

## Chapter II

### Of Transfers of Property by Act of Parties

#### (A) *Transfer of property, whether moveable or immoveable*

5. "Transfer of Property" defined—In the following sections "transfer of property means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, <sup>1</sup>[or to himself] and one or more other living persons; and "to transfer property" is to perform such act.

<sup>1</sup>[In this section "living person" includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals.]

#### *Case Law*

**Section 5**—Transfer of property—  
Meaning of—"Transfer of property" is defined in section 5 as an act inter parties, and does not extend to transfer arising by operation of law. *Queensland Insurance Co Ltd. vs British India Steam Navigation Co Ltd.* PLD 1958 (WP) Karachi 389—1960 KLR 272—PLR 1959(1) WP 1069.

—Will—not a transfer of property—  
Transfer by will does not come within the ambit of the transfers of property dealt with under the Transfer of Property Act but that is because section 5 of the Act restricts the meaning of transfer of property to an act "by which a living person conveys property. *Jassumal vs Central Government Rehab.*

1. Inserted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 6.

*Dept. PLD 1961 Supreme Court (Pak) 206—1961 (I) PSCR 123—13 DLR (SC) 177.*

**Effect of change**—The Select Committee have amended section 5 to make it clear that a transfer can be made by a person to himself, as for instance by a person making a settlement or trust in which he constitutes himself a trustee. An explanation has also been added to the section to make it clear that the words "living person" "include corporations and other associations of persons"—(*Report of Select Committee*)

**"Transfer of property"**—The definition of "transfer of property" given in section 5 applies suitably to all sections contained in Chap. II. But it seems very doubtful that the definition applies to the term "transfer" used in section 130. *96 IC 1004—1926 N 469*. See also *5A 121 (137); 13 A 432*. The definition does not apply to transfers contemplated by the Presidency-Towns Insolvency Act, *24 Bom LR 861—1923 B 107*. A person acquiring another's right by transfer must acquire it by a valid transfer from the original owner or by operation of law. *9 NLR 54—19 IC 759*. Mere delivery of documents of title does not amount to a transfer. *96 C 339—1926 N 357*. The Act is not exhaustive of all modes of transfer. Dedication to a temple is not a "transfer" within the meaning of this section. See *42 M 440; 1926 N 469—96 IC 1004*. A gift to God Almighty is not a gift to a living person and does not require a

registered instrument. *128 IC 791—1930 P 610*. Where a person entitled to an annuity allowance under a wakf transferred it. Held, that no human being has any interest in the dedicated property and the grantee cannot be said to have an interest in the income from the dedicated property in the hands of the mutawalli as the income cannot be said to be existing property which always, is contemplated in section 5. *1936 PWN 395—1936 Pat 527*.

Where a transaction can only be regarded as a mutual relinquishment and admission of claim by all the parties, it cannot come within any of the classes of transfers dealt with by this Act. *33 A 356; 1923 N 55(2); 1930 A 498 (2)*. A partition is not transfer. *52 A 716—125 IC 1—1930 A 687*. But see contra, *161 IC 861—1936 L 220*.

A document by which a widow consents to give possession of the property to reversioners because they are reversioners of her deceased husband is not a transfer of property. *89 IC 722—1926 O 69*. Minority is no disqualification for acquiring property. 130 IC 200—18 OC 115. An arrangement, by which on dissolution of a partnership certain partners are paid off and in return give up or assign their interests in the assets of the partnership is a "transfer of property" as defined by Section 5. *ILR (1939) Kar 344—1939 Sind 288*.

✕ 6. What may be transferred—Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force.

- ✓ (a) The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred.
- (b) A mere right of re-entry for breach of a condition subsequent cannot be transferred to anyone except the owner of the property affected thereby.
- (c) An easement cannot be transferred apart from the dominant heritage.
- (d) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.
- <sup>1</sup>[dd)A right to future maintenance, in whatsoever manner arising, secured or determined, cannot be transferred.]
- (e) A mere right to sue<sup>2</sup> \* \* \* cannot be transferred.
- (f) A public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable.
- (g) Stipends allowed to military,<sup>3</sup>[naval],<sup>4</sup>[air-force] and civil pensioners of<sup>5</sup>[the Government] and political pensions cannot be transferred.

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1. Clause (dd) inserted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 7.  
 2. The words "for compensation for a fraud or for harm illegally caused" repealed by the Transfer of Property Act, 1900 (II of 1900) section 3 (i).  
 3. Inserted by the Amendment Act, 1934 (XXXV of 1934), section 2 and Schedule.  
 4. Inserted by the Repealing and Amending Act, 1927 (X of 1927), section 2 and Schedule I.  
 5. The original word "Government" was first substituted by AO., 1937, and then amended by AO., 1961, Article, 2 (with effect from the 23rd March, 1956), to read as above.

(h) No transfer can be made (1) insofar as it is opposed to the nature of the interest affected thereby, or (2) <sup>1</sup>[for an unlawful object or consideration within the meaning of section 23 of the Contract Act, 1872] (IX of 1872) or (3) to a person legally disqualified to be transferee.

<sup>2</sup>(i) Nothing in this section shall be deemed to authorise a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee.]

