

Chapter III

Of Sales of Immovable Property

Amended
02.03.2012

54. "Sale" defined—"Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Sale how made—¹Such transfer, in the case of tangible immovable property of the value of one hundred ²[Taka] and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

¹In the case of tangible immovable property, of a value less than one hundred ²[Taka] such transfer may be made either by a registered instrument or by delivery of the property.

Omitted

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

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

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

1. As to limitation to the territorial operation of paragraphs 2 and 3 of section 54, see section 1, supra. These paragraphs extend to every cantonment in the Provinces, etc see section 287 of the Cantonments Act, 1924 (II of 1924.)
2. Substituted by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act VIII of 1973), section 3 and 2nd Schedule for "Rs" (with effect from the 26th March 1971).

Case Law

Section 54—Sale—Transfer of land must be for money—Transfer of land for land is not sale.

According to Section 54 of the Transfer of Property Act, sale is a transfer of ownership in exchange for a price, not in exchange for land, and there is abundant authority for the view that price in this context means money not anything else. *Umar Din vs Fazal Din* PLD 1952 Lah 166-PLR 1952 Lah 196.

Sale of property worth more than Rs 100—Not sale for purpose of pre-emption.

Section 54 of the Transfer of Property Act, 1882, enjoins that sale of any immovable property worth more than Rs 100 can be effected only by a registered deed and so in a place where the provision of section 54 of the Act is in force, sale of immovable property worth more than Rs 100 not complying with the provision of the section is not a sale for purposes of suit for pre-emption. *Jangi vs Jhanda* PLD 1961 Baghdad-ul-Jadid 34.

Registration not enough to pass title—Where there is neither possession of the property alleged to have been sold, nor any proof of the payment of consideration mere registration of the sale-deed does not operate to pass title to the vendee. 7 DLR (WP) 62.

It cannot be laid down as a general rule that mere registration of an instrument without reference to other circumstances operates to transfer the property. 7 DLR 443.

Where a deed of sale collectively created to defeat the title of the defendant by antedating the same to a date prior to the date of the execution and registration of the

defendant's document, it cannot be said that mere registration has the effect of transferring title. (*Ibid*)

—Although under section 54 of the Transfer of Property Act a condition of repurchase does not create an interest or charge on the immovable property concerned, it is a benefit annexed to the ownership of land, and unless the contract is induced by considerations which are personal to the vendor, it is assignable. If it appears that the option is given as a matter of grace or favour it will be restricted to the vendor personally and will not be assignable but if it is not induced by any such consideration but in fact a part of the bargain the beneficial interest created by the contract is assignable. 1 PLR (Dac) 349.

—According to this section sale is a transfer of ownership in exchange for a price not in exchange for land, and there is abundant authority for the view that "price" in this context means "money," not anything else. (1952) PLR (Lah) 196.

Conveyance and contract of sale—Statements in a document which convert it into a sale-deed and not a contract of sale. 12 DLR 466.

—If a vendor can convey a property without an instrument of sale deed he can do it and can escape payment of stamp duty. *Ibid*

—An agreement for re-conveyance of land is not a right in property. 12 DLR 849.

—A sale may be complete even if the ingredients of section 54 not complied with. The mere failure of the parties to comply with the requirements of section 54 of the Transfer of Property Act as to the manner in which the

transfer should be made cannot alter the nature of the transaction intended to be entered into between the vendor and the vendee or affect the pre-emptor's right in respect of it.

If the transaction amounts to a sale in fact then notwithstanding that it is not in the form prescribed by section 54 of the Transfer of Property Act the right of pre-emption will come into operation. *Abdul Karim vs Fazal Muhammad Shah* 19 DLR (SC) 477.

—Agreement for sale of land binds the purchaser at Court sale with notice. The agreement for sale would bind the purchaser at a Court sale if he had notice of the agreement. *Mohiuddin Mollah vs Province of East Pak* 14 DLR (SC) 112.

—Right of reconveyance, a transferable right—A right to reconveyance cannot but be assignable, unless the terms of the contract manifest an intention to restrict the right to the transferor personally. *Shaukat Ali vs Shamsun Bibi* 27 DLR (AD) 59.

—Subsequent registration of Kabalas without payment of consideration money for curing defects of earlier lease deeds cannot be called sale-deeds and, as such, pass no title.

The plaintiff took bandabasta of the suit property by registered lease deeds. But finding the lease deeds legally defective the lessors subsequently transferred their interest in the property by registered Kabalas in favour of the plaintiff.

Held: The Kabalas cannot be called sale deeds and they pass no title. *Makbul Ahmed Contractor vs Md Idris*, 21 DLR 511.

—'Sale' explained.

Sale means a transfer for a fixed or ascertained price and it takes effect in the year in which the price is so fixed for till then there is no sale and the asset, unless destroyed, demolished or discarded, continues to be deemed to be in the use of the assessee. *M/s Chittagong Engineering & Electric Supply Co Ltd vs Income Tax Officer*, 22 DLR (SC) 443.

Section 54—A contract of re-conveyance of a property does not create any interest to the property—Rule against perpetuity has no application to an agreement when such agreement does not create any interest in the land. *Abdul Quddus vs Anjuman Khatoon* 36 DLR 312.

—Mere execution and registration of a sale-deed *ipso facto* does not pass title to the purchaser. Intention is consideration paramount and it can be inferred from circumstances. *Mahar Ali Matbar vs Daliluddin Chowkidar*. 31 DLR 392.

Section 54—Right of reconveyance, a transferable right.

A right to reconveyance cannot but be assignable, unless the terms of the contract manifest an intention to restrict the right to the transferor personally. *Saukat Ali vs Shamsun Bibi* 27 DLR (AD) 59.

Section 54—Trial Court approached erroneously the question of ownership of the suit property relying on some exhibits which never created title in defendant No. 4 company being absolutely oblivious of the mandatory provision of section 54 of the Transfer of Property Act and section 17(1)(B)

of the Registration Act which rendered the impugned judgment and decree illegal as a whole. *Government of Bangladesh & others vs Paper Converting & Packaging Ltd & others* 6 BLC 467

Section 54—This section is not applicable to a lease in respect of agricultural land. *Haji Md Mostafa & others vs Md Mumtazul Haque & others* 4 BSCR 267.

Section 54—Lease created on the basis of a compromise decree is compulsorily registrable after 1-4-1930—compromise decree passed prior to 1-4-1930—Land outside the suit was included therein—decree was acted upon by the parties and rent was paid in terms of compromise decree to the landlord—even if the compromise decree is inadmissible in evidence due to absence of registration it can be used for collateral purpose as provided in the proviso to section 49 of the Registration Act. *Haji Md Mostafa & others vs Md Mumtazul Haque & others* 4 BSCR 267.

Section 54—Agreement to sell—Dispute relating to identify of property agreed to be sold—Plaintiff in his suit claimed return of earnest money, declaration to the effect that agreement between parties had become inoperative and of no legal effect and also decree for payment of damages—Plaintiff in his application in terms of Order XXXIX, rule 10, CPC also claimed that pending decision of suit defendant be directed to deposit earnest money in Court—Trial Court directed that amount of earnest money be deposited by defendant in Court—Validity—In presence of admitted material on record, no *prima facie* case was made out for seeking

indulgence to gain interim relief—Provisions of Order XXXIX, rule 10, CPC were not at all attracted for neither defendant was holding money in question as trust nor he admitted to be holding such money in trust—Admitted position was that money paid was earnest money for purchase of house while terms of agreement gave right for forfeiture of earnest money and rescission of contract by vendor in case, buyer failed to perform obligations in terms of agreement—In absence of any material, supporting *prima facie* allegations made in plaint, defendant could not be directed to return earnest money or deposit the same in Court which otherwise defendant could insist to have been forfeited—Order of trial Court for deposit of amount in question, at initial stage of case would tantamount to grant decree in anticipation which was not permissible in law—Order of trial Court directing deposit of earnest money was set aside—Defendant, however, would furnish security in trial Court to the effect that if suit was decreed, he would pay decretal amount along with profit. *Fariha Aziz vs Ali Zafar* 1997 CLC 1965.

Section 54—Non-payment of price of sold land and non-delivery of possession of subject-matter of sale—Effect—Payment of price of sold land or its delivery was not necessarily *sine qua non* for transfer of title from seller to purchaser—Title from seller to purchaser would pass on execution/registration of sale-deed, although purchase money might be wholly or partly unpaid; subject however, to exception where parties to agreement prove that sale would take place only when purchase money was first paid. *Shahid Nasim vs Imtiaz Khatoon* PLD 1997 Lah 243.

Section 54—Transfer of property though affidavit—If affidavit purporting transfer of property was taken as agreement for sale, same was also not compulsorily registrable either under section 54 of Transfer of Property Act, 1882 or section 17 of Registration Act, 1908—Affidavit had to be executed on a stamp paper worth four rupees under Item No. 4 of Sched. 1 of Stamp Act, 1899 and should be duly stamped and same would be admissible under section 35 of Stamp Act, 1899. *Muhammad Bashir vs Muhammad Siddique* 1997 MLD 3263.

Section 54—Sale of immovable property amounting to more than rupees one hundred—Registration—Document which was compulsorily registrable was not registered—Effect—Transfer of immovable property amounting to more than rupees one hundred can only be made by registered sale-deed under section 54, Transfer of Property Act, 1882—Document which was compulsorily registrable, if not registered, would not be read as evidence of any transaction under section 49, Registration Act, 1908, nor would such document affect any immovable property or confer any right under transferee thereof—Instrument chargeable with duty could not be admitted in evidence unless same was duly stamped. *Muhammad Bashir vs Muhammad Siddique* 1997 CLC 466.

Section 54—Registration Act (XVI of 1908), Sections 17 & 49—Transfer of property—Non-registration of document compulsorily registrable Effect—Transfer of immovable property amounting to more than rupees one hundred could only be made by a registered sale-deed under section 54,

Transfer of Property Act, 1882 and sale-deed/document would be compulsorily registrable under section 17 of Registration Act, 1908—Document compulsorily registrable, if not registered, same could not be read in evidence of any transaction under section 49 of Registration Act, 1908 nor it would affect any immovable property or confer any right upon the transferee thereof—Instrument chargeable with duty also could not be admitted in evidence unless it was duly stamped. *Muhammad Bashir vs Muhammad Siddique* 1997 MLD 3263.

Section 54—Mere agreement to sell would not confer any right, title or ownership inasmuch as any transaction of sale in respect of immovable property worth Taka 100 or upward was required to be compulsorily registered—Suit on basis of title, therefore, was not maintainable, *Gulshan vs Ameer Ali* PLD 1997 Kar. 292.

Section 54—Two sale-deeds, one in favour of plaintiff and other in favour of defendant executed and registered on same day relating to property in question—Order of precedence—Notwithstanding the fact that serial number of deed produced by defendant was earlier to deed produced by plaintiff, both having been registered on the same day, could not be considered to have any preference over each other for executor of both deeds was same and he was the person who produced both deeds for registration—Which deed was on top and which was underneath and why so, having not been specifically stated, Court refused to give preference to deed bearing serial number earlier (i.e. 524) than the deed bearing later number (525). *Sher Muhammad vs*

Muhammad Hassan Siddique 1997 MLD 778.

Section 54—Suit for possession on basis of title through purchase—Dismissal of suit by trial Court—Appellate Court decreed plaintiff's suit—Validity—Property in question, being joint, plaintiff's admission clearly indicated that he had never sold any specific area—Perusal of sale-deed showed that plaintiff had purchased land out of joint property owned by vendor and his brothers and sisters and that he had not sold any specific area exclusively in possession of vendor—Recital of sale-deed stood confirmed from statement of Patwari that specific Khasra number wherein land purchased by plaintiff was situated had not so far been partitioned—Plaintiff having purchased land owned jointly by vendor, his brothers and sisters, he could not file suit for possession unless and until getting the area purchased by him demarcated from a Court of competent jurisdiction and having determined as to in whose possession the same was lying—Judgment and decree of trial Court dismissing plaintiff's suit for possession was restored while that of Appellate Court decreeing suit was set aside in circumstances. *Rauniq Ali vs Muhammad Mansoor Butt 1998 CLC 2030.*

Section 54—Mode of devolution of proprietary rights—Contract/agreement for sale of immovable property in terms of section 54, Transfer of Property Act, 1882, was such agreement where sale of property would take place on terms and conditions settled between parties and such agreement would not by itself devolve proprietary rights on promisee—Sale of land was, thus, contingent upon grant of such rights. *PLD 1998 Pesh 52.*

Section 54—Pardanashin lady—Transaction of sale executed on behalf of Pardanashin illiterate lady by person claiming to be her attorney—Validity—Admitted facts established on record were that plaintiff was illiterate Pardanashin lady; that contents of power of attorney were not read out to her at the time of attestation and no independent advice was available to her; there was no evidence that sale proceeds were received by her and; general attorney was a total stranger—Burden of proof in respect of document purported to have been executed by Pardanashin lady affecting her right or interest under the document concerned—Such person must establish affirmatively that transaction in question was substantially understood by such lady and it was really her free and intelligent act—If affected lady was illiterate, document in question must have been read over to her—Courts below in the face of proved facts, acted illegally in non-suiting plaintiff—Courts below had also failed to draw necessary adverse inference against defendants due to non-production of Sub-Registrar as witness—Only presumption that could have been drawn was that had such witness been produced, he would have not supported defendants on question of reading out contents of document in question and making plaintiff understand the same—Besides, no reason was forthcoming as to why plaintiff in presence of her husband, would have granted general power of attorney in favour of total stranger—Judgment of Courts below being not sustainable set aside in circumstances. *Muhammad Sadiq vs Allah Ditta 1998 CLC 323.*

Section 54—Suit for possession—Factum of sale—Proof—Mutation of sale had

proved sale transaction by plaintiff to vendee (defendant)—Defendant in his statement before Court had stated that he had purchased land in question through registered sale-deed for consideration and that possession had also been delivered to him as result of such sale—Entries in Revenue Record showed that plaintiff was never in possession of land in question from the date of sale transaction—Copies of Revenue Record showed that from the time of sale transaction in 1929 till filing of suit in 1966, defendants were in possession of land in question as owners on basis of sale—Sale transaction, thus, stood proved in circumstances. *Darey Khan vs Muhammad Hussain 1998 CLC 1439.*

