyer subsists, and that he has the power to transfer the same. The guarantee which is thus implied in law is absolute and unconditional, and the breach of this guarantee at any time after the conveyance would fix the seller with a liability in damages to the buyer and his transferees.

This implied covenant for title applies to any lawful eviction by a paramount title and imports an absolute warranty of the title professed to be transferred and of the seller's power to deal with it. It, therefore, supersedes the strict rule of English law by which the doctrine of *caveat emptor* applies after the buyer has accepted the conveyance.

MARKETABLE TITLE BY SELLER.—A seller is bound to give a *marketable title;* therefore, a sale conveys with it a *warranty of title* on the part of the seller, and if the warranty is broken, the buyer is entitled to *compensation* from the seller for the loss caused by the breach of this *implied* warranty.

It may also be noted that the covenant for title referred to above is a covenant which is annexed to, and which goes with, the interest of the transferee as such. *It is a covenant running with the land.* Therefore, every person in whom the interest is vested can benefit under this covenant.

Thus, in *Rogers* v. *Hosegood*, (1900 2 Ch. 388), the purchaser of a plot of land covenanted *not* to erect more than one dwelling house on the plot, and further that such a dwelling house would be used for private residence only. The Court *held* that such a covenant runs with the land, and can, therefore, be enforced by an assignee of the covenantee.

The right of action arises on the execution of the conveyance, and *not* on discovery of the defect of title; it is lost to the purchaser by (i) fraud, (ii) notice, (iii) waiver, or (iv) an express contract to the contrary.

Such implied covenant may be excluded either by a *contract to the contrary, i.e.*, by a special covenant for title, *or* by proof that the buyer, having knowledge of the facts, was content to take such title as the seller might in fact have, in which case the buyer obviously could not complain if it turned out that there was no title.

If the vendor is found to have no title at all,—the buyer can repudiate the contract and is entitled to a refund of the purchase-money. *If the vendor has a title, but it is defective*.—the buyer can claim damages.

PROBLEMS.—1. *A* sells an enclosed field to *B*. Before accepting the conveyance, *B* discovers that the public have a right of way across the field, of which there is no visible indication on the land. What are the rights of *B*?

Ans.—Here, there is a defect both in the *property and* in the seller's *title*. As *A* had *not* disclosed this defect, *B* can refuse to complete the sale and also claim damages. If *A* files a suit for specific performance, *B* can also successfully resist such a suit.

2. *A* sells property to *B*. After accepting the conveyance, *B* discovers that, under a decree for partition, a portion of the property had been allotted to *C*. What are the rights of B ?

Ans.—As *A* had failed to disclose, the conveyance is fraudulent, and *B* can file a suit to set aside the conveyance. (*Gajapathi v. Alagia*, 1886 9 Mad. 89)

Marshalling by subsequent purchaser (S. 56)

If the owner of two or more properties | mortgages them to one person, and then *sells* one or more of the properties to another,

the buyer is, *in absence of a contract to the contrary,* entitled to have the mortgage-debt satisfied out of property or properties *not* sold to him, so far as the same will extend.

However, this *cannot* be done so as to prejudice the rights of— | (a) the mortgagee, *or*
(b) persons claiming under him, *or*
(c) any other person who has acquired any interest in any of the properties for consideration.

Sec. 56 of the Transfer of Property Act contains the *doctrine of marshalling* as applied to a subsequent *purchaser.* Similarly, Sec. 81 deals with the rule of marshalling as applied to the subsequent *mortgagees.*

The rule laid down by this section may be made clear by an illustration. Suppose *A* is the owner of two properties *X* and *Y,* both of which are mortgaged to *C. B* purchases the property *X.* He will be entitled to insist that his vendor *A* should satisfy his mortgage-debt out of the property *Y* (which is still unsold) in the first instance, as far as possible. If after the property *Y* is exhausted, and there still remains any balance of debt unsatisfied, then and then only, the property *X* will be drawn upon. This section does not absolutely relieve property *X,* but only *postpones* it to the other property *Y* in the hands of the vendor-mortgagor.

It may be noted that the question of notice is *not* at all material for claiming the benefit of this rule. It may be availed of by the purchaser. *whether or not he has notice* of the fact that the property is subject to a mortgage.

The subsequent purchaser can claim the right of marshalling *only if* the interest of the prior mortgagee or persons claiming under him or any other person who has for consideration acquired interest in any of the properties, is not affected thereby.

But *the parties may contract to the contrary,* and agree that the purchaser should *not* claim the benefit of this section. For instance, in one case, one of the two properties subject to a mortgage was sold. It was agreed in the sale deed, and in a separate agreement which was executed by the vendee, that in case it was necessary to pay to the mortgagee more than what the vendor left with the vendee, the vendor would provide the balance, and in case of failure, the same could be recovered from him personally, with interest and costs. It was *held* that the stipulation in the sale deed as to the vendor's personal liability was a contract to the contrary, and excluded the statutory charge provided by S. 56 on the other property. (*Prithiraj* v. *Rukmin,* (1926) 24 A.L.J. 527)

Discharge of encumbrances on sale (S. 57)

(a) Where immovable property, subject to any encumbrance, is sold by the Court, or in execution of a decree, or out of Court, the Court may, on the application of any party to the sale, direct or allow payment into Court :

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

In either case, such additional amount as the Court considers sufficient to meet the contingency of further costs, expenses and interest, and any other contingency, must also be paid into the Court.

(b) Thereupon, the Court may, if it thinks fit, and after notice to the encumbrancer,—	declare the property to be freed from the encumbrance, and make any order for conveyance, or vesting order, for giving effect to the sale.

(c) After notice is 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 person entitled to receive or give discharge for the same, and generally may give directions respecting the application or distribution of the capital in income thereof.

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

This section prescribes the procedure for discharging an encumbrance on a property which is sold free from an encumbrance. The power which is given to the Court under this section is intended to facilitate the alienation of encumbered estates by relieving the land from the encumbrance and substituting for the land another form of security.

It will be seen that this rule has been enacted to facilitate the realisation of fair value of encumbered estates.