### Case Law

**Section 6**—Compromise petition by way of family arrangement—No transfer effected.

**Held:** The compromise petition did not involve any transfer at all. The interest created was one restricted in its enjoyment to the owner personally within the meaning of section 6 Transfer of Property Act, which interest would not be transferable. *Lal Mohan vs Onkar Mall AIR 1946 Pat 55.*

—NWFP—Act not applicable—  
Reversioner may transfer vested remainder to whomsoever he likes.

A vested remainder is not a mere expectance in succession by survivorship, but an interest which is a substantial property liable to attachment and sale. Apart from that,

the Transfer of Property Act is not applicable to the NWF Province, and consequently, the stringent law created by section 6 of that Act cannot override an established rule of law and equity that any property can freely be transferred by one person in favour of another. If a person who grants a perpetual lease in favour of another has got some interest left in the property leased which he can transfer to another person, then why can a reversioner in the case of a property granted to another for life transfer his interest therein to whomsoever he likes. *Inayat Begum vs Marayam Bibi PLD 1953 Peshawar 1.*

**Section 6(d), 54**—Repurchase, right of—When assignable.

1. Substituted by the Transfer of Property Act, 1900 (II of 1900), section 3(ii), for "for an illegal purpose."

2. Clause (i) inserted by the Transfer of Property Act, (1882) Amendment Act, 1885 (III of 1885), section 4.

Right to re-purchase reserved in a deed of sale does not, according to section 54, Transfer of Property Act, create an interest in 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— Whether it is a question of fact. If it appears that the option was given, as a matter of grace or favour, it would be restricted to the vendor personally and would not be assignable but if it is not induced by any such consideration but is, in fact, a part of the bargain the beneficial interest created by the contract is assignable. *Majeda Khatun vs Rabindra Chandra De* PLD 1952 Dacca 112—PLR 1951 Dacca 349 Ref 44 IA 243.

Right to claim estate on inheriting it —It may be surrendered for good consideration— When such relinquishment is void.

There is nothing illegal in a person, for good consideration contracting not to claim the estate, in the event of his becoming entitled to inherit on the decease of a living person, and the provisions of section 6, Transfer of Property Act, do not in any way create a bar against the legality of such a contract. Section 6 cannot in terms apply to such a relinquishment. If the relinquishment is in the nature of a gift or transfer of a contingent right then of course it would be void under section 6 but if it is merely an agreement or contract for not claiming a contingent right of inheritance when succession opens in the future, then the case would not be governed by the provisions of section 6 at all. *Muhammad Sher vs Ghulam Fatima* PLD 1951 Lahore 117—PLR 1951 Lahore 293.

**Section 6(a)**—Right in expectancy—It may be transferred.

Future property, possibilities and expectancies are all assignable in equity for value. *Ghulam Muhammad Shah vs Fateh Muhammad Shah*. PLD 1955 FC 1—1954 FCR 142—PLR 1955 Lahore 999—7 DLR(FC)(2) 70.

—An agreement for consideration by a Muslim heir not to claim the inheritance when it opens, does not operate to transfer the expectancy so as to deprive the heir of his chance to succession, but it may, in suitable cases, be equitably enforced as an agreement to sell the property when it falls into possession, on the opening of the succession in future. In what cases it should be enforced will be a question for the Court to consider on the facts and circumstances of each particular case, having regard to all the equities. Such an agreement could also be pressed into service for founding a plea of estoppel against the person who executed it, subsequently when the inheritance opens. The application of this principle would depend on the circumstances of each case. *Qamar Din vs Aisha Bibi* PLD 1956 (WP) Lahore 795—PLR 1956 Lahore 1962—8 DLR (WP) 86.

—Scope—All kinds of property may be transferred—Right to convey is property—Restrictions on transfers.

The general rule under section 6, Transfer of Property Act is that "property of any kind may be transferred" and that what is non-transferable has been stated there in the form of exceptions, it was intended to use the term in a very wide sense. Thus, in exception (b),

"a mere right of re-entry for breach of a condition subsequent is not transferable except to the owner of the property affected thereby which means that the owner affected by the breach has a right of re-entry which he can transfer. Now if a mere right of re-entry can be transferred in certain cases, it follows that Act treats this right as "property". A *fortiorari*, a right to the re-conveyance of immovable property, being ever so much more solid than a right of re-entry, should be treated as property. As regards clause (d) its application depends on two conditions, namely, (1) that what is transferred is an interest in property; and (2) that it is restricted in its enjoyment to the owner personally. Neither condition is fulfilled. If under section 54 a contract of sale cannot create interest in immovable property, a contract to reconvey also does not create any interest. As regards condition (2) there should be something positive to indicate that it was intended to restrict the enjoyment to the owner personally. Such interests are by their very nature restricted to a person or a class of persons, (2) a grant for maintenance, (3) a religious office. *Umar Din vs Fazal Din* PLD 1952 Lahore 166—PLR 1952 Lahore 196.

**Sections 6, 10, 11 & 40—Right of repurchase is not transferable.** Ekrarnama is not a deed of conveyance—It is at best an agreement between the vendor and the vendee and by itself it does not create any interest in land. The restriction created in ekrarnama is quite valid. Unless the interest created by any transfer is absolute, section 11 Transfer of Property Act shall have no application. *Asim Ali vs Badaruddin* 46 DLR 96.