Section 54—Two different sale-deeds relating to same property executed by vendor in favour of plaintiffs and defendants—Trial Court dismissed plaintiff's suit which was based on earlier sale-deed—Trial Court's judgment was affirmed in appeal and in revision by the High Court—Validity—Sale-deed in favour of plaintiffs was in respect of disputed property and was executed by original owner—Defendants, admittedly, were brought as tenants in said property by father of plaintiffs—Courts below had not read evidence on record in its correct perspective and had also misread important evidence—Courts below, therefore, had legally erred in decision of case which resulted in miscarriage of justice—Evidence on record clearly proved that plaintiffs were owners of house in question, while defendants were first occupying the same as their tenants but later on denied their ownership—Judgments and decrees of all the Courts including the High Court dismissing plaintiffs' suit, were

set aside by Supreme Court and plaintiffs' suit relating to ownership of property in question was decreed in circumstances. *Sartaj Khan vs Jan Muhammad PLD 1998 SC 1502.*

Section 54—Agreement of sale—Determination of title—Agreement of sale would not confer any title unless same had been determined in favour of vendee by a Court of competent jurisdiction. *Muhammad vs Noor Ali 1999 MLD 2117.*

Section 54—Entries in "Nikahnama" showing transfer of property in lieu of dower—Non-registration of such transfer—Effect—Transfer of property in lieu of dower at the time of marriage by husband in favour of his wife, was neither sale nor the same required any registered document for completion—Entries in "Nikahnama" showing transfer of property in lieu of dower would be sufficient evidence of events and arrangements which had already been subscribed to by parties and the same being not sale did not require registration. *Wali Dad vs Tasneem Kausar 1999 CLC 163.*

Section 54—Possession—Delivery of possession—Proof—Mere recital in the sale-deed is not sufficient to prove the delivery of possession, unless same is supported by other evidence. *Nasir Ahmed vs Muhammad Abid 1999 YLR 1196.*

Section 54—Right or title based upon an agreement—Validity—Where plaintiff had sought declaration for ownership on the basis of mere an agreement, same would not confer any right or title in the immovable property. *Khadija Karim vs Zia-ur-Rehman Khanzada PLD 1999 Kar 223.*

Section 54—Sale and contract for sale—Agreement which was not registered, could, at best, be termed as contract for sale and same would not amount to sale itself—Contract for sale would not, by itself, create any interest in relation to immovable property valued at Rs. 100 and above—Creation of interest in such property was required to be effected through registered instrument. *Towakal Hussain vs Shamim Fatima Rizvi 1999 MLD 1.*

Section 54—Sale of land from joint holdings—Co-sharer in exclusive possession of specific field number, could alienate entire field provided the area of said field did not exceed his entitlement in entire joint holdings—Effect of such sale was that vendee would step into the shoes of the vendor and could retain possession subject to adjustment at time of partition of joint holdings *Ghulam Abbas vs Barkat Ali 1999 YLR 2190.*

Section 54—Suit for declaration—Sale of land by a blind man—Plaintiff had claimed that defendant, a blind man, had sold land in dispute in favour of predecessor of plaintiffs and that mutation of sale was duly approved by Revenue Authorities—Defendant, who was an issueless blind man, had denied sale of land in favour of predecessor of plaintiffs by attestation of mutation and also denied receipt of sale consideration for land—Validity—Where sale was claimed to have been effected by mutation and said mutation itself was challenged, person claiming benefit of sale had to prove transaction by independent evidence as mutation by itself would not convey any title—Defendant being a blind man, it was necessary for plaintiffs to take steps for ensuring that defendant was

associated and accompanied by some relatives who could make him understand about transaction or in whose presence one could ensure that transaction of sale was made out of free will and volition of the alleged vendor—To prove lawful and valid transaction by a blind person, stronger evidence was required that in ordinary cases of execution by a person capable of entering into any deal independently—Such evidence would be missing when defendant was not claimed to have been accompanied by any of his relatives with whom he was residing—No receipt was claimed to have been given or prepared in acknowledgment of alleged payment of huge amount of alleged sale transaction—Transaction of sale and payment of sale consideration was not proved by any independent evidence, but was based on statement of witness which was not worthy of credence because said witness was proved to be inimical towards defendant—Trial Court, in circumstances, had rightly concluded that mutation in respect of alleged sale was invalid, void *ab initio* and inoperative as against right of the defendant/alleged vendor—Even otherwise, mutation in itself, could not give any title to plaintiffs, especially when defendant had denied very existence of sale transaction. *Ghulam Shabbir vs Sikandar Shah 1999 CLC 576.*

Section 54—Suit for possession of property—Co-owner of property cannot file suit for possession without impleading all the other co-owners. *Abdul Ghani vs Abrar Hussain 1999 SCMR 348.*

Section 54—Registration Act (XVI of 1908), section 17—Oral sale, non-registration of—Plaintiff assailed sale of

agriculture land situated in rural area which was orally sold and the sale was not registered as required under the provisions of section 54 of Transfer of Property Act, 1882—Suit was decreed by trial Court but the same was dismissed by lower appellate Court on appeal by respondents—Validity—Provisions of section 54 of Transfer of Property Act, 1882, were not applicable to agriculture lands in rural areas of Punjab—Agreement only affirming oral sale of such land was not required to be registered under section 17 of Registration Act, 1908—Appeal was dismissed accordingly. *Hakim Ali vs Sultan Khan 2001 MLD 563.*

Section 54—Unregistered sale-deed like agreement to sell creates no title in property in view of clear bar provided under section 54 of Transfer of Property Act, 1882. *Muhammad Younis vs Muhammad Bibi 2001 YLR 2789.*

Section 54—Sale—Mutation, non-attestation of—Effect—Whole consideration amount was paid to the vendor and possession was also handed over to the vendee—Mutation was neither entered nor attested—Validity—Such transaction was a perfected sale and merely because the promised mutation was not entered and attested, the same did not dilute its effect as a sale. *Hakim Ali vs Sultan Khan 2001 MLD 563.*

Section 54—Sale—Registration of—Provisions of section 54 of Transfer of Property Act, 1882—Applicability—Disputed sale was made on the basis of general power of attorney execution of which was denied by the plaintiff in the suit—Neither the attorney appeared in the trial Court nor the power of attorney was

produced—Person who identified the executant at the time of execution of the power of attorney did not appear in the trial Court as witness—Appellate Court decreed the suit filed by the plaintiff—Contention of the defendant was that the provisions of section 54 of Transfer of Property Act, 1882, were not applicable to the area comprising of the former State of Bahawalpur on 23-3-1973 when the disputed mutation was sanctioned—Validity—Provisions of section 54 of Transfer of Property Act, 1882, were applicable to the area comprising of the former State of Bahawalpur—Where the sale was not effected through registered instrument the same was ineffective on the rights of the plaintiff—Appellate Court had exercised its jurisdiction legally, fairly and in a just and proper manner—High Court declined to interfere with the judgment passed by the appellate Court. *Abdul Khaliq vs Sultan 2001 YLR 2223.*

Section 54—Sale—Scope—Where entire sale consideration was paid by the vendee who was already in possession of the land, nothing was required to perfect the sale. *Hakim Ali vs Sultan Khan 2001 MLD 563.*

Section 54—Sale—When effective—Contention that sale before attestation of mutation or registration of deed could not be deemed to have any existence, was repelled on the ground that sale as defined means transfer of ownership in exchange for price paid or promised or part paid or part promised and has nothing to do with the attestation of mutation or registration of deed. *Muhammad Sobhan vs Mir Qadam Khan 2001 BLD 1716.*

Section 54—Sale of tangible immovable property—Passing of title—Valid title cannot

be passed to the buyer unless a registered sale-deed is executed. *Muhammad Ismail vs Maqbool Ahmed 2001 CLC 252.*

Section 54—Suit for specific performance of agreement—Courts below had concurred that the plaintiff had failed to prove execution of agreement of sale—Plaintiff had not produced the vendor of stamp paper nor the scribe of the said agreement in rebuttal—No reliable evidence was on record to prove that the plaintiff was inducted in possession of suit land as a tenant—Finding of the appellate Court that agreement to sell had not been proved, was unexceptionable and was upheld—No question of law and fact arose which could merit interference with judgment and decree of appellate Court—Appeal being meritless was dismissed. *Nazeer Ahmad vs Abdul Hameed Khan 2001 YLR 2145.*

Section 54—Suit for specific performance of contract—Agreement to sell—Non-production of scribe or stamp vendor—Effect—Plaintiff had neither produced the vendor of stamp paper nor the scribe of the agreement to sell and no explanation had been given for such non-production—Non-production of the scribe of the agreement to sell or the stamp vendor was fatal to the case of the plaintiff and adverse inference would also be drawn against the plaintiff for non-production of the same. *Nazeer Ahmed vs Abdul Hameed Khan 2001 YLR 2145.*

Section 54—Suit for declaration—Evidence on record was not sufficient to prove any agreement in favour of the plaintiffs and even if such agreement was proved it would not create any right or title in

favour of plaintiffs being an unregistered document in accordance with the provisions of section 54 of Transfer of Property Act, 1882—Title of the defendant was firmly established by the registered sale-deed duly executed in his favour—Both Courts below had arrived at an incorrect decision by misreading and non-reading of evidence on record and placing undue reliance upon totally inadmissible and untrustworthy evidence—Agreement to sell fell short of the standard as the same was silent about the sale price or details of the land to be sold or description of the vendor—Adverse presumption drawn against the defendant for his non-appearance was also misplaced—Facts on record had established that suit for declaration on the basis of an agreement to sell was not maintainable and the only suit which could be filed was one for specific performance of the agreement—Judgments and decrees passed by courts below were set aside by the High Court. *Allah Bakhsh vs Karam Shah 2001 YLR 2047.*

Section 54—Transfer—Agreement—Valid title—It stands proved on record that the respondent lost the land as it was found that the appellant had no valid title to transfer—Apart from the express term of the agreement Exsh P1, the appellant is bound to reimburse the respondent at least the consideration amount he received from him for the said land which he was not entitled to sell—No question of law arises in this RSA and the factual controversy has correctly been resolved by the Court below—Appeal dismissed. *Muhammad Ibrahim vs Bashir Ahmad 2001 CLR 83.*

Section 54—Transfer of property—Value of the land in question being more than

Rs 100 title could not be conveyed through an oral transaction and without a registered sale-deed. *Abdul Samad vs Muhammad Hanif* 2001 YLR 2093.

Sections 54 & 53A—Suit for declaration and permanent injunction—Maintainability—Abatement of appeal for non-impleading of legal representatives of defendant/respondent—Plaintiff/appellant had claimed ownership of land in dispute, though an oral sale for consideration in his favour alleging that entire sale price was paid to vendor who had delivered possession to him in consequence of such sale—Plaintiff/appellant had alleged that as vendor had started asserting his ownership rights in land, he filed a declaratory suit and in alternative for ownership by way of adverse possession, but said suit was dismissed by trial Court—Appellate Court decreed the suit by reversing findings of trial Court as to sale of land in dispute as well as ownership on basis of adverse possession, but appellate Court had found that in view of section 54, Transfer of Property Act, 1882, title had not passed on to plaintiff/appellant—Judgment passed by appellate Court was challenged by respondents in regular second appeal before High Court—Plaintiff/appellant who was vendee of land in dispute died during pendency of said appeal but his legal representatives having not been brought on record within prescribed period, appeal stood abated—High Court set aside abatement and disposed of appeal on merits holding that only suit for specific performance of agreement was competent, but suit for declaration filed by plaintiff/appellant was barred—Validity—Transaction of alleged sale of land in dispute in favour of

plaintiff/appellant having not been reduced into writing and signed by parties, High Court had rightly found that plaintiff/appellant could not take benefit of principle of part performance under section 53A, Transfer of Property Act, 1882—Non-impleading of predecessor-in-interest of plaintiff/appellant in appeal filed by respondents was not fatal to hearing appeal, to determine real controversy between the parties—Judgment of trial Court as well as High Court, on merits of case having been concluded by finding of fact, which were in aid of justice, same did not suffer from any legal defect—Supreme Court declined interference in circumstances. *Ghulam Rasool vs Muhammad Hussain* 1999 SCMR 2004.

Sections 54 & 55—Sale of land—Principle of "caveat emptor"—Applicability—Son of vendor of land in dispute had set up a case under principle of "caveat emptor"—Son of vendor who had stepped into shoes of his predecessor, could not avail said plea as same was opposed to all norms of fairness, equity and justice—Principle of "caveat emptor" could be used by a third person having a conflict or interest on same subject-matter with vendee, but son of vendor could not legally articulate on said plea—Principle of "caveat emptor" was not approved by Injunctions of Islam as a vendor was required to disclose defects in sale commodities to the vendee. *Said Azam Khan vs Adam Khan* PLD 1999 Pesh 75.

~~Abstract~~

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1. Scope and Applicability

No writing was necessary to validate a sale before the Act. *42 IA 1-42 C 801-28 MLJ 548(PC)*. The section is not exhaustive. *41 b 438 (FB)*. See also *23 CWN 284-47 IC 428*. The Transfer of Property Act is not in force in Marwar so that the statutory provisions of that Act embodied in section 54 as to the modes of transfer of property cannot be enforced and an oral sale can be recognised as valid. *1939 Mar LR 266(Civ)*. Provisions of the section are imperative and Courts cannot disregard them on equitable grounds. *42 MLJ 449-45 M 537; 59 IC 451 (N)*: In order to create title in immovable

property of the value of more than Rs 100 it is necessary that the registered deed should be executed. *1933 P 428*. In the case of property worth less than Rs 100 there are, according to section 54, obviously two methods of transferring title (1) registered instrument and (2) delivery of the property.

Any defect in one mode cannot obviously impair the validity of the other mode if properly carried out. If there is delivery of possession in lieu of the receipt of consideration, there is nothing more required to effectuate the sale. A superfluous unregistered sale-deed cannot invalidate the sale otherwise valid. *1941 NLJ 643*. See also *1939 Pat 218*. Sale, meaning and essentials of—Use of formal words such as "convey"—Not necessary—Deed—Intention. See *71 MLJ 488*. Although under section 47, Registration Act, once a document is registered, the effect begins to commence from the date of execution; if the document is not registered it can never have any effect in law as a sale-deed, a valid transfer is not made until the deed is registered. *40 LW 413-1934 M 637(2) 67 MLJ 380*. This definition of sale applies to Punjab. *53 PR 1916-33 IC 747 (FB)*. (But see *110 IC 243*); and also to Burma. *28 IC 264*. Section applies to Hindus and Mohammedans also. *10 ALJ 154*. See also *46 B 302; 16 A 337; 20 CWN 1048; 34 IC 210; 10 CLJ 601*.

The section applies to a conveyance by Official Receiver of an insolvent's estate *53 IC 121-46 C 887; 48 LW 959-1939 M 220; 152 IC 988-40 :W 747-67 MLJ 746*; and to a conveyance of a mortgage-debt *68 IC 752-41 MLJ 453; 69 IC 473-41 MLJ 267*. Section 54 makes a registered deed requisite by whomsoever the sale of a mortgage's right

is undertaken, except when it can clearly be shown that the sale takes place (e.g.) under Order XXI, CPC. Where no receiver in insolvency is appointed and the Court by virtue of the powers conferred on it by section 58 of the Provincial Insolvency Act sells the mortgagee interest of an insolvent firm, it does not proceed under the CPC. It is one of the administrative actions which a receiver would take, and hence the sale could only be effected by registered instrument. *1940 Rang 186.*

A transfer of property effected under a compromise decree not evidenced by a registered document cannot be treated as a sale as defined in the Act. 53 A 100. Where a document, though described as a sale-deed, is merely an agreement to divide the fruits, if any, of a contemplated litigation between the two parties of the agreement, the description of the document cannot make the transaction a sale. *132 IC 753-7 OWN 1010.* The Transfer of Property Act does not apply to pre-emption sales, so far as the formalities are concerned, *1931 N 166.* See also *139 IC 693-1932 ALJ 851-1932 A 685.* A mere contract for the sale of an immovable property which does not create an interest in such immovable property does not require registration. [*51 A 771 (PC Expl) 1933 ALJ 1584-1933 A 846.*]

2. Sale-Deed—When Complete

The executant of a sale-deed which is compulsorily registerable has no *locus penitentiae* to resile from the transaction, merely because the title under the deed is incomplete for want of registration, because such incompleteness is not a thing of which he

can take advantage. If the instrument is otherwise complete, the executant is to be regarded as having done everything that was in his power to complete the sale and to make it effective. But as regards third parties the point of time at which the transfer is to be effective is when the deed can be said to be a registered deed. *61 CLJ 360; 1938 N 253—ILR (1939) N 253.* But see *167 IC 48-1937 N 1.* An agreement of sale gives the purchase an equitable title as owner in the property concerned. But, ordinarily, this is good only against the vendor himself, and does not operate against a person who obtains a legal interest in the same property in good faith without notice of the equitable title. Consequently, where the mortgagor enters into an agreement to sell property with a third party before mortgaging the same property and the sale is completed after the mortgage, the mortgagee if he had acted in good faith and had no notice of the agreement of sale is entitled to precedence over the purchaser. *194 IC 787-1941 L 240.* Contract to sell land—Subsequent attachment of land in execution of decree against owner—Effect—Sale in pursuance of contract—Subsequent Court sale in execution—Vendee under sale in pursuance of contract—Title of. See *(1941) 2 MLJ 722.* Mortgagee—Assignment—Registration—Necessity—Mortgage to Bank—Agreement between Bank and trust as to transfer of assets—Agreement neither completed nor registered—Right of suit on mortgage-Bank, if can sue. *155 IC 743-39 CWN 834-1935 PC 108 (PC).*

3. Sale Distinguished from Lease

4 OWN 231; distinguished from exchange, *102 IC 142-1927 O 204;* sale and

mortgage distinguished; *109 IC 18-1928 M 459*. Transfer of ownership marks the difference between sale and mortgage. In the latter the property is held merely as security for the debt; in sale the full right of the vendor passes to the *purchaser*. *7 A 553*. Sale is to be distinguished from the passing of rights under a *compromise* from one person to the other, a compromise being the acknowledgment of an existing or doubtful right and not a transfer of ownership. *34 B 139*.

4. Consideration

A conditional payment of consideration is not opposed to public policy, *37 A 631-30 IC 512; 51 IC 24; 66 IC 622*. Third parties cannot question adequacy of consideration. *20 IC 952-25 MLJ 248; 110 PLR 1912-15 IC 192*. Portion of consideration alone found good, effect of, *114 IC 192-26 ALJ 539-1928 A 391*. Inadequate consideration does not render a sale fictitious; *21 OC 97-46 IC 330*. See also *26 ALJ 539-1928 A 391; 76 IC 635-1924 N 124*; nor the fact that the consideration is not ascertained, but only capable of being ascertained. *66 IC 622-8 O LJ 346; 55 C 285*; nor mere non-payment of price. *46 IC 382-16 ALJ 454; 36 M 8-21 MLJ 800-10 IC 546; copy of Koran* is good consideration for transfer of immovable property in the nature of *hiba-bil-ewaz* *13 CWN 160-4 IC 466*. Gift in lieu of dower, whether sale or gift, see *34 PLR 1915-27 IC 562; 14 OC 214-11 IC 928; 87 IC 176-1925 O 407*. Sale, the consideration for which is the getting of another document registered, is valid *49 A 680-100 IC 1029-1927 A 422*. Failure of sale-deed for want of consideration will not make the transfer good as a gift, *45 IC 330*. See also *4 IC 389(A)*. Burden of

proof of want of consideration is on the party who alleges it when the document recites receipt of payment of consideration *925 N 15*. As to the effect of payment of consideration, see *11 Bom LR 383-2 IC 429; 11 A 244, 30 A 125; 18 M 61, 23 B 525; 22 B 176; 7 IC 568*. Suit for possession by vendee who has not paid consideration—Nature of decree to be passed *1929 A 85*. See also *38 MLJ 467*. Where a cash payment is to be made at the time of registration of a sale deed, the common practice in India is for the vendee, on payment, to present the deed for registration and get the registration receipt. *61 IA 115-13 P 242-1934 PC 68-66 MLJ 255 (PC)*.

5. Price

(See also "consideration", *supra*). Meaning of: *2 Luck 575*. Price need not be ascertained in the first instance *55 C 285-104 IC 527; 66 IC 622; 30 C 921*. Price consists of money; where the thing given in exchange consists of money; where the thing given in exchange consists of anything else, it is not a sale *102 IC 142-1927 O 204; 9 M 141; 11 M 459; 25 B 696; 45 M 612 at p 617; 2 Luck, 575*. Service, past or present, is not price *34 B 287-12 Bom LR 9; 2 L 199 at p 202*; so also forbearance to take certain legal proceedings *54 M 163-60 MLJ 56*, following *45 M 612 (FB)*. If the thing given in consideration of the sale of land is other land or house it is not sale, but *exchange* *9 M 141; 30 C 921; 34 B 287*. So also transfer made in consideration or in pursuance of a compromise of a family dispute is not sale *34 B 139*.

6. Non-Payment of Price

Non-payment of consideration does not, by itself, show that title did not pass *65 IC*

882-1922 P 619. See also 44 IC 202 (C); 34 IC 106 (Cal) 17 CWN 1161-20 IC 325; 2 B 547; 23 B 525; 19 IC 562(C) 12 IC 534; 14 IC 120; 11 A 244; 33 A 125; 30 M 524; 18 M 61, 6 IC 477 (C) : 13 CWN 692-4 IC 541; 3 IC 177; 53 PR 1916-33 IC 474 (FB); 9 IC 547(L); 40 IC 489(L); 32 IC 961; 1929 P 550; 17 Pat 318-1938 P 505. If the price is not paid, the seller cannot on that account repudiate the sale and his only remedy is to sue for the price or the balance of the price not paid. The mere fact that the entire purchase price is payable before possession is delivered to the vendee does not make the sale incomplete until the entire purchase-money has been paid 151 IC 163-1934 L 917. A sale once registered passes title unless it is established to the satisfaction of the Court that the intention of the parties as to that title should not pass until the payment of consideration. See 43 M 712-38 MLJ 467; 30A 125; 55 IC 569;— 7 OLJ 240. But see also 4 LBR 369.

In cases of sales, it is very seldom the intention of parties to allow title to pass without receiving the consideration. To gather the intention of the parties, one has only to refer to the *kabala* itself where the terms and conditions are mentioned. It cannot be said that merely by registration, title passes 154 IC 612-1935 P 45. See also 1934 P 68-147 IC 767; 1934 L 917-151 IC 163. When the sale has been effected and possession delivered, if the consideration has not been paid, the vendor can only sue for it and cannot set aside the sale. 36 M 8-21 MLJ 800. See also 51 IC 104-29 CLJ 250; 17 CWN 1161-19 CLJ 146; 19 IC 562; 53 PR 1916-34 IC 474 (FB). In a suit for possession the vendee is entitled to a decree free of any

condition for payment of price 43 M 712-38 MLJ 467. See also 1929 A 85. Deed of sale executed by widow to her mother-in-law in lieu of maintenance due is sale. 1928 A 204. Where the execution of sale-deed is admitted, it is for the vendor to prove that consideration did not pass in spite of the recital that it passed. But where the vendee does not get possession under the deed, for a long time; the burden of proving that consideration passed is shifted to him 61 IC 634-10 LBR 264. Where the vendor agrees to sell property to the vendee in consideration of certain decretal amounts due from him to the vendee, the decretal amounts change their legal character. 1937 Mad 714.

7. Immovable Property

An interest under a deed of settlement, whereby a person is granted an income in future rents and profits of certain immovable property and also a share in the proceeds of the sale of the property in future, is immovable property within the meaning of section 54, and sale or transfer of such interest cannot be effected, otherwise than by a registered instrument. Such a transfer cannot also be effected without a registered deed in view of sections 5 and 8, Trusts Act. 63 IA 340-14 R 400-40 CWN 1253-1936 PC 230-71 MLJ 440 (PC). See also 12 R 589. Right of cutting and appropriating plants is an interest in immovable property 15 IC 234; so also, an undivided share in immovable property. 11 IC 637-14 OC 161; 83 IC 270-1924 R 257. Immovable property includes superstructure of a house. 91 IC 754-1926 M 343; a mortgage-debt. 27 CLJ 453-22 CWN 614; 1922 M 344; and house property with option to pull it down. 1926 M 343.

8. Grant of Easement

The *grant* of a mere easement does not involve such a transfer of ownership in immovable properties as is contemplated by section 54 and the same does not require registration *115 IC 145-1929 M 79-57 MLJ 45; 34 IC 95; 20 CWN 1158-34 IC 450.*

Sale of Equity of Redemption must be registered. *50 A 986-1928 A 726 (FB).* See also *15 IC 853; 38 IC 819; 49 IC 426; 37 M 423; 23 MLJ 339; 11 ALJ 40-18 IC 818; 23 CWN 513-52 IC 558; 63 IC 284- 24 OC 155.* But see *39 B 55-27 IC 613; 27 IC 594-16 Bom LR 719 (Note); 26 ALJ 1084; 15 P 772-1937 P 178; ILR (1939) Bom 71-40 Bom LR 1192-1939 Bom 31.* As to *sale of equity of redemption under a compromise see 16 Bom LR 719.*

Reversion is intangible immovable property and a transfer of it requires registration. *40 B 319.* Section 54 deals with sale of immovable property. The other 'intangible thing' referred to in the section is intended to embrace those *imponderables* which are related to immovable property such as, for example, a reversionary right. There is nothing in the section or Act to justify the conclusion that all licences which are intangible things can only be transferred by a registered instrument. There is no law which expressly enjoins that transfer of a licence to sell electricity can be effected only by written or registered instrument *ILR (1940) A 568-1940 ALJ 449-1940 A 458.* A transfer of property to wife to be enjoyed for her life in lieu of maintenance needs no registration *45 M 612-42 MLJ 410.* Transfer by a widow of her life interest for a price above Rs 100 requires to be registered *34 IC 748.* A

transfer in lieu of *dower* is a sale and has to be registered *64 IC 126-17 NLR 403; 28 OC 227-87 IC 176.* See also *35 PLR 1915-27 IC 562; 38 CWN 747-1934 C 693.* Before registration no title passes, though the deed of transfer has been executed.

Undivided share of less than Rs 100 in value—Delivery—Constructive delivery, not sufficient—Registration, the only mode of transfer *144 IC 919 (N).* All cases of *hibab-ilewaz* cannot be held to be sales within the definition given in section 54. Transfer of Property Act, and writing and registration is not always necessary. [*1926 O 186 Rel on 11 OWN 592-1934 O 163.* Section 54, has no application to instrument assigning or transferring a decree for money. A simple decree for money (or for possession of immovable property) is not an "intangible thing" under section 54. Nor can a decree for money be, by any stretch of reasoning regarded as immovable property. The assignment of such a decree does not require registration for its validity. *17 Pat LT 536.* As to assignment of copyright see *1939 All 305; as to assignment of rents and profits see 1940 Rang LR 7; 1938 Lah 304.*

9. Admissibility in Evidence —Registration

37 M 480-16 IC 587. Where a deed is not compulsorily registerable it can be admitted in evidence to prove contract of sale and its terms *41 IC 779- 21 CWN 1149; 31 IC 52-29 MLJ 721; 56 IC 382; also 30 CWN 254; 2 IC 413 (Cal); 23 CWN 284-47 IC 428-67 IC 144; 1923 R 230; or the nature of possession 1925 A 206 (1).* Unregistered sale-deed for Rs 90—Admissibility in evidence. See *26 ALJ 1084; 79 IC 394.* It is admissible in evidence to prove the nature of possession of

vendee. 1930 R 188. Non-payment of price may be proved by oral evidence even in spite of a recital to the contrary in the sale-deed.