**Sections 6, 107—**Subsequent lease to tenant already in possession—Valid and effective.

Where the person in possession is a tenant from month to month, a subsequent lease is very near a true lease though to the new lessee only the right to get actual possession has been transferred. The new lessee can terminate the existing tenancy and get actual possession, so that there is almost a transfer of actual possession to him by the landlord. *Agha M Jaffri vs Hunis Ali Kirmani* PLD 1960 (WP) Kar 103.

**Section 6—**Property of any kind may be transferred.

A right to the reconveyance of immovable property, being ever so much more solid than a right of re-entry, should be treated as property. 1952 PLD (Lah) 196.

**Section 6(a)—**Transfer of expectancy.

Dispute relating to land between mother, step-mother and sister of last male owner on the one side and reversioners on the other—Parties not sure as to their respective shares—compromise deed executed to avoid further litigation and to put an end to doubts—Deed not invalid as transfer of expectancy. (1951) PLR (Lah) 293.

**Section 6—**Scope of section—Section does not apply to the Punjab. 89 IC 792—1926 L 39: 1933 L 378. Hence sale of reversionary interest of a Hindu is transferable in the Punjab. 1929 L 39. Section has no retrospective operation. Hence, where an agreement entered into between expectant heirs in 1868 provided for the division of the property after the succession opened.

**Held:** That the agreement was not hit at by section 6, Transfer of Property Act, or Section 23, Contract Act, and was enforceable. *14 PLT 27—1933 P 165*. It controls section 43—Duty of Court to reconcile sections 6 and 43. See *40 Bom LR 147*. The conveyance of an interest in remainder or interest *in futuro* is, according to Sunni school, invalid, *24 MLJ 258—18 IC 185*.

A Hindu religious endowment cannot be transferred, but its income can be pledged. *6 B 552(FB)* An assignment of an estate or interest which does not exist at the date of assignment cannot operate according to its tenor. In equity such a transfer may in certain circumstances create equitable rights. *1931 PC 203—134 IC 324 (PC)*. Contract to assign property to come into existence in future. The assignment becomes complete when property comes into existence. *97 IC 257*. The interest of a person's holding on which he has planted a grove is property and is transferable under section 6: *1924 A 795*. See also *123 IC 767—1930 A 377*. Interest of surety in the property furnished as security can be transferred subject to the charge. See *52 A 619—125 IC 477—1930 A 225(FB)*.

**Construction**—Decisions under section 60, CPC, as to what properties can be attached in execution of a decree are not of much assistance in construing this section which deals with voluntary transfers. *25 C 778*. See also *40 M 302*.

**Clause (a)**—Section 6(a) construed and reconciled with section 43, *infra 57 All. 474*; But see *145 IC 965—38 LW 610—1933 M 795—65 MLJ 588*, "Possibility" and of alike nature, meaning and scope of. See *47 IC 563*. *A contract for the future sale of future*

*expectations* cannot be enforced. *45 MLJ 617—50 IA 239—50 C 929 (PC)*. Section 6(a) not only forbids the transfer of the expectations of an heir or legatee, but by the words 'of a like nature' prohibits any transfer of a similar kind of possibility. It is not the circumstances connected with a transfer which sanction or forbid its transfer but the inherent qualities of the chance itself. Where the granting of a gratuity to a Municipal employee is entirely in the discretion of the Municipality any transfer by such an employee of his chances of getting the gratuity, at a time when it had not been actually sanctioned, is void as a mere *spes* under Section 6(a). The hope of a gratuity differs from a tradesman's book debts, in that the book debts are a necessary incident of every business conducted on a credit basis. A mortgage of such debts operates as an equitable assignment, fastening on the property when it comes into existence *1938 Rang LR 542—1939 Rang 8*. A mortgage of future income to be derived from the work of scavenging to be done is invalid, as the subject of the transfer is an expectancy or a possibility within the meaning of Section 6(a). *48 LW 258—1938 Mad 881*.

**What is not mere possibility**—See *34 Bom LR 366*. Interest of a *co-parcener* is a vesting interest. *49 IC 907*. The *interest of a donee subject to life-interest* is a vested interest and is transferable. *48 IC 396—21 OC 312*. See also *31 SLR 506—1937 Sind 306* (Life interest in a definite fund). Where, by a settlement, a vested interest is given in the income of a property and also a contingent interest in the corpus on the youngest child attaining the age of 20, the contingent interest is not a mere possibility or

a mere right to sue 8 R 8—57 IA 10—58 MLJ 83 (PC). An adopted son has a vested interest and such interest is not *spes successionis*. 40A 692—47 IC 599. Death of occupancy tenant leaving wife and daughter—Rent in respect of future possible lease cannot be assigned. 34 MLJ 236—1923 M 3164 Offerings made at temple—Alienability when disassociated from priestly office. 113 IC 242.