10. Sale by Delivery of Possession and Registration

Where an unregistered deed of sale in respect of immovable property worth less than Rs 100 is executed on a particular day and the property sold is delivered to the purchaser some days later in pursuance of the sale-deed, there is no reason why the sale should not stand valid. It is not necessary that delivery of possession of the property should be contemporaneous with the execution of the sale-deed though the unregistered sale-deed will not of itself confer any title on the purchaser 1939 Pat 218. See also 1941 NLJ 643. An unregistered sale-deed of properties of value less than Rs 100 is invalid for purposes of conveying title. It can only be used as proof of the terms of the contract between the parties. But the title can pass to the vendees by delivery of possession of the properties 10 Pat LT 449; 14 Pat LT 224. Even in the case of a sale for less than Rs 100 where delivery of possession is not possible, the deed in order to be valid must be registered 142 IC 582-1933 C 544; 144 IC 919. Though there is no doubt abundant authority that copyright is an intangible thing it is equally clear that copyright is movable and not immovable property. Section 54 has no application to the sale of movable property and the words 'intangible thing' in that section have reference only to immovable property. The section has no application to the transfer of a copyright and it could be validly assigned by an unregistered instrument ILR (1939) All 275-1939 ALJ 71-1939 All 305. A deed is

necessary to effectuate a transfer of ownership of Crown lands even though the value may be less than Rs 100. 10 P 203-1931 P 268. Admission of parties cannot pass title when the section requires registration 13 IC 436; 43 C 790. A purchaser of immovable property of the value of Rs 100 and upwards cannot in the absence of registered deed sue for a declaration of title except when he has acquired title by adverse possession 10 R 529-140 IC 777; 151 IC 227-1934 R 127.

11. Title by Estoppel

Even in the absence of registered conveyance, acts of parties might create an estoppel, preventing the owner from asserting his title 45 C 909-45 IA 97-35 MLJ 46 (PC). See also. A 759-22 ALJ 719; 33 CLJ 437; 2 R 285-81 IC 857-1924 R 214 (FB). But mere admission cannot operate as an estoppel in creating title 20 IC 679-41 C 148. There is no estoppel contrary to sections 54 and 118 of the Act 32 IC 5-30 MLJ 1. See also 36 M 564-23 MLJ 301. But see now section 53A, *supra* Conduct of parties and part-performance may create title even in the absence of a registered conveyance 42 C 801-42 IA 1-28 MLJ 548(PC); 40 C 187; 33 CLJ 437; 40 M 1134-33 MLJ 252, Doctrine of Part-performance as a defence, see 29 Bom LR 1419. See also 75 IC 141, see now section 53A.

12. Title by Delivery

Where value is below Rs 100 delivery will pass title. But real delivery is necessary 48 C 509-48 IA 127 (PC). See also 8 Bur LT 268-33 IC 612; 8 Bur LT 70-29 IC 886; 3 Bur LR 49-8 IC 443; 29 IC 413 (C); 5 MLT 263-4 IC 1135; 10 Pat LT 449. Constructive delivery by delivery of the instruments is

insufficient 60 IC 833-25 CWN 985-40 MLJ 489 (PC). Where the vendee is in possession no actual delivery is necessary 48 MLJ 264; 38 M 1158-27 MLJ 497; 92 IC 478-1926 A 300. see also 11 Pat LT 478-123 IC 799-1930 P 53; 60 C 384-1933 C 411-144 IC 155. But see 34 C 207. If the parties put the terms of the sale in writing, sale ceases to be one by delivery 28 LW 234-111 IC 677-1928 M, 546. See also 19 C 623 (FB); 1925 A 206; 51 IC 561; 29 MLJ 721. Sale of property though less than Rs 100 in value, if in writing must be registered, 1928 M 546; 30 CWN 254-93 IC 115-1925 C 705. Even in the cases of a sale for less than Rs 100 where delivery of possession is not possible, the deed in order to be valid must be registered 142 IC 582-1933 C 544.

13. When Sale is Complete

See 59 IC 144; 1924 N 146; 5 Pat LJ 715; 22 Bom LR 1079; 39 B 55-27 IC 613. The title passes on the execution and registration of the deed though the purchase money may remain wholly or partly unpaid except where there is an agreement to the contrary 10 P 264. An unregistered sale certificate cannot create title 43 C 790-20 CWN 370; 1937 Nag 1; 1938 Nag 253; nor entry in revenue papers 3 IC 171-38 A 411; nor mutation proceeding; 100 IC 270-1927 A 338; nor a *rajinamah* and *kabuliyat*; 59 IC 114-22 Bom LR 1079, A conditional sale is not complete until the condition is performed 112 PLR 1911-9 IC 833. See also 5 R 636. Where the vendee of the property sold is already in possession of it mutation of the vendee's name in the records is sufficient to constitute delivery of possession so as to satisfy section 54 (34 IC 691, *Rel on*) 151 IC

55-1934 P 301; 15 P 772-1937 P 178; 1936 R 497; 1936 L 756.

14. Priority and Notice

A prior oral purchaser with possession can effectively retain his title against a subsequent registered purchaser 57 IC 447-44 B 586; 25 Bom LR 1027-1924 B 150; 9 PLR 1916-29 IC 305. See also 30 IC 7; 15 CrLJ 29-22 IC 285; 7 MLJ 372-5 IC 57. See *contra* 22 IC 285. Possession of the prior purchaser is held sufficient to put the later purchaser on enquiry 20 MLJ 127-34 IC 906. Prior agreement for sale has priority in law over later agreement or sale if there is knowledge of the prior agreement 1929 A 817.

15. Sham Transaction

Section 54, no doubt, lays down that immovable property worth less than Rs 100 can be sold by means of a registered instrument but it does not lay down that if the parties to a so-called sale get a sham deed of sale registered without intending that the transaction should take effect even then the ownership of the property will pass from one to the other by registration. 13 Luck 484-1937 O 493. A sham transaction is not sale. It is only in cases where transfer is genuine and title passes that the vendee is entitled to possession and the vendor can maintain suit for consideration money if it has not been paid. Where however no consideration passes from the vendee nor is there any intention of passing the rights from the vendor to the vendee and the whole transaction is fictitious, title does not pass to the vendee and a suit by the latter for possession is not maintainable. 183 IC 221-1939 Pesh 27.

16. Suit for Specific Performance

Agreement to sell immovable property—Vendee's right to specific performance as against subsequent transferee under registered deed *61 IA 115-13 P 242-1934 PC 68-66 MLJ 255 (PC)*. A contract for sale of immovable property does not become unenforceable, merely because of failure to keep the dates assigned by the contract either for completion or for the step towards completion. Equity does not regard the terms or the letter of the contract, but rather its substance. The disregard of the terms of the contract so far as time is concerned may depend upon the express stipulations of the parties, the nature of the property or the surrounding circumstances *15 Pat LT 469-1934 P 518*. Earnest money is generally paid as a guarantee for the payer's performance of the contract and is subject to forfeiture if he makes default. "It is part of the purchase price when the transaction goes forward; it is forfeited when the transaction falls through by reason of the fault of the vendee'.

17. Sale and Contract to Sell with Possession Distinguished

Section 54 expressly enacts that a contract for the sale of immovable property does not of itself create any interest in or charge on such property. There is therefore no room for the application of the English equitable doctrine that a contract for sale of real property makes the purchaser the owner in equity of the estate. Thus under the law applicable before the insertion of section 53A, an averment of the existence of a contract of sale, whether with or without an averment of possession following upon the contract, was not relevant defence to an

action of ejectment. If the contract is still enforceable the defendant may depend upon it to have the action stayed, and by suing for specific performance obtain a title which will protect him from ejectment. But if it is no longer enforceable, its part-performance will not avail him to any effect *61 IA 388-39 CWN 34-1934 PC 235-67 MLJ 865 (PC)*. See also *45 MLJ 528-46 M 919 (SB)*; *1930 P 53* and cases referred to therein; *46 B 722*; *45 B 434*; *40 B 498*. See *contra 29 IC 195*; *39 B 472-28 IC 946*. See now section 53 A. Contract of sale need not be registered. See *16 IA 233-17 C 291*; *5 B 143*; *7 M 310*; *9 B 103*; *26 C 222*; *5 M 115*; *28 B 396*; *12 M 505*; *13 M 324*; *14 M 55*; *1931 MWN 297*. In Indian Law contract to sell land creates no charge on the land *44 C 542-44 IA 15-32 MLJ 6 (PC)*; *41 IC 468-2 Pat LW 108*. Principles of English law have no application to places where the Transfer of Property Act is in force *44 C 542 (PC)*. Contract to sell immovable property does not create even an equitable interest in property. *79 IC 429-1924 A 396*. See also *55 C 35-32 CWN 16-1927 C 956*. But see *33 Bom LR 1296-1931 B 578*; *20 MLT 127*. It was otherwise before passing of Transfer of Property Act *24 Bom LR 449-1922 B 84*.

A contract for sale establishes only a fiduciary relationship which ends when a registered instrument comes into existence or something occurs to absolve the vendor for his promise and with the termination of that relationship the equitable right of the vendee to retain possession ends and he becomes a new trespasser. *121 IC 18-1930 M 84*. Contract is not vitiated by the rule against perpetuities *45 A 478-21 ALJ 430*; *39 M 462-28 MLJ 471*. A valid contract by manager of a joint Hindu family to sell, though it cannot

be enforced against *bona fide* purchaser without notice, may be enforced against surviving members of a joint family. 29 IC 435 (M). Time can be made the essence of a contract to sell by parties, though ordinarily not 48 MLJ 150. Agreement to sell mortgage rights—Sale not completed—Rights of parties 33 CWN 907. See also 24 B 400; 1925 R 68; 18 B 13; 23 B 181; 24 M 449.

Contract of sale—Vendee let into possession before payment of purchase-money. A contract for sale of immovable property though it does not create a charge or interest in immovable property, gives the obligee the benefit of an obligation to execute a conveyance under para 2 of section 40 which may be enforced against a transferee with notice of that obligation 34 IC 906.

Where a decree for specific performance of a contract was passed.

Held: the vendor could not recover rent but was entitled to interest on the purchase-money from the date when the contract was intended to be performed 120 IC 538 (2)—1939 L 131. A promisee who has paid advance under a contract of sale of land, but to whom no registered title has been conveyed cannot pass to others legal title to the land by a registered deed of sale. 2 R 459-86 IC 205-1925 R 68. As to distinction between contract to transfer and conveyance, see 122 IC 872-1930 AI (FB).

18. Sale and Hire-Purchase Agreement Distinguished

The distinguishing mark of a true hire-purchase agreement as distinguished from a

sale, is that the hirer should have a right to terminate the agreement at his pleasure and that the 'hirer' should be bound to pay the full value of the goods by way of instalments without any option to cancel the agreement if he so wished before the full value of the goods is paid. Where under an agreement the defendant bound himself to pay the plaintiff a certain sum in advance as monthly hire and it was further agreed that if he paid ten months hire regularly he should become the purchaser, but if he failed to pay regularly the plaintiff could cancel the transaction and terminate the agreement.

Held: that the agreement was one of sale and not hire-purchase. 1932 ALJ 761-1932 A 607.

19. Attachment Subsequent to Contract for Sale

The section does not affect any equitable rights which may arise under a contract of sale. The person in whose favour the contract is made becomes the equitable owner and an attachment can only be subject to such obligation, if subsequent to the contract of sale. 5 LW 234-38 IC 107.

20. Sale with Condition to Reconvey

Where a sale is effected with a condition to reconvey on the sale, consideration being paid back by a certain fixed date, money actually tendered before the date so fixed and paid into Court is good payment and has the same legal effect as a payment made into a Bank in which the person entitled to receive the money has an account to the account of such person 100 IC 494-1927 O 159.

21. Sale or Mortgage by Conditional Sale (sections 54 and 58(c))

It is a matter often of some difficulty whether a particular document or set of documents disclose a transaction of mortgage by conditional sale or out-and-out sale. In order to bring a transaction within the category of mortgage, the relationship of debtor and creditor must subsist between the parties and if there is no debt for which the transfer is a security it is impossible to hold that the transaction is a mortgage. When a

document appears on the face of it to be a sale deed, in the absence of fraud it must be held to embody a transaction of sale. The burden of proving it to be a deed of mortgage will rest heavily on the party alleging it to be so. Circumstances like the existence of a debt, a short period of repayment, grantor continuing in possession, stipulation for interest on repayment, inadequate price and a contemporaneous agreement for reconveyance indicate that a transaction is a mortgage 1939 ALJ 377-1939 All 539.

~~22. Rights and liabilities of buyer and seller—~~In the absence of a contract to the contrary, the buyer and the seller of immovable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold:

(1) The seller is bound—

- (a) to disclose to the buyer any material defect in the property¹ [or in the seller's title thereto] of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover
- (b) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power;
- (c) to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto;
- (d) on payment or tender of the amount due in respect of the price, to execute a proper conveyance of the property when

1. Inserted by the Transfer of Property (Amendment) Act, 1929 (XXVI of 1929), section 17.

the buyer tenders it to him for execution at a proper time and place;

- (e) between the date of the contract of sale and the delivery of the property, to take as much care of the property and all documents of title relating thereto which are in his possession as an owner of ordinary prudence would take of such property and documents;
- (f) to give, on being so required, the buyer, or such person as he directs, such possession of the property as its nature admits;
- (g) to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest on all encumbrances on such property due on such date, and, except where the property is sold subject to encumbrances, to discharge all encumbrances on the property then existing.

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

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

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

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

Provided that, (a) where the seller retains any part of the property comprised in such documents, he is entitled to retain



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

(4) The seller is entitled—

- (a) to the rents and profits of the property till the ownership thereof passes to the buyer;
- (b) where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money to a charge upon the property in the hands of the buyer¹[any transferee without consideration or any transferee with notice of the non-payment] for the amount of the purchase-money, or any part thereof remaining unpaid, and for interest on such amount or part²[from the date on which possession has been delivered].