**What is "*spes successionis*"**—The right of sons to get a share in the mother's estate. 48 C 1059—25 CWN 990. The interest of a reversioner is a mere *spes successionis* and is neither transferable nor divisible. See 13 NLR 187—42 IC 737; 107 IC 987—1928 N 262; 1938 MWN 259; 1938 Bom 121—39 Bom LR 1287; 1937 PWN 183—1937 Pat 280; 1939 All 689. It is not competent to a person to relinquish his rights in property to which he is the then nearest reversionary heir, expectant upon the death of a widow in possession. His son is, therefore, not estopped from claiming the property by reason of the relinquishment. 1938 OWN 152—1938 Oudh 94; 1930 MWN 1054; 48 A 637—96 IC 595—1926 A 715; 48 C 536—25 CWN 496; 22 CWN 486; 62 IC 933—2 Pat LT 471; 2 Pat LJ 578—41 IC 631; 86 IC 1016(2)—1925 M 941; 15 OC 122—13 IC 495. But in the Punjab, where the Transfer of Property Act, is not in force, alienation of reversionary rights is not void. 1933 L 378. Future offerings of worshippers. 43 C 28—28 IC 675. But see 26 ALJ 115; 164 IC 1111—936 OWN 144; 1928 A 721. The interest of the adopted son during the lifetime of the widow is not a mere *spes successionis*. 59 C 859—55 CLJ 205.

Under Muhammedan Law the right to succeed is a mere possibility. 41 M 365—34

MLJ 460; 41 IC 361; 108 IC 390. A Hindu daughter cannot bargain away her son's right as reversioner. 44 A 428—1922 A 217. A reversioner joining with a limited owner in a transfer is not estopped from claiming them as heir. 46 C 566—36 MLJ 68(PC)—45 C 590—45 IA 38—34 MLJ 298 (PC). But this clause does not bar a contract by one not to claim a share in property in the event of his succeeding to it. 27 IC 701—13 ALJ 110; 33 A 414—8 ALJ 199; also 29 IC 549—29 MLJ 214; nor an agreement by an expectant heir to divide property in a particular way on the happening of a contingency. 33 A 457—9 IC 530; 1933 P 165. But see *contra* 50 IA 238—45 MLJ 617—50 C 929 (PC). A family arrangement is valid and binding not as an assignment or relinquishment of the rights in expectancy but as a settlement by which parties defined their respective interests to avoid future disputes and hence section 6(a) has no application to such an arrangement. 1038 OWN 711—1938 Oudh 190.

The right of a Hindu reversioner is one in regard to which it is impossible to say that it would ever become concrete; it could only become concrete upon the death of the widow and if the reversioner survived her. The bare transfer of such interest or its relinquishment in favour of another is void under section 6(a). But this is not necessarily so in every case. If the transfer was part and parcel of family settlement or a compromise in dispute between rival claimants to property it would not necessarily be invalid. *ILR (1939) All 950—1939 ALJ 824—1939 All 689 (FB)*. An agreement to sell Karnam inam lands when enfranchised cannot be enforced. 1925 M 885—48 MLJ 598.



An agreement among reversioners to divide in particular shares the future estate is inoperative. 49 IC 260—35 MLJ 684. Family settlement deciding in what proportion several contesting members should inherit when succession opened is valid. 1929 L 485; 1938 Oudh 190. The Transfer of Property Act does not recognise any distinction between a whole debt and a part of a debt. Both may be transferred under the Act if they come under the category of actionable claims as an actionable claim is "property". The transferee of part of a debt may however find that what is transferred to him is not an actionable claim as under Order II, rule 2, CPC, a single cause of action cannot be split up into several causes of action. But Order II, rule 2, CPC being a rule of procedure, does not affect the right of transfer, that is to say, it cannot make what is transferable non-transferable. It does however, bar the right of suit in certain cases, and it may prevent the transferee of a part of a debt from enforcing his claim and thereby make the transfer nugatory. 18 Pat 839—21 Pat LT 928—1940 Pat 170.

Agreement not to claim a share on the death of a living person may be valid. 84 IC 208—1924 P 736. Agreement that on death of one member his share is to pass to survivors is legal. 29 MLJ 214—29 IC 549; 33 A 414—8 ALJ 199. Where the daughters who had possession of the property during their mother's lifetime effected a partition of the same, held, that the partition was not a transfer and that section 6(a) did not apply. 52 A 716—1930 A 687. But see 38 PLR 201—1936 L 220. On the death of an occupancy tenant leaving a widow and daughter, the property was mutated in favour of the widow

for her life or till re-marriage. After about 20 years, the widow applied to have the occupancy rights transferred in the name of her daughter, but the daughter was directed to file a suit to have her right declared. Accordingly, the daughter filed a declaratory suit that she was the legal heir and entitled to the property. The collaterals contended that the suit amounted only to an assertion of *spes successionis* and, as such, was not maintainable.

**Held:** the suit was maintainable. (9 L 467, Not foll; 10 L 58 and 10 L 489, Foll) 34 PLR 743—1933 L 555. A *vested remainder* is not mere *spes successionis*. 17 PLT 876 1937 Pat 163. However illegal and unenforceable a bare relinquishment or renunciation of the chance of a heir-apparent succeeding to an estate may be, different considerations prevail if that renunciation or relinquishment proceeds on a settlement of conflicting claims or *bonafide* disputes between the contracting parties. If, therefore, to avoid an adverse decision on the factum of his legitimacy, a plaintiff enters into a compromise with the defendants and gains an immediate advantage for himself, it cannot be said that he is relinquishing a mere chance of succession. Such a compromise is valid and binding upon him. 44 PLR 87. As to applicability of the rule as to *feeding title by estoppel*, see 6 OWN 233.