(5) The buyer is bound—

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

1. Inserted by the Transfer of Property (Amendment) Act 1929 (XX of 1929), section 17.

2. Inserted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929) section 17.

- (b) to pay or tender, at the time and place of completing the sale, the purchase-money to the seller or such person as he directs: provided that, where the property is sold free from encumbrances, the buyer may retain out of the purchase-money the amount of any encumbrances on the property existing at the date of the sale, and shall pay the amount so retained to the persons entitled thereto;
 - (c) where the ownership of the property has passed to the buyer, to bear any loss arising from the destruction, injury or decrease in value of the property not caused by the seller;
 - (d) where the ownership of the property has passed to the buyer, as between himself and the seller, to pay all public charges and rent which may become payable in respect of the property, the principal moneys due on any encumbrances subject to which the property is sold, and the interest thereon afterwards accruing due.
- (6) The buyer is entitled—
- (a) where the ownership of the property has passed to him, to the benefit of any improvement in, or increase in value of, the property and to the rents and profits thereof;
 - (b) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against, the seller and all persons claiming under him,^{1*} * * to the extent of the seller's interest in the property for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission.

1. The words "with notice of the payment" repealed by the Transfer of Property (Amendment) Act 1929 (XX of 1929), section 17.

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

Case Law

Illegal contract of sale—Principle embodied in the section not applicable.

The principle embodied in section 55 regarding charge of the purchase money on the property sold in favour of the vendee, cannot be invoked in respect of an illegal contract which is void *ab initio* *Raja vs Karam Ali* PLD 1951 Lahore 177—PLR 1951 Lah 307 Rel: AIR 1941 Lah 407.

—Covenant to indemnify for loss on account of defect of title—Personal covenant does not run with property—Subsequent transferee cannot benefit from it.

Where 'A' transferred land to 'B' with a covenant to indemnify 'B' from other land, in case of loss due to defect of title, and 'B' in his turn transferred the land to C without assigning the covenant, 'C' suffering loss by reason of a defect in A's title. On a suit by 'C' against 'A' and 'B' and otherwise, transferees, of the other land which in the meantime had been transferred, by 'A' for being indemnified from such other land.

Held: that a covenant for indemnity is not annexed to or inherent in the land so that it could pass to the subsequent transferees, namely, the plaintiffs. It was a covenant personally given to the predecessors in title of the plaintiff and was not assigned to the latter. The plaintiffs, being neither the parties nor privies to the original contracts were not

entitled to rely on them. The indemnity clause contained in them was of a personal character and was to be distinguished from an implied covenant of title contemplated by section 55(2), Transfer of Property Act. The general principle is, that a personal covenant even though it may have reference to property is binding as between the parties thereto or their privies. It is not as a general rule enforceable against third persons into whose hands the property may have passed, unless they took the property with notice of the covenant or gratuitously.

The plaintiff however, could sue their own vendors or their successors in interest, for money compensation. *Muhammad Sharif vs Muhammad Shafi* PLD 1956 (WP) Lah 675; PLR 1956 Lah 184 Rel: AIR 1928 Lah 357 (Dist); AIR 1928 Mad 894 (DB) AIR 1950 EP 74, (DB) 11 QB 444, 20 Ch D 562.

Conveyance—Obligation of seller.

Section 55(I)(d), Transfer of Property Act, in terms did not say that the purchaser should tender a conveyance but it is now well established that it is the duty of buyer to tender it for execution of the sale deed. It does not mean that if a conveyance is not tendered the seller is discharged from all obligations. In this behalf no hard and fast rule can be laid down but if both the parties to the sale have fulfilled their obligations under the contract and only a sale deed is to be

executed, the buyer will not be entitled to the specific performance of the contract if he failed to tender the conveyance to the seller before seeking the aid of the Court. In such a case much does not depend on the question whether the buyer tendered the conveyance or not. *Munawar Begum vs Bapal Kaikushro Contractor PLD 1960 (WP) Karachi 122.*

—Document of title—Who must produce.

The duty to produce the documents of title even under section 56(1)(b), Transfer of Property Act was on the seller. *Munawar Begum vs Bapal Kaikushro Contractor PLD 1960 (WP) Karachi 122.*

—Document of title—What are—Income-tax certificate of clearance, on custodian's certificate are not such documents.

The only documents which the buyer is entitled under section 55 of the Transfer of Property Act to call upon the seller to produce for his examination are documents of title relating to the property. Income tax clearance certificate or Custodian's certificate cannot be said to be documents of title relating to the property. *Abdul Hamid vs Abbas Bhai Abul Hussain PLD 1959 (WP) Karachi 629.*

—Seller—Duty of—Must disclose all material defects in property of which buyer is not aware.

The seller is bound to disclose all material defects in the property of which the buyer is not aware and to make out a valid and perfect title of the property sold by him. *Ebrah Saleh Mayet vs Ghulam Hussain Pakiseema. PLD 1960 (WP) Kar 297.*

—Vendor's duties to purchaser—Detailed.

The words 'take care of the property' are not restricted to the preservation of the property from physical deterioration. They include care in its management having regard to the interest of the purchaser. The obligations imposed by section 55(I)(e) are substantially those imposed on a vendor under English law. The vendor's duties to a purchaser under paragraph (e) of section 55(I), Transfer of Property Act, although he is not a trustee, are the same as they would be if section 15 of the Trusts Act, 1882, were applicable. The vendors, therefore, had no right without consultation with the purchaser to diminish the value of the property as it was after the surrender by relating it. *Mohammad Haji vs Manek Shah PLD 1959 PC 68.*

—Conveyance to be executed on payment of price—Should be a proper conveyance.

According to section 55, Transfer of Property Act (IV of 1882), the seller is bound, *inter alia*, in the absence of a contract to the contrary, on payment or tender of the amount due in respect of the price, to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place. The words used here are "proper conveyance which" mean a conveyance which transfers title. As in the case of an ordinary contract, the passing of consideration by both the parties to a contract should be simultaneous. A vendee has to pay money at the time when the vendor transfers title to him. That is the essence of section 55 and in a case where the mere execution of a deed does not entitle the vendee to have it

registered it would not be said that the vendee would be bound by law to pay the purchase price on mere execution of the deed. Conveyance in section 55 could mean a conveyance which has not only been executed but has been registered but in any case even if there could be some argument in favour of the vendor after a deed is executed which the vendee has a right to get registered, there can be no such argument in a case where on account of some statutory provision there is a condition to be fulfilled by the transferor before a deed can be registered. Section 3 of the Transfer of Property Ordinance, 1947 debars a Registrar from registering a document in the absence of a certificate by the Income tax authorities to the effect that income tax has been paid or its payment has been arranged for, as mere execution of it does not entitle the vendee to have it registered. *Azizuddin vs Sugnichand* PLD 1959 (WP) Karachi 168.

—Execution—May include registration also.

The word "execution" may sometimes include registration. In section 55 of the Transfer of Property Act the word used in respect of a conveyance is only "execute", yet it cannot be said that the mere registration of the sale deed would be sufficient compliance with section 55 particularly in a case where a liability is to be discharged before the transferor can be in a position to have the sale deed registered. *Azizuddin vs Sugnichand* PLD 1959 (WP) Karachi 168.

Section 55(2)—Apprehension that land agreed to be purchased is to be acquired by Development Authority—Purchasers may rescind contract.

The purchasers were entitled to rescind the contract of sale in view of the threat of the acquisition of the lands in question. The plaintiffs would be entitled to take the attitude that they were not going to purchase the land which was under the cloud of requisition and that they were not going to wait and see what course these apprehended proceedings were going to take. *P & T Co-op Housing Society Ltd vs Manzoor Ahmad*. PLD 1961 (WP) Kar 53.

Income tax certificate stipulated to be produced by seller—Not produced—Buyer may rescind contract of sale.

Where an agreement of sale of land provided for the securing of a no-objection certificate from the authorities by the seller as well as the making out of a marketable title, but the seller was unable to secure the certificate and unable thus to make out a marketable title.

Held: that the seller had committed a breach of the terms of the agreement. *P & T Co-op Housing Society Ltd vs Manzoor Ahmad*. PLD 1961 (WP) Kar 53.

—Sale deed not effecting transfer of property—Breach of contract to sell occurs immediately on transfer.

An agreement for sale is, in fact, a promise to transfer ownership of land and if by the sale-deed the land, in fact, has not been transferred a breach of contract would appear to occur the moment a sale deed is executed which has not the effect of transferring the promised title. *Umar Hayat vs Mathela*, PLD 1953 Lahore 410—PLR 1953 Lah 689.

—The principle embodied in section 55 regarding charge of the purchase money on the property sold in favour of the vendee, cannot be invoked in respect of an illegal contract which is void *ab initio*. 1951 PLR (Lah) 307.

Material defect in the title to the property—repudiation of contract.

An agreement was executed by the defendant for sale of a certain property to the plaintiff. A certain amount was paid by the plaintiff as earnest money. The registration of the document for sale was to be completed by certain fixed date.

In the meanwhile before the arrival of the date for the completion of the transaction, namely, the execution and registration, etc. the Government published a notice that a development scheme has been framed which proposed the acquisition of the property contract to be sold to the plaintiff. The plaintiff thereupon refused to complete the sale on the ground that the notice referred to above constituted a material defect in the title to the property and demanded the return of the earnest money.

Held: By the issue of the notice a material defect was created in the title which the vendor was capable of passing on the due date. Time being clearly of the essence of the contract, the purchaser was within his rights to rescind the contract at once, and the forfeiture of his earnest money was, therefore, not in accordance with the relevant stipulation in the contract. 6 DLR (FC) 168 (202 *rt-h col.*)

—The undertaking clearly indicates that the contract was subject to title being approved by the purchaser and that this was a term in the contract. 6 DLR (FC) 168.

—Though the vendor had good title at the time of contract for sale he was not in a position to give the vendee at the time fixed for the completion of the sale, a title free from reasonable doubt, owing to the material imperfection that set into it as a result of the notice by the Government for the acquisition of the property. The vendee was, therefore, entitled to repudiate the contract and claim back the earnest money. 6 DLR (FC) 168 (202 *rt-h col.*)

The matter is different where what the vendee desires is a piece of property, and in the result he stands to get a property different from what he contracted to get or believed that he would get under the contract. Where the vendee is faced with the prospect of being left with nothing but a sum of money as a result of his entering into the transaction, e.g., a sum by way of compensation assessed according to law, the difference is even more marked. 6 DLR (FC) 168. (190 *rt-h col.*)

Section 55—Decree was for a specific performance of contract for sale of land—Decree did not contain any direction for delivery of possession—The decree-holder is entitled to delivery of possession without such direction. *Jahiruddin Ahmed vs Joynal Abedin Khan* 14 DLR 739.

"Document of title"—Income-tax clearance and Custodian's certificate are not such documents—Vendee not entitled to insist on "examining" such documents but only to be satisfied that vendor has obtained them *Abdul Hamid vs Abbas Bhai-Abul Hussain Sodawaterwala* 14 DLR (SC) 24.

Sections 55 & 54—Sale of land—Principle of "caveat emptor"—Applicability

—Son of vendor of land in dispute had set up a case under principle of "caveat emptor"—Son of vendor who had stepped into shoes of his predecessor, could not avail said plea as same was opposed to all norms of fairness, equity and justice—Principle of "caveat emptor" could be used by a third person having a conflict or interest on same subject-matter with vendee, but son of vendor could not legally articulate on said plea—Principle of "caveat emptor" was not approved by Injunctions of Islam as a vendor was required to disclose defects in sale commodities to the vendee. *Said Azam Khan vs Adam Khan PLD 1999 Pesh 75.*

Section 55(1)(a)—Sale of land—Prayer for getting back consideration money on the plea of absence of sellers' title when cannot be allowed—The facts of the case disclose that the plaintiff purchased the property with open eyes having opportunity to know the title of the defendant and the plaintiff having obtained delivery of possession was still in possession in respect of the whole property. His apprehension that 3/4 portion of the land will be taken over by the vested property authority is too vague and remote to give rise to any cause of action for the suit as framed. *Narayan Chandra Banerjee vs Md. Salek Ali Shaik 44 DLR 202.*

Section 55(2)—Covenant to indemnify is distinguishable from covenant of title. Former does not run with property sold, and benefit of it does not pass to subsequent transferees unless specially assigned—Remedy of subsequent transferee—By suit for money compensation against his own transferor *1956 PLR (Lah) 1840.*

Section 55(2)—Where the seller not having title to the property sells the same, the buyer is entitled to recover the consideration money from the seller, and the question of limitation for the filing of the suit to recover money in such a case does not arise. *Jahura Bibi alias Bani Bibi vs Saifuddin Khalifa 17 DLR 216.*

Section 55(4)—Part of sale price left with vendee to be paid to a previous mortgagee, remaining unpaid—Amount unpaid is part of consideration of sale and is a charge on property sold. *1955 PLR (Lah) 772.*

Sections 55(4)(b)—Money decree creating a charge only on the suit property—cannot be enforced for the purpose of selling the property.

Where a decree is a money decree together with a declaration of charge in respect of the decretal amount upon the plaint properties, unless a decree was passed specially for sale of the properties mere creation of charge does not, of itself, operate as a decree for its enforcement. *Abdul Jabbar vs Abdul Aziz 19 DLR 7.*

Section 55(4)(b)—Applicability of the section.

Clause (4)(b) of section 55 of the Transfer of Property Act is applicable where ownership of the suit property has passed to the buyer before payment of the whole of the purchase money *31 DLR 392.*

Abstract

1. Cl. (1) (a)
2. Sub-cl. (b)
3. Sub-cl. (c)
4. Sub-cl. (d)

5. Sub-cl. (e)
6. Sub-cl. (f)
7. Sub-cl. (g)
8. Sec 55 cl. (2)
9. Sec 55, cl. (3)
10. Sec 55, cl. (4)
11. Sub-cl. (b)
12. Pre-emption suit
13. Sec 55, cl. (5) (a)
14. Sec 55, cl. (b)
15. Sub-cl. (d)
16. Sec 55, cl. (6) (a)
17. Sec 55, cl. (6) (b)

Section 55—Section 55 only applies to those cases in which the ownership of property has passed under an agreement of sale; and if an agreement falls under section 17(2)(v) of the Registration Act, it is one under which the ownership has not passed to the purchaser and therefore could not come under section 55. The explanation added to section 17, Registration Act, by Act II of 1927, does not deal with those cases in which a lien has been specifically created *13 P 620-15 PLT 443-1934 P 495*. The section applies to executory contracts as well, *94 IC 561-1926 M 369-50 MLJ 228*. The operation of this section can be controlled, curtailed or excluded by the agreement of the parties. *31 C 57 (71); 47 IC 340*. (Note the words "in the absence of a contract to the contrary" at the commencement of the section. This "contract to the contrary" must be clearly and unambiguously expressed *39 MLJ 449-60 IC 235; 31 C 57(73); 41 MLJ 267*. But see *1933 ALJ 201-1933 A 203*. Where it was held that the "contract to the contrary" need not be express and may be implied from the terms of the sale-deed, but that the contract, covenant

or agreement must so clearly be inconsistent with the statutory rules as to lead to the inference that it had been made to qualify the generality of the law. If section 55 be taken as a whole, there is no warrant for taking buyer and seller to mean those who have actually completed a sale; those in the course of transacting a sale are also contemplated. A buyer who has taken an agreement can put an end to his contract if he finds before the completion of the sale that the seller is disabled from performing his promise in its entirety, such as regarding the covenant to deliver vacant possession of the property sold. *1932 MWN 122*. Suit by vendee for possession—Portion of consideration remaining unpaid—Form of decree to be passed. *30 Bom LR 1604-1929 B 60; 39 M. 288-27 MLJ 746*. There is a distinction between a sale where the consideration is intended to be paid and is not paid and where the consideration is not intended by both parties to be paid at all. In the former case, the title would pass to the purchaser and in the latter case though the vendor was tricked into going through the form of execution and registration of the document, the sale deed would be void as a colourable transaction. *138 IC 534-34 Bom LR 427-1932 B. 247*. Limitation for suit to enforce him for unpaid purchase money, See *1942 MWN 631-(1942) 2 MLJ 482*.

1. Clause (1) (a)

A covenant for title must be distinguished from a covenant for quiet enjoyment. The former if broken, is necessarily broken immediately upon the execution of the assurance which contains it; and the purchaser may bring an action immediately and is not bound to wait till he is evicted. But

a covenant for quiet enjoyment affords no right of action until a disturbance. The onus is on the plaintiff to allege and prove a breach of the covenant. *57 M 1016-1934 M. 687-67 MLJ 647*. The cause of action from the breach of one part of the covenant will lapse if the remedy is not sought within the statutory period, but that will not destroy any remedy to which the vendee may be entitled by reason of the breach of the covenant. [*1932 N 5 (FB), Rel on.*] *30 NLR 138-148 IC 480-1934 N 16*. Considerations regarding defective title, and duty to disclose the same *52 B 883—113 IC 27*. If the purchaser could have discovered the defect in title if he had taken reasonable care to investigate into title, the duty cast on the vendor is considerably narrowed. *58 B 883*. See *30 Bom LR 1149—1928 B 427*. See also *55 IA 135—50 A 371—55 MLJ 689 (PC)*.

The words "ordinary care" are somewhat indefinite. A purchaser of property is under no legal obligation. But in dealing with real property, regard must be had to the usual course of business. A purchaser who wilfully departs from it to avoid knowledge of his vendor's title is not allowed to derive any advantage from his wilful ignorance of defects, which would have come to his knowledge if he had transacted the business in the ordinary way. *36 Bom. LR 1041*. When a sale is complete and a conveyance is executed vendee cannot avoid the sale on subsequent discovery of defect in vendor's title unless there has been fraud. His remedy is merely to sue for damages. (*52 C 914, Re 1 on*) *1933 L 262—34 PLR 714*. See also *1933 section 144—144 IC 371*. If the seller had knowledge of defect but the buyer had not, then it amounts to fraud. There is no fraud if

the buyer had also knowledge. *50 C 615—1923 C 641; 50 MLJ 100—1925 M 1209*. See also *32 C 357*. But knowledge of defect of title does not bar a suit for damages based on a special covenant for title. *11 M 419; 16 NLJ 201*. Non-disclosure of defects unknown to vendor is not fraud and would not vitiate the sale (*cf.* Section 116, Contract Act). But the omission to disclose a known defect is fraudulent and the sale can be avoided. *1925 R. 372*.

For what is knowledge of defect in title, see *38 M 887; 49 B 245*: Existence of mere doubts on the part of the vendee regarding the vendor's title will not disentitle the vendee to damages. *22 L.W. 392—1925 M 1209*. A defect to be material must be of such a nature that it might be reasonably supposed, that if the buyer had been aware of it, he might not have entered into the contract at all, because he would be getting something different from what he contracted to buy. A defect in title, as distinct from a defect in the property itself, is a latent defect, because *prima facie* the seller knows his title and the buyer does not. Liability of the property sold to be acquired compulsorily under the Land Acquisition Act amounts to a material defect as well as a latent defect. *36 Bom LR 1041*. Non-disclosure of restrictive covenant contained in the conveyance to vendors from original owners and of vendor's breach thereof entitles vendee to repudiate contract. Mere reference to some covenant without mentioning even its purport is not enough. *49 B 325—26 Bom LR 1071; 36 Bom L.R. 1041*. Where after a sale of land with a warranty by the vendor to be liable for the purchase price in case of any defect in title a suit is brought against the vendor and vendee by the real owner and on

the vendor admitting such owner's title the vendee had compromised the suit by giving up a portion of the property, the vendor was bound to return the purchase price as the sale had failed for want of consideration and it was not open to him to say that the vendee had made advantageous bargain with the real owner and had practically lost title thereby. *1934 P 280—1471 C 1170.*

2. Sub-clause (b)

In the absence of demand on the part of the vendee the vendor is not bound to produce title deeds. *35 IC 573.* The vendor is bound to produce marketable title. *49 B. 245—1925 B 69; 58 CLJ 513—1934 C 372.* The failure to produce title deeds is omission to carry out the terms of the contract and the purchaser is entitled to refund of the earnest money with interest at 6 percent till date of recovery. *167 IC 858—1938.*

3. Sub-clause (c)

The vendee has got the right to put questions. But that does not affect the duty of the vendor to disclose material defects as laid down in clause (a). See Sheppard and Brown Transfer of Property Act; see also *26 B 519; 1 Bom. HC 777; 16 C 330.* There may, however, be specific conditions expressed in plain and unambiguous words restricting the rights of the purchaser as regards his requisitions about title. See *12 B 1 (17); 15 B 657.* Such right may be lost by waiver. *13 M 158.* Any information regarding the income or the rental of the property to be sold is a relevant question within section 55(1)(c) and it is the duty of the seller to answer such a question to the best of his information. If he gives an answer which he knows to be false

he is guilty of a breach of duty and misrepresentation. Further, if he volunteers any information about the income he is certainly bound to give true information. *28 NLR 184—1932 N 148.*

4. Sub-clause (d)

The purchaser has to tender a conveyance for execution; until such tender is made or waived by the vendor, the purchaser has no right to obtain the title-deeds. *31 CLJ 87—55 IC 791 (PC).* See also *30 Bom LR 920—1928 B 328.* But where the vendors specifically agree to convey the property sold to the vendee or his nominee, the vendee is under no duty to tender to the vendors a draft conveyance. *59 CLJ 503—1934 C 699.* *Failure to pay expenses of sale and registration shows default on vendee's part 6 IC 121—27 MLJ 482.* See also *4 BHCR 125 (OCJ).* When a person purchases the right, title and interest of an insolvent he is entitled to demand a conveyance either in favour of himself or in favour of another to whom he has in the meanwhile sold his rights in the property. The purchaser at the insolvency sale cannot be deprived of the benefit of section 28(3) of the Stamp Act. *37 Bom LR 440.* A purchaser is in actual possession or receipt of the rents and profits must pay interest upon his purchase-money from the time fixed for completion of the transaction. *1923 N 37; 55 IC 405.* As to the effect of non-registration owing to the default of vendee. See *31 MLJ 181—12 L.W. 161—43 M 822.*

5. Sub-clause (e)

The vendor is regarded as a trustee for the purchaser, who is in equity the owner of the land. Fry on Sp Performance 4th Ed. 605;

Shep. and Brow. Transfer of Property Act Cf. also Trust Act, Section 15.

6. Sub-clause (f)

The vendee cannot recover any expenses which he may have incurred subsequent to the sale in obtaining possession. If he wishes to rely upon the covenant granted to him by the statute, then he can enforce his rights only by a suit against the vendors for specific performance of the contract of sale or for damages. *167 C 84—1937 R. 31*. "Contract to the contrary". See *47 IC 340; 1924 A 937*. In every sale, covenant to deliver possession is implied. *45 MLJ. 431—47 M 150; 29 IC 195; 6 L 308—1925 L 481*. The vendee has a right to possession even though a part of the consideration remains unpaid. *34 IC 106*. Court can pass a conditional decree for possession on payment of balance of consideration. *39 M 288—27 MLJ 746*. See also *30 Bom. LR 1604—1929 B 60*. The Court in passing a decree for possession in a suit for specific performance should also declare a statutory charge on the property in favour of the seller in respect of the unpaid purchase-money due to the seller from the purchaser, and should order that the vendee should pay the balance within a fixed period, and that in default the vendor should on payment of Court-fee recover that amount by sale of the property in suit, *31 SLR 150—1937 section 198*. A vendee's suit for possession should be brought within the time allowed to his vendor who was out of possession on date of sale. *24 C 216*. Delivery of physical possession is necessary especially when the identification of the property is difficult. *1 PLJ 140—35 IC 539*. See also *149 IC 304—1934 AA 617*. As to possession by mere attornment, see *1925 R*

372—92 IC 766. Article 116 of the Limitation Act applies to a suit for refund of purchase-money on default in delivery of possession. *49 B 596*.

7. Sub-clause (g)

The liability to discharge encumbrances does not pass to the transferee on a sale. *22 L.W. 786*. See also *119 ICI—1929 A 791; 93 IC 670—1926 M 173; 27 NLR 392* (and cases referred to therein). A vendee paying off a prior mortgage to save the property from sale, can recover it from his vendor *87 IC 756—1925 A 704*. "Encumbrance" under the section is wide enough to include a recurring claim for maintenance charged on the property by a decree. *11 OWN 1348—1934 O 492*. Where property has not been sold subject to any encumbrance, or making the vendee liable for any encumbrance, the vendor is clearly bound under section 55(g) to meet all the encumbrance. *1034 Oudh. 402*. Covenant for discharge of encumbrance does not run with the land. *1927 M 1972—106 IC 866*.

The provision under the clause cannot be enforced against the vendor without an express covenant after the completion of the purchase. *57C 683—51 CLJ 538—1930 C 568*. Where a leasehold is sold, the seller is bound to pay all rent accrued due upto the date of sale. *1924 P 822*. Express provision as to certain encumbrances does not exclude vendor's liability to discharge an undisclosed encumbrance. *87 IC 756—1925 A 704*. Effect of vendee paying off encumbrances, see *1922A. 508; 1925 A 704*. Where properties are sold free from encumbrances and the purchaser pays off mortgages or decrees

thereon he is entitled to a refund from the seller of moneys spent by him to clear his title. *42 MLJ 444—26 CWN 514—1922 PC 176 (PC); 11 OWN 1563—1935 O 142.*

As to measure of damages. See *1938 Nag. 257*. Where the vendors undertake to indemnify their vendees, if they suffer any loss or damage on account of any claim to the property sold, where it is found the vendees were negligent in their defence of a suit on mortgage by the original owners and did not raise proper pleas available to them and that there was really no cloud on the title of their vendors and with a little diligence exercised on the part of the vendees the cloud that was sought to be cast on the title of the vendors could have been cleared. *182 IC 60—1938 Lah. 743*. Contract to certain lands acceptable to vendee out of larger area belonging to vendor—Lands chosen by vendee found encumbered—Duty of vendor to discharge the encumbrances before conveyance. *14 R. 766—1937 Rang. 753.*

"Contract to the Contrary."—Express contract excludes statutory covenants *22 ALJ 576—79 IC 590—1924 A 937.*

8 Section 55 Clause (2)

An express condition in the sale deed on the part of the seller to indemnify purchaser in case any defect in his title is subsequently discovered, is not necessary, *166 IC 302—1936 Lah. 746*. In the absence of a contract to contrary there is an implied statutory covenant for title and power to transfer, *1938. ALJ 1136—1939 All. 170*. Where the vendor had title to at least part of the property and the vendee obtained possession of at least part of the property, the vendee can only claim that

the sale deed is voidable because of material defect in his vendor's title not disclosed by the vendor, such non-disclosure amounting to fraud under section 55. The remedy in such circumstances is a suit for rescission of the sale deed, and for return of the price paid and not to ask for return of the price before the conveyance is rescinded. *1942 Sind. 81* Provisions of section 55 compared with section 108 *as to warranty of title in cases of sale and lease. 34 CWN 347—1930 C. 561.* The section applies to contracts to sell as well. *40 M 338—32 LMJ 180 (FB); 49 MLJ 668; 50 MLJ 228;* but not to a transfer of a mortgage debt; *31 IC 179—29 MLJ 454.* Section does not apply to the Punjab and covenant as to guarantee of title cannot be implied in that province, But the Court may on equitable grounds apply analogous principles. *28 Punj. LR 74.* As to covenant for title, see *1927 R 134; 100 IC 327—1927 R 90; 19 SLR 337—1927 S. 120; 1929 M 775.* Sub-section (2) of section 55 does not apply where the vendee is dispossessed as a result of a pre-emption suit, inasmuch as it cannot be said that the interest which the vendor purported to sell to the vendee did not subsist at the time of the sale or that the vendee had no power to transfer his interest. *1935 OWN 99—1935 O.75.* Though the Act does not apply to *pre-emption sales* so far as the formalities are concerned, the pre-emptor is entitled to enforce the implied covenant for title which runs with the land. *1931 N 166—27 NLR 392.* The vendee is not entitled to payment of the difference between the sale price and that which he got from the pre-emptors who dispossessed him. *153 IC 715 1935 O.75.* Vendee's knowledge of defect of title—Effect. See *98 IC 450—1927 M 193; 130 IC 88—1931 N 14.* Seller professing to

transfer interest not subsisting commits a breach of covenant. 1922A 837. As to extent of vendor's liability, see 1933 ALJ 611—1932 A 546. Unless the vendor's liability under section 55(2) is excluded by express covenant, his liability would be deemed to subsist though the vendee "may have some idea" as to the defect in title. 1933 A 389—1933 ALJ 1938—144 IC 406; 8 P 432—1929 P 380. Covenant for title and contract to indemnify difference between. See 55 MLJ 151—51 M 688.