Two groves with some other property of the mortgagor were mortgaged for the purpose of purchasing the very two groves from its owner.

**Held**—That the mortgage was enforceable against them on the principle of feeding the grant by estoppel, there being no third party's interest intervening between the

execution of the security and the execution of the sale-deed 131 IC 38—1931 A 275.

A contract by reversioner to sell his expected estate is not specifically enforceable. 39 M 554—28 MLJ 650. See also 132 I C 321—1931 ALJ 295; 130 IC 822—1931 N 51 (1928 N 262 and 1928 O 185, Diss from) .See also 59 C 859—55 CLJ 205. So also agreement by one reversioner with another to sell his interest or not to claim estate for certain sum to be paid annually. 1937 PWN 183—1937 P 280. The section has no application to a *bonafide* settlement of a right to succeed among rival competitors. 41 A 611—17 ALJ 822. See also 38 A 107; 49 MLJ 296; 108 IC 440; 1929 L 485. A family arrangement is not a transfer and cannot come under the prohibition. 1930 A 498 (2). See also other cases cited on the point under section 5.

**Right to offerings made at place of worship—Transferability**—It cannot be laid down as a broad proposition of law that the right to a share in the offerings made at a place of worship, or in the income of fairs or other functions held in connection therewith, is a mere "possibility" and therefore not alienable on the principle of law embodied in section 6(a) of the Transfer of Property Act. Nor can it be said that such a transfer is, in every case, void as being opposed to public policy, as the making of offerings by persons resorting to temples and other places of worship is a matter of violation with them and no one can compel another to make offerings on a particular occasion to him and him alone. The determination of the question depends on a variety of considerations (e.g.) the nature of the institution, the occasion on,

and the purpose for which the amount is paid; the capacity in which it is appropriated by, or divided among, the persons concerned. A distinction must be drawn between cases in which emoluments are attached to a priestly office, and the cases in which the offerings are made to a deity and the persons who receive the same have not to render services of a personal nature as a consideration for the receipt of the offerings. The emoluments of the former kind are not, in the absence of a custom or usage to contrary, ordinarily transferable. But when the right to receive the offerings made at a temple is independent of an obligation to render services involving qualifications of a personal nature such as officiating at the worship, then the right to receive the offerings, when made, is a valuable right and is property and is, therefore, transferable. 44 PLR 403.

**Section 6(a) & 6(b)**—Applicability—transfer in consideration of release *spes successionis*—Validity void contracted—Duty of party receiving the benefit to make compensation—Contract Act, section 65. (1942) 2 MLJ 364.

**Clause (b)**—A transfer of a revision of a lease carries with it the right to enforce for future of the lease for breach of condition, even where the breach occurred prior to the transfer, 43 B 28—20 Bom. LR 767 see also 15 M 125.

**Clause (c)**—This clause means that there cannot be an "easement in gross" 34 IC 450—20 CWN 1158; 20 A 200. The clause does not bar waiver or release of rights of one in his own property. 26 IC 211—27 MLJ 272. *Kumaki* rights are not rights in gross and this

clauses applies to them. 15 IC 278. So also an assignee of equity of redemption cannot sue for unascertained excess profits. 96 IC 339—1926 N 357. But an auction-purchaser at a revenue sale can maintain a suit for recovering arrears of rent due by tenant. 91 IC 474.

**Clause (d)**—See 1928 M 1201 *Prima facie* proprietary rights are transferable and it is for the contesting party to show that such transfer is not permissible. So, a certain *muafi* granted by the ruler for the support of Brahmin, was transferable. 15 IC 562—1934 A 973.

**Personal rights—What are—**The widow's right to maintenance is a personal right and, as such, inalienable. But where property has been given to a widow of a Hindu joint family in lieu of maintenance, the transfer of such property by her is valid and effective during her lifetime. 54 A 366—1932 A 662. See also 69 MLJ 317 (Hindu widow's right of residence). The statutory non-transferability enacted by section 6(d) and section 6(dd) is based on the impossibility of transfer inherent in the nature of the right sought to be transferred, and not on notions of public policy. Where property has been given to a Hindu widow in time of maintenance, the transfer of the property during her life is not a transfer of her rights to maintenance and is valid. Section 6(d) and (dd) have no application to such a case. (AIR 1932 All 662 Foll) 42 CWN 1258—1938 Cal 405. See also 1936 Pat 527; 1939 Pat 506. An agreement by a vendee to pay revenue for other lands of vendor is personal. 38 A 230—33 IC 187.

Rent-free grant made in lieu of service or

service inam is not transferable. 3 OLJ 235—34 IC 672; so also a contract of service, 47 IC 902; settler reserving allowance to himself out of trust property. 52 M 465—1928 M 1201; lands given to a Hindu widow restricted to her personal use and preventing any alienation. 47 B 597; 25 Bom LR 293—1923 B 276. In the absence of any restriction of alienation the grantee may have a right of alienation for the period of the limited interest. 125 IC 461—1930 A 593. Where a Hindu widow gifted certain property to her daughter and the widowed daughter-in-law consented to the same, provision for her maintenance having been made in the gift deed, held, section 6 had no application. 32 Bom LR 705—127 IC 332—1930 B 373. Where an owner in full right of certain property grants it to a trustee upon trust, among other things, to pay him an allowance per month for his maintenance, this is not a "restricted" interest in the sense of clause (d) of section 6 of the Transfer of Property Act, and a hypothecation by such a person of his rights creates a valid charge on the allowance. ILR (1938) Mad 646—42 CWN 565—67 CLJ 241—40 Bom LR 767—1938 PC 123—(1938) 1 MLJ 597 (PC).