As to breach of covenant for title, see 31 Bom. LR 658, Express covenant in sale-deed—Suit to recover damages on the basis of implied covenant is maintainable. 1932 ALJ 69—1932 A 224; In a suit brought not on the statutory covenant contained in section 55(I)(f) but upon covenant of title contained in the sale-deed, a decree based on the provisions of the Transfer of Property Act cannot be passed. 167 IC 84—AIR, 1937 Rang. 31. When there is a guarantee of extent, shortness may justify withdrawal from contract. 69 IC 827. In all registered conveyances, a covenant for title is implied. 52 IC 269; 38 M 1171; 27 MLJ 517; 38 M 887—23 IC 570; 6 L 308; 27 CWN 1025—1924 C 148; 127 IC 617—32 L.W.138—1930 M 748; 120 IC 163—31 PLR 482; 1936 L 746; but there is no implied covenant that the vendor shall put the vendee in possession. 94 IC 302—1926 M 495—1926 MWN 209. The mere passing of a decree for possession in favour of a third party would not constitute a cause of action for compensation for breach of the covenant of title, and the cause of action accrues only on dispossession in execution of the decree. 1936 OWN 143—1936 Oudh 141. When the sale fails on

account of want of title, sale price must be returned. 1923 L 590, 13 IC 803—14 OC 343. *Caveat emptor* never applies to currency coins. 89 IC 2591—926 sections 17. But the doctrine of *caveat emptor* may apply when the seller does not in express terms guarantee title. 65 IC 734. Buyer having notice of facts indicating want of title of vendor does not mean that he covenants against benefit under this sub-section. 40 M 338—32 MLJ 180 (FB). The contract to the contrary must be in unambiguous terms. 39 MLJ 449—60 IC 235; 22 L. W. 704—29 MLJ 668. It cannot be oral because such an agreement would be inadmissible in evidence under section 92 of the Evidence Act. 52 A. 604—124 IC 185—1930 A 271. Notice of defect in title will enable the vendee to such rights only as his vendor had. 40 B. 498—37 IC 360. Notice or knowledge of defect in or want of title will not bar right to refund of proportionate price paid, unless there is a clear contract to the contrary. 60 IC 235—39 MLJ 449; 29 IC 747; 45 IC 669. The right to compensation or refund applies only in cases or complete sale. 27 IC 889—2 L. W. 155.

In the case of a continuing breach, the case of action arises when the title is finally declared to be in some person other than vendor. 47 IC 924—35 MLJ 124. But see 21 IC 740—1 L.W. 110. When the vendee is dispossessed, cause of action arises on the date of dispossession. 1921 MWN 634. The benefit of this sub-section is available even where the transferee compromises with the claimant. 35 A 168—18 IC 52. Measure of damages is the price of land to which title was lost as on the date of eviction and not on the date of sale. 58 IC 757—1 L 380; 44 M 167—39 MLJ 706; 52 A 704—1930 A 771;

120 IC 163—31 PLR 482; 130 IC 88—1931 N 14; 41 L.W. 728—68 MLJ 588. See also 1936 OWN 143—1936 O 141. And such damages include the value of improvements made by vendee. 130 IC 88—1931 N 14. Measure of damages is the difference between the market value of the property on the date of eviction and the price originally paid. 1929 L. 416; 19 SLR 337—101 IC 704—127 section 120.

If the purchaser free of all encumbrances had to pay off mortgages those moneys are recoverable from the transferor. 42 MLJ 444—26 CWN 514—1922 PC 176 (PC); 41 CLJ 571—52 C 914. As to *covenant to indemnity for expenses incurred in defending title*, see 43, M 898—39 MLJ 316. Where there is a stipulation as to the payment of damages on given contingency it is not open to the vendee to receive further damages by way of compensation for the costs of litigation incurred in protecting title against a third person. 132 IC 892—1931 ALJ 97. *Implied warranty of title*—Right of vendee to recover damages. See 1932 ALJ 598—1932 A 553. Declaratory decree in suit by sons that sale by Hindu father is for necessity only in part—Vendee's right to sue for damages—Cause of action—When arises. 1935 L 70. As to *limitation for a suit for damages for breach of an implied covenant of title*, See 52 A 604—1930 A. 771; 14 NLJ 125 (FB); 68 MLJ 588.

9. Section 55, clause (3)

As to the document of title to be delivered to buyer, see 11 B 485; 15 B 657. Land forming a block—Sale in different parcels to different persons—Covenant to produce title-deeds when called upon—Sale

of remaining plot comprising largest area—Right to title-deeds—Covenants in prior sale-deeds to produce—If bar—Duty of purchaser to indemnify vendor. 42 Bom. LR 1024—ILR (1941) B. 55—1941 B. 48. A deed to mortgage under which the mortgagee exercises a power of sale is clearly a document of title, and must be surrendered to purchaser of the property. 1939 M 774—(1939) 2 MLJ 434.

10. Section 55, clause. (4)

Applicability of English Common Law Rules, see 1926 M 55; 44 C 542 (PC). Where a portion of the purchase-money is left with the vendee for payment to a creditor who remitted a portion of the debt, the vendor could recover it from the vendee. 18 IC 503(A). The unpaid vendor's lien is an interest in immovable property and an instrument assigning such a right, when the property is worth more than Rs. 100 in value, is compulsorily registerable under section 17, Registration Act. 142 IC 730—1933 M 181:152 IC—375—40 L.W. 481—1934 M 615. The vendor's lien is not extinguished by the vendee's undertaking to pay the vendor's creditors. 54 MLJ 109—108 IC 291. See also 39 M 997—31 MLJ 530 (FB) (overruling) 33 M 446 and 21 MLJ 359; 18 IC 503; 43 A 314—60 IC 933. See *contra* 33 IC 527.

11. Sub-clause (b)

The principle of equity that a purchaser of immovable property has a lien on the property purchased is recognised in section 55(4)(b). 8 OWN 1313.

But the principle does not apply to an exchange. 16 IC 109—1912 MWN 535; *nor to a lease*. 48 M 821—49 MLJ 313. A

mortgagee decree-holder purchased the entire mortgaged property in execution of his decree and before the formal confirmation of the sale in his favour, agreed to transfer a portion of the mortgaged property to the mortgagor for a certain sum. In pursuance of the agreement, a compromise petition was presented to the Court and the Court confirmed the sale, in respect of the mortgaged property excepting the portion which was the subject-matter of the transfer. The judgment-debtor failing to pay the amount executed a simple mortgage in respect of the property in favour of the decree-holder. The decree-holder brought a suit on the mortgage to recover the money by sale of the mortgaged property. The lower appellate Court held that the transaction could not operate as a mortgage as the deed had not been attested.

Held : that the transaction in respect of the transfer of the portion of the mortgaged property, although it could not operate as a mortgage, constituted a sale and that under section 55(4)(b) the mortgagee decree-holder was entitled to a charge upon the property transferred in the hands of the mortgagor judgment debtor for the amount of the purchase money and for interest thereon. The charge could be enforced by sale of the property under section 100, Transfer of Property Act, and under Order XXXIV, rule 15, CPC, as in the case of a simple mortgage. *63 IA 304—59 M 910—1936 PC 204—71 MLJ 347 (PC)*. Where the vendee of the equity of redemption who retains part of the consideration for paying off the mortgage gets a reduction of the interest under the Agr. Rel. Act and discharges the mortgage, the vendor has right to recover the difference

between the amount paid and that agreed to be paid, as it is unpaid purchase-money. *ILR 1940 A 340—1940 ALJ 203—1940 A 351*.

An agreement to receive purchase-money by instalments does not imply abandonment of lien. *43 A 544—63 IC 495*; whether execution of a pro-note implies abandonment of lien is a question of fact regarding the intention of the parties. *84 IC 949—47 MLJ 737; 21 MLJ 849—11 JC 890; 44 IC 523—35 MLJ 304*. See also *18 IC 81—1913 MWN 826; 107 IC 302—1928 M 486*. Where the consideration for a sale is a sum of money, and for a portion of such consideration the vendee executes a promissory note in favour of the vendor, the vendor can, in the absence of anything to show that the statutory charge has been abandoned, enforce the statutory charge for the amount covered by the promissory note and remaining unpaid. *1939 M 590—(1939) 1 MLJ 344*. Promissory note for purchase-money executed by vendee in favour of third party as benamidar for vendor—Effect. See *51 MLJ 856—50 N 548—108 IC 291; 35 MLJ 304 44 IC 523; 9. WN 1032; (1940) 2 MLJ 827*. See also *43 N Bom LR 1014; 1941 L 10; (1942) 1 MJ 603*. An assignment of the vendor's lien is valid. *44 C 573—44 IA 30—32 MLJ 206 (PC)*. See also *42 C 489—19 CWN 899; 103 IC 690—1927 N 332*; also by Court auction-purchaser of vendor's interests. *1936 MWN 926—1937 M 92*. The lien can be exercised against a transferee without notice. *38A, 254—35 IC 284; 25 IC 939; 25 IC 208*; but not against a transferee for value without notice. *3 OWN 25*. See also *38 A 254; 91 IC 917—1926 order 81—1 Luck 7; 1937 M 92; 41 PLR 377—1939 L 273*.

Where under a sale-deed the bulk of the consideration is retained with the vendee for

being paid to certain holders of decrees against the vendor it cannot be said that the statutory charge in respect of the vendor's lien for unpaid purchase money is given up. The mere fact that the vendor asks the vendee some time after the sale-deed not to pay the amount due to one of the creditors does not mean that the vendor intends to give up or waive the right given to him by the statute in the shape of a charge on the property for unpaid purchase-money. The charge is an interest in property and is saleable. Where the holder of one of the decrees, who is not paid by the vendee, brings the property to sale in execution of the decree against the vendor, it is the charge for unpaid purchase-money which the vendor had in the property after the private sale by him that passes to the purchaser of the property at the execution sale, and from him to a subsequent purchaser from him. Such a purchaser is entitled to enforce the charge against the original vendee. *1938 M 457—(1938) 1 MLJ 316*. The statutory lien does not cease to exist but continues, so long as there is no novation or a direct undertaking between the vendee and the mortgagee for the payment to the latter of the money retained in the vendee's hands. Where there is no privity between the vendee and the creditor who is to be paid off the money remains, in fact, money at the disposition of the vendor who can countermand the instructions given to the vendee as to the disposal of that fund. *1939 M 876—(1939) 2 MLJ 493*.

A mortgagee purchasing the property from mortgagor, knowing that the mortgagor had not paid his vendor the purchase price in full is entitled to decree possession only on payment of the balance of the purchase price

due by his mortgagor to the vendor. The mortgagor's vendor should not be asked to file a separate suit for declaration of his lien. *147 IC 742—1933 R.401*. See also *ILR (1939) Nag. 636—1939 NLJ 252—1939 Nag. 210*. A Burmese Buddhist husband purchased some property in his own name. He paid part of the consideration out of cash belonging jointly to himself and his wife and for the balance executed a registered mortgage of the property which he had just purchased. In a suit on the mortgage without making wife a party a decree for sale was passed. The wife then brought a suit for declaration that the mortgage decree was not binding on her share.

Held : that the wife's interest was subject to the mortgage as it was executed for the balance of the purchase price. But as the wife was not made a party to the mortgage suit the decree passed thereon was inoperative as against the share of the wife in the mortgage property. *153 IC 1026—1934 R 190(2)*.

Where the sale of land is to three persons in certain shares, the vendor has a lien on the land for the unpaid purchase-money against all and not concerned with the proportion paid by the various co-sharers. *150 IC 725—1934 L 348*. It will take effect as against a purchaser at a Court auction sale *8 OWN 1313*. The section prior to amendment of 1929 did not in terms give the vendor a charge on the property in the hands of anyone but the buyer. But still the vendor can always follow the property in the hands of a transferee who had notice of the non-payment of the purchase-money. The amendment of 1929 merely gave affect to this principle. *9 R.56—1931 R. 139*. As to *vendor's right to interest on unpaid purchase-money*, see *24*

L.W. 257—1926 M 1031. The unpaid vendor is not entitled to a statutory charge for interest. *31 SLR 150—1937 S. 198.* Interest on the sale price is to be calculated only from the date of delivery of possession. *43 B.181—36 MLJ 1 (PC); 6 L.W. 233—42 IC 509; 46 B 195—64 IC 492—1922 B.186; 121 IC 641(1)—1930 N 32.* See also *35 M 625—21 MLJ 236.*

Purchase price left with vendee for payment to vendor's decree holders Default by vendee—Vendor's right to interest at one percent per mensem. *165 IC 352—1936 ALJ 1081.* Where enjoyment of property is not entirely transferred to buyer, interest is not payable. *48 MLJ 721—1925 M 660.* As to the effect of a direction to pay purchase-money to third person, see *39 M 997—31 MLJ 530—37 IC 429 (FB).* Hence where there was an agreement to transfer certain clay works to another company, the consideration for which was partly in cash, partly in promise to employ the transferor at a certain rate, and partly for the allotment of shares to the transferor and the company went into liquidation before the conditions were carried out, the transferor could not claim a charge against the assets of the company under section 55. His remedy is by action against the company for breach of contracts. *1939 Rang. 46.*

Default of Vendee to Discharge Encumbrances—Remedy of Vendor.

Held: on the facts that the vendor was entitled to a decree for refund of the whole on the amount left in the hands of the vendee together with interest at the rate running on the mortgage debts. He was however not entitled to any decree for damages without

proving the extent of the damages actually incurred. The vendor could compel the vendee to pay the amount in order to release the vendor's other properties from liability even though he might not yet have suffered actual loss. *56 A 766—1934 ALJ, 318—1934 ALJ 318—1934 A 406 (FB).* Undertaking by vendor to discharge encumbrance immediately—Default—Vendee can retain part of purchase-money. *1942 MWN 353—(1942) 1 MLJ 603.* Vendee defaulting to pay debts of vendor out of consideration left with him—Right to enforce statutory charge is negated by absence of pecuniary loss. *1942 ALW 317.*

12. Pre-Emption Suit

The covenant in a sale deed only provided that, if the vendees were dispossessed, the vendor would be liable to refund the whole of the purchase-money. The vendees being dispossessed in pursuance of a decree in a pre-emption suit by the vendor against vendees for the balance of purchase-money, the vendees sought to set-off the expenses incurred by them in contesting the pre-emption suit against the unpaid purchase-price.