**Mere right to sue**—Hindu reversioners—Document executed by in favour of stranger authorising latter to file suit on their behalf for recovery of estate —Right given to stranger to conduct suit and to divide the property after recovery in case of success of suit and to take half-share—If operative and valid. 1938 MWN 259. As to non-transferability, of interests created for and restricted to the personal enjoyment of a particular person. see 5 Bom LR 727; 1 M 235; 7 WR '266; 1927 O 436. *Right of pre-*

emption is purely personal. 36 B 139—11 IC 693; the right to hold markets on another's land. 6 A 497.

Alienation of hereditary fanning service inam in a temple is invalid. 25 IC 685—1914 MWN 745. A rent-free grant in lieu of service is not transferable 34 IC 672; also 42 MLJ 477—45 M 620. A contract of service is not assignable before breach. 47 IC 902. But the right of enjoyment in certain property accruing to a person under an award of partition can be validly assigned. 1932 ALJ 821. Grant for grantee's *parwarish* for lifetime is personal. 105 IC 196. Section 6(d) does not prohibit the beneficiaries for life under a gift deed from disposing of their interest in the property. 1927 R 157—101 IC 625.

**\* Personal rights—What are not—** Malikanas rights of fixed share in the rent of lands are not personal and are transferable 21 ALJ 289—1923 A 304. The right to exercise the profession of a broker is not personal. 18 CWN 1184—19 CLJ 313.

**Addition of new sub-clause (dd)—** "Section 6, which enumerates property of different kinds which cannot be transferred, includes in clause(d) an interest in property restricted in its enjoyment to the owner personally. A right to receive maintenance is a personal right, although any particular property or the income thereof may be charged with it. It is in accordance with public policy that these rights which are generally created for the maintenance or personal enjoyment of a qualified owner, e.g., a Hindu female, ought to be inalienable; but in some cases it has been held that if the amount of maintenance is fixed by an

agreement or by a decree, it can be assigned. (5 B 99; 38 C 13). Although an agreement or a decree would make such right definite, it is nevertheless a right created for the personal benefit of the qualified owner and should not be alienable. Section 60 of the CPC which protects such right for the process of a Civil Court does not make any exception in the case of maintenance fixed by agreement or decree.

The above reasoning, however, does not apply to arrears of maintenance which have accrued due. To make the position clear, we suggest that the following clause should be inserted as clause (dd) viz, 'a right to future maintenance in whatsoever manner arising or secured or determined cannot be transferred'.—(Report of Select Committee). Right of residence is connected with and is governed by the same rules as apply to a right of maintenance. 1 Punj LR 209(212, 213). See also 1937 Bom 358—39 Bom LR 458; 42 CWN 1258—1938 Cal 405.

**Allowances conferred by will—Transferability—**The right to future maintenance contemplated by section 6(dd) means a personal right for the maintenance or personal enjoyment of the grantee. Allowances conferred by a will stand on an entirely different footing and they are transferable. 167 IC 52—1937 OWN 188—1937 Oudh 420; 42 Bom LR 165. What is intended by section 6(dd) is not a sum which is used as maintenance but which in fact is maintenance. There is nothing in the subsection to prevent an assignment of arrears of maintenance, that is to say, a sum which has already become due.

The section deals with a right, under the personal law of the parties concerned, to

maintenance. A sum will not come within the section merely because it is used as maintenance. The fact that the maintenance is secured by a deed does not exclude it from coming within mischief of the section. *1939 Pat 506—181 IC 37*. A right to monthly maintenance allowance which has not accrued due already, cannot be assigned by way of mortgage in view of the provision of section 6(dd) of the Transfer of Property Act. These provisions will apply whether or not there was an antecedent obligation on the grantor to maintain the grantee under the personal law of the parties.

There is no doubt a distinction between a maintenance allowance and an annuity, and whether an allowance is the one or the other will depend on the facts of each case. *77 CLJ 528*. See also *1936 Pat 527*; *1938 Cal 405*; *(1938) 1 MLJ 597—1938 PC 123—ILR (1938) Mad 646 (PC)*.

~~Clause (e)~~—Right under a contract to sell is not a mere right to sue and is transferable. *1924 L 709*. If along with the land, the right to recover the profits of the land which have already accrued due is sold, it is not a "mere right to sue", but property with an incidental right attached to the property itself, to which the section has no application *56 B 403—44 Bom LR 991*. See also *1926 C 428*. Where the transfer is of a right to sue for the money which may be found to be in the hands of the agent and is not meant to include a right to sue for damages on account of negligence or in the sense of moneys which ought to have been in his hands if he were diligent, such a transfer cannot be a mere right to sue. *145 IC 123—57 CLJ 46—1933 C 461*; nor where a transfer is made of the property which is the subject-

matter of the litigation and if the transfer is for good consideration *143 IC 575—37 CWN 706—1933 C 454*.