Held : the covenant was merely intended to cover defect of title and that it did not cover any loss resulting from the pre-emption suit. *1933 L 522—146 IC 120.*

13. Section 55, clause.(5)(a)

Omission to make the disclosure required by this would amount to fraud on the part of the buyer. As to setting aside sale under this sub-section, see *5B 450.*

14. Section 55, clause (b)

Where the transaction of sale is completed there is a personal remedy against the vendee apart from the statutory lien. *52 A 901—130 IC 198—1931 A 99; 35 MLJ 692—49 IC 313; 9 ALJ 534—14 IC 244—34 A 429*. See also *5 MLT 247—4 IC 1121*. In such a case the plaintiff is damnified because interest was mounting upon his debts and he has a valid cause of action to sue for recovery of money. *131 IC 686(2)—1931 A 419*. Where the consideration for sale is left in the hands of a purchaser for payment to a prior mortgagee, the purchaser is not bound to redeem the mortgage if the amount due under it is in excess of that deposited with him. *10 ALJ. 480. 15 IC 854*. Vendee charged with discharged part of encumbrance can deny liability to discharge on ground of vendor not paying off balance. See *55 L.W. 403—(1942) 2 MLJ 94*. Agreement for sale—specific performance—Direction for execution of sale deed—payment of unpaid purchase money to mortgagee—Failure—Liability of vendee *1932 ALJ 556—1932 A. 454*. Limitation for enforcement of liability under this clause. *15 P 753*.

15. Sub-clause (d)

A vendee subject to a mortgage can contest its legality. *21 IC 79—18 CLJ 354*. *Sale subject to encumbrance*—Effect of encumbrance proving invalid. See *31 A. 583—19 MLJ 682—36 IA 203 (PC)*. The law does not require the purchase of property subject to a mortgage to give notice of his purchase to the mortgagee. *19 OC 12—34 IC 266*. Purchaser has to satisfy the encumbrance even though it is not disclosed in the sale: *30 IC 238*; but he can recover the

same from the vendor. See *1925 A. 704* (See *clause (1)(g)*).

16. Section 55, clause (6)(a)

A person who purchases the assets including a mortgage right, at a sale by the Official Receiver, but does not get a registered deed of sale is not entitled to maintain a suit on the mortgage as against the original mortgagor merely on the strength of his purchase and payment of the sale price. Though he would get a charge or lien in his favour under section 55(6), the charge would attach to all the items purchased by him and he would not be entitled to throw the whole burden on one of the items covered by the charge. *48 L.W. 766—1939 Mad. 165—(1939) 1 MLJ 582*. The right to growing crops passes by the sale of the land, in the absence of an express provision to the contrary, and in the case of a Court sale, the right to possession of the crops accrues from the date of delivery of possession of the land. *151 IC 662—61 C. 991—38 CWN 854—1934 C 610*.

17. Section 55, clause. (6)(b)

The principle of section 55(6)(b) being a general rule of English law applies in the Punjab, as being in accordance with justice, equity and good conscience. *43 PLR 656—1941 Lah. 407(FB)*. A charge under section 55(6)(b) has the same force as one by act of parties. Where a guardian agrees to sell minor's property for a binding purpose and receives an advance, to that extent the minor's estate becomes charged. *1939 NLJ 260—1939 Nag. 209*. The lien can be excluded only by a contract to the contrary. *176 IC 444—1937 Mad. 714—(1937) 2 MLJ 922*. The lien commences as soon as any part of the

purchase money has been paid. *33 IC 121; 10 NLR 19—39 IC 50*. See also *30. Bom. LR 923—1928 B 328*. Such a charge is not subject to the provisions of section 100, and is operative not only against the seller, but also against all persons claiming under the seller irrespective of notice. *ILR 1937 B. 140—167 IC 804—38 Bom. LR 1200—1937 B. 142*. When earnest money is Rs. 100 or upwards, an agreement to sell becomes compulsory registerable *98 IC 890*. See also *31 CWN 125 (PC)*. [But see now the amendment of section 17, *Reg. Act by Act II of 1927* according to which such an agreement is not compulsorily registerable.] Though the sale may be invalid for want of registration the vendee in possession has a lien for the money paid : *24 IC 57—7 LBR 262*; or when the seller has failed to perform his part of the contract. *25 Bom. LR 1144—1924 B. 282*. The question whether a purchaser by part-payment can obtain a charge on the property depends on whether

the default in completing the contract was committed by him or the vendor and that is a question of fact in each case. *54 M 708—131 IC 487*. See also *1938 Rang. 367*. Section 55(6) clause (b) applies to the case of the sale having fallen through and the purchaser consequently acquiring a right to refund of his money. *8 MLT 361—8 IC 144*. See also *1938 Rang. 367; 1937 Pesh. 8*. Contract of sale cancelled and purchaser allowed to remain in possession till repayment of purchase price paid by him—Suit by subsequent transferee from seller for possession—Purchaser under cancelled sale alleging novation but not proving it—No question of statutory charge under section 55(6)(b) raised in trial Court—Appellate Court cannot entertain such question—Purchaser's possession, not sufficient notice. *54 L.W. 237—46 CWN 57—1941 PC 47. (PC)*. If a sale is wholly invalid the vendee has no charge upon the property for the purchase-money paid by him. *8 MLT 464—8 IC 1089*.

¹[56. **Marshalling by subsequent purchaser**—If the owner of two or more properties mortgages them to one person and then sells one or more of the properties to another person, the buyer is, in the absence of a contract to the contrary, entitled to have the mortgage-debt satisfied out of the property or properties not sold to him, so far as the same will extend, but not so as to prejudice the rights of the mortgagee or persons claiming under him or of any other person who has for consideration acquired an interest in any of the properties.]

1. Substituted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 18, for the original section.

Case Law

Section 56—Marshalling by a subsequent purchaser.

There is no reason why the equitable rule of marshalling by a subsequent purchaser embodied in section 56 of the Transfer of Property Act should not be extended to sales other than private sales. (1952) 4 DLR 95.

Accordingly, though a decree-holder has a right to have all the properties mortgaged to him put up for sale, it is entirely in the discretion of the court to direct in which order the properties should be sold, if by such direction, the court can give relief to deserving parties without any prejudice to the interest of the decree-holder. (1952) 4 DLR 95.

Mortgage and paramount title.

Where neither party objected in the Court's going into the question of paramount title in a mortgage suit and it was contended in the High Court in second appeal that the courts below committed an illegality in entering into the question of paramount title in a mortgage suit:

Held : If it does not lead to confusion and inconvenience then the Courts are entitled to go into the question of paramount title in a mortgage suit to satisfy the ends of justice.

Held further—A mortgagee who is in possession of the land is in no way estopped from questioning title of the mortgagor as a paramount title-holder in the suit land. 1 PLR (Dac.) 606.

—Mortgages.

The mortgage of a lease in any of the six forms specified in the Transfer of Property Act is not an absolute assignment and does

not create privity of estate between the lessor and the mortgagee. 6 DLR 220.

—The prior mortgagee without impleading puisne mortgagee got decrees and purchased mortgaged property. The puisne mortgagee brought a suit on his mortgage, not decrees and obtained possession through Court before the decrees and possession of the prior mortgagee. The purchaser of the mortgaged property in puisne mortgagee's decree brought a suit for possession against the prior mortgagee's purchase at a time when the prior mortgagee was barred by time. The prior mortgagee cannot claim that purchaser in the puisne mortgagee's decree must redeem his prior mortgage. Where the prior mortgagee was not barred then he can claim, it not being necessary for prior mortgagee to bring fresh suit. 2 DLR 9.

—The true rule is that a mortgagee cannot, by a mere assertion of his own or by any unilateral act of his, divest himself of his character as mortgagee and convert his possession as possession of an absolute owner. 7 DLR 103.

Marshalling—When may not be permitted—Presumption of contract to the contrary. The contract to the contrary within the meaning of section 56, Transfer of Property Act need not be express, it may be implied that is. if from the facts and surrounding circumstances, an inference could be drawn negating the right of marshalling, effect must be given to that inference, even though the contract does not say in so many words that there shall be no such right in the purchaser.

The purchaser of one of several items of mortgaged property undertook to pay and discharge out of the consideration money the mortgage debt due but did not do so. On a suit by the mortgagee for the sale of the property the purchaser claimed that the property sold to him should be directed to be sold last.

Held : that from the very circumstances that the sale to the purchaser of one of the items was for the purpose of freeing the other properties from the mortgage it could be presumed that there was a contract to the contrary within the meaning of section 56 and the purchaser was not entitled to marshalling *Sivaramayya vs Venkaryammu. AIR 1946 Mad. 59. Ref: AIR 1930 PC 183, 14 IC 179.*

Scope—Section 56 has no application to a case of an auction sale. *51 A 606—116 IC 297; 43 PLR 321—1940 Lah. 291; 15 CWN 80—7 IC 4; 41 C 418—25 IC 118;* the rule in this section has been applied to execution sale *5 M 385; 7 A. 711; 43 A. 589.* But see *1929 A. 309.* Section applies only between purchaser and original mortgagor and not between one purchaser and another. *42 A. 336; 31 C. 95; 130 IC 817—1931 N. 91.* Section (as amended in 1929) is exhaustive and the right of marshalling in equity and in law, is co-extensive, there is no justification to extend the legal right of marshalling by relying on the provisions of Order XXXIV, rules 4 and 5, in a way which cannot be justified by any well-established principle. *52 L.W. 120—1940 Mad. 776—(1940) 2 MLJ 27.* There cannot be any preferential right to reserve mortgaged property from sale between two persons who are both auction purchasers of the mortgagor's rights in different portions of the mortgaged property. *1930 A. 684. A*

mortgagee who has obtained a foreclosure decree would be entitled to the benefit of this section, just as a purchaser *41 C. 418.* Where a property is mortgaged and a portion of the same is afterwards assigned to a third party free of encumbrances, the assignee cannot be asked to contribute towards the mortgage debt in respect of his portion of the mortgaged property. *78 IC 52—1924 M 749.* See also *41 C 418.*

Application—*7 A. 711; 42 A. 336—59 IC 67; 19 ALJ 584—63 IC 209—43 A. 589; 18 ALJ 287.* It was held under the old section that it did not apply as between the mortgagee of the seller and the buyer. *35 B 395—11 IC 989.* The principle of the section does not apply to leases. *30 CWN 183—94 IC 786—1926 C 525.* Section 56 applies to charges. *167 IC 962—1937 OLR 188—1937 OWN 438—1937 O.301.* But see *ILR 1936 N.22—165 IC 550—1936 N.125.* Where a survey number when it became liable for the recovery of a Land Improvement Loan advance upon it, was a single property and not capable of description as two or more properties, and later on a portion of it is sold, this does not make the property two or more properties at the time the liability or charge under section 7(I)(c) of the Land Improvement Loans Act was created. To such a case section 56 of the Transfer of Property Act has no application. *1939 NLJ 235.* Prior mortgage debts, unless they are agreed to be paid by the vendee, are to be paid only by the vendor. *21 OC 360—49 IC 406.* The section does not apply where the purchase is subject to the prior encumbrance. *6 Part. LT 393—1925 P 484.* "Contract to the contrary", see *24 ALJ 527—95 IC 343—1926 A 415.*

Where a portion of the property was sold free of encumbrances and the remaining item was subsequently sold the later vendee was directed to pay off the subsisting mortgage debt, the subsequent purchaser is liable to pay off the entire mortgage debt and the first purchaser is entitled to rely on the rules as to marshalling. 8 P 585—1929 P 664. See also 1925 M 124. Section 55 applies only to cases where the party claiming marshalling is a purchaser and the party against whom it is claimed is the original mortgagor. Where a prior mortgagee has acquired the equity of redemption in proceedings to which the puisne mortgagee is not a party, the puisne mortgagee is not thereby necessarily deprived of his

ordinary right of bringing the mortgagee property to sale subject to the first mortgage. 8 SLR 257—28 IC 49.

Sections 56, 81 and 82—Scope—The right to contribution is controlled by the right of marshalling as shown by sections 56 and 81. Transfer of Property. 69 MLJ 303. Sections 58 and 81 of the Act do not apply to NWF Province but their principles are applicable as principles of equity, justice and good conscience. A *pro rata* share should be recovered from the property which has been proceeded against if the mortgagee has released another property which was also liable for the security. 195 IC 322—1941 Pesh. 49.

Discharge of encumbrances on Sale

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

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

1. Substituted by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act VIII of 1973), section 3 and 2nd Schedule for "Central Government" (with effect from the 26th March, 1971).

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

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

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

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

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

(e) In this section "Court" means (1) ¹[the High Court Division] in the exercise of its ordinary or extraordinary original civil

1. Substituted by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act VIII of 1973), section 3 and 2nd Schedule, for "a High Court" (with effect from the 26th March, 1971).

jurisdiction, (2) the Court of a District Judge within the local limits of whose jurisdiction the property or any part thereof is situate, (3) any other Court which the ¹[Government] may, from time to time, by notification in the official Gazette, declare to be competent to exercise the jurisdiction conferred by this section.

Case Law

Section 57—Section 57 applies only when the payment is made either before the sale is complete or as part of the sale transaction. The section (taken almost *verbatim* from the English Conveyancing Act of 1881) is seldom made use of in India. An application under the section before a final decree in a mortgage suit is passed is incompetent. *1936 AMLJ 58*. In a mortgage suit the Court can pass by consent a combination of several decrees in favour of different mortgagees determining the order in which they are to be paid and incorporating orders which the Court would be amply justified in making under section 57. *58 C.598*. Where an auction-purchaser in execution of decree for a maintenance charge purchased a house specifically subject to the charge that is, without adopting the appropriate procedure under section 57, he could not claim to hold the property free from charge. That house could be sold again to realise the same charge, as the charge was not wiped out. *166 IC 796—1937 N 36*.

1. Substituted by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act VIII of 1973), section 3 and 2nd Schedule, for "Provincial Government" (with effect from the 26th March, 1971), which had been substituted by AO 1937 for, "LG".