Where after the filing of a suit for damages for wrongful dispossession of premises in breach of an agreement of lease, the plaintiff assigns by way of sale the profit and loss of the suit to another, and on the death of the plaintiff thereafter, the assignee claims to be brought on record and to continue the suit, he cannot be permitted to do so. The right to recover damages whether for tort or contract is a mere right to sue. The assignment of the fruits of a pending action, though valid, gives the assignee no right to interfere in proceedings in the action. The Court has merely to consider the nature of the suit. *58 LW 64—1941 Mad 389—(1941) 1 MLJ 22*.

Though a right to sue for damages is a mere right to sue and not an actionable claim, and therefore ordinarily not transferable, the bar of section 6, Transfer of Property Act, cannot apply to a case where a person has transferred to another the whole of his rights in the property in respect of the acquisition of which damages are claimed by the transferee. *1939 OWN 500—1939 Oudh 196*. Where a guardian has sold the minor's property and the minor does not file a suit within 3 years of his becoming a major to set it aside, but later on merely transfers the property to a third person, it is not a transfer of an actionable claim and it could not be a transfer of immovable property because the minor transferor, nor having himself sued within time, had ceased to have any rights in the property which he was capable of transferring. The transfer was not one of

anything more than a right to sue and therefore without effect in view of the bar of section 6(e). *1939 OWN 241—1939 Oudh 122.*

Sale by guardian—Transfer by minor of the same properties on attaining majority being a mere right to sue, is invalid. *34 Bom LR 1512.* Mere right to sue—Bond by guardian to Court under Guardians and Wards Act—Breach—Assignment by Court to new guardian and assignment by latter to ward on becoming major—Validity—Suit by ward to enforce bond is maintainable. See *1938 MWN 379.* As to a case where this clause was held not to apply, see *59 IA 41—11 P 266—36 CWN 280—62 MLJ 287 (PC).*

**Scope**—What is a right to sue depends on facts of each case. *1925 S. 18.* See also *7 P 58—110 IC 526.* The income of an estate deposited in bank drawable by a successful litigant does not properly fall under this clause, *43 MLJ 486—46 M 190.* The section is not exhaustive. All contracts capable of specific performance are assignable. *19 MLT 329—33 IC 696.* The object of the clause is to prevent trafficking in litigation. *3 B 402; 12 B 554.* See also *1925 O 299.*

Where a person transferred certain properties and all his interests in certain suits relating to the same, it was held that the transferee could maintain a suit to recover mesne profits and that the same was not prohibited by section 6(e). *33 CWN 614.* Under section 6(e) the prohibition is against the transfer of a mere right to sue. The word 'mere' implies that the transferee acquires no interest in the subject of transfer other than the right to sue. Where the party purchased a tank along with a covenant against

misfeasance, it was held that what was purchased was not a mere right to sue but a property. *10 Pat LT 191—1929 P 245.* So also where a manager alienates the joint family property for himself and his minor brother, the latter has an interest in the property which he is capable of transferring, and hence an alienee from him is entitled to sue. *151 IC 1043—36 Bom LR 474—1934 B 234.*

What can be assigned is property or right which can be regarded as property capable of being assigned. The right to recover a share of village profits is not a contractual or personal right but a right which arises from ownership of property or ownership of land and is ancillary to the right of property. Whatever doubt there might be as regards the assignment of a mere right to recover past profits no question can arise, when the right is assigned as incidental to the proprietary share itself which is transferred. Such a transferee is entitled to sue for rendition of accounts of the village profits. *1942 NLJ 30.*

**What are transferable**—The right to recover moneys found due on taking accounts is transferable. *42 IC 390; 1925 S. 72; 32 Bom LR 894—1930 B 409; 1926 M 417—50 MLJ 54.* Where at the time of the assignment, a liquidated amount had become due to the assignors of the plaintiff, the assignment of a right to recover his debt is more than a mere right to sue for accounts, and it does not therefore offend the provisions of section 6(e). *57 M 1074—1934 M 461—67 MLJ 158.*

The mere fact that a calculation will have to be made before determining the exact amount does not make that amount any the less a debt due to the assignors validly

assignable in law. *57 M 1074*. A right to mesne profits under a decree is assignable. *20 IC 685—18 CWN 450; 44 M 539—40 MLJ 204; also 1 Pat LJ 427—37 IC 998; 113 IC 767—1929 A 63*. But see *125 IC 468—1930 A 593*. A right to take accounts and to recover such sums as may be found due is not assignable, being a mere right to sue within the meaning of section 6, Clause(e), and the assignee is therefore not entitled to maintain a suit for such a purpose. See *1937 Lah 934*. An agent has a right to claim an indemnity from his principal after rendering an account and not before. Consequently, a right to indemnity before rendering an account is a mere right to sue and cannot be assigned. *62 C 510—39 CWN 606*. *A right of contribution. 43 MLJ 129—1922 M 397; a right of reconveyance of land 1921 MWN 519*.

A claim to recover arrears of rent by purchaser of the whole estate is valid, as the purchase is not a bare right to sue but the estate together with that right. *91 IC 474*. See also *1935 A 342—1935 ALJ 348*. *Right to recover unpaid purchase money. 27 NLR 288—1931 N 89*. See also *1942 Mad. 209—(1941)2 MLJ 695* (Right to recover purchase money when sale is set aside as vendor had no title to property sold, and executory contract; *31 IC 604—18 MLT 483*; a right to recover from the transferor's agent moneys not brought to account fraudulently. *18 IC 138—24 MLJ 313*; a share to arrears of profits of an estate. *60 IC 690—23 OC 384 ; 47 IC 634; 1925 A 765* (see *contra 89 IC 827*).

Right of a co-sharer to recover from *lambardar* his share of profits. *1926 M 396—97 IC 189; 145 IC 228—1933 M 710*. See

also *ILR (1940) Nag 37—1939 Nag 97*. Transfer of debt due by a debtor is not transfer of a mere right to sue. *1926 M 417—50 MLJ 54*, see also *149 IC 529—11 OWN 691—1934 O 240*. But the assignee of a debt so far as the claim to interest due before the date of assignment is conveyed purchases a mere right to sue which is not transferable. *1934 Oudh 240*. A non-permanent tenure created after the passing of the Transfer of Property Act and before the Bengal Tenancy Act was passed is transferable. *1927 C. 220—103 IC 202*. Sale by OA of properties in the possession of alienees from the insolvent is nothing more than a sale of right to litigate. *1927 PC 253—54 MLJ 88 (PC)* "Transfer by a beneficiary of his rights under a settlement is not a mere right to sue. *5R 145—1927 R 165*.

A right of maintenance in a definite sum of money cannot be mere right to sue. It may not be attachable in advance under section 60(1)(n) CPC, but that is not sufficient to bring it within section 6(e), Transfer of Property Act, for it will, in case of a breach, support a suit for a debt and not for damages. *1936 PWN 395—1936 Pat 527*. See also *1939 Pat 506; 1938 Cal 405*; Sale of goods sent by railway which had not reached its destination and about which investigation was proceeding, is not transfer of a mere right to sue and hence such a sale is not illegal. *1941 AMLJ 35*.

**Cases where the clause applies—**A claim to recover an ascertained amount is an actionable claim and can be validly transferred, but a claim for unliquidated damages for breach of contract, after the breach is not an "actionable claim" within the

meaning of Section 3 and cannot be transferred because of Clause(e) of section 6. *1933 ALJ 1009—1933 A 642*. A claim for damages for breach of contract after breach cannot be transferred. *86 IC 960—1925 L 548; 106 PR 1914—27 IC 115; 36 C 345—13 CWN 384; 1935 N 135; 1935 N 2; 36 C 245; 22 MLJ 207; 38 M 138; 122 IC 264—1930 N 22; also 1925 M 62—47 MLJ 435; 47 B 719 1923 B 403; 4 OLJ 425—41 IC 436; 1935 N 2*.

An executory contract for the future sale of immovable property is however not a mere right to sue, although a right to sue is involved in it on breach of its conditions. Where, however, at the time of the execution of the assignment deed by the vendee, the assignor is aware that the contract was incapable of execution, what he assigns is not an executory contract but a claim in respect of compensation for a breach thereof and hence mere right to sue. *1934 N 268*; also a claim for past mesne profits. *38 M 308—25 MLJ 410*. See contra *103 IC 678(3)*; right to sue for damages for wrongful attachment of movable property. *5 A 207*.

A mortgagor assigning his equity of redemption cannot transfer his right to unascertained excess of alleged profits. *1926 N 350—96 IC 339*. A right to sue for recovery of debt cannot be purchased. *17 ALJ 837*. See also *62 Cal 510—1938 Cal 377* (Right of commission agent to sue for commission coupled with the obligation to render accounts. Where a person who has purchased a car on instalments sells it to another on payment of full price but dispossesses his vendee, the latter has only a personal right against the former, Such a right is a mere right to sue within section 6(e) and

hence cannot be transferred. *30 NLR 213—1934 N 78*.

Where a mortgagor left a portion of mortgage-money with the mortgagee to be taken later on, held, the right to recover such amount is a mere right to sue and cannot be transferred. *7 OWN 12—1930 O 88*. Mortgagor and mortgagee—Amount left with mortgagee to pay creditor of mortgagor in respect of claim in pending suit—Creditor getting decree for lesser sum and balance left with mortgagee—Right to recover balance from mortgagor—Assignment of right—Held—That the right transferred was not a mere right to sue within the meaning of section 6(e), but an actionable claim falling under section 130 and the assignee was entitled to sue and recover on the basis of assignment. *1937 ALJ 518—1937 All 470* section 6(e) is confined in its operation to the transfer of a mere right to sue. Where a vendee was directed by the sale deed to pay part of the consideration to a creditor of the vendor, the relation between the vendor and vendee is that of a debtor and creditor and the money left in the hands of the vendee is a debt which could be transferred. The right to recover this is an actionable claim as defined in section 3. *1938 ALJ 851 1938 All 544*.

Where the mortgagor completes his part of the contract by executing a usufructuary mortgage and by putting the mortgagee in possession and the mortgagee fails to discharge the consideration, the mortgagor has a transferable claim and his assignee is entitled to sue the mortgagee for the amount. (*1931 A 95, Foll*) *162 IC 698—1936 L 196*. Right to indemnity is not transferable. *62 C 510—39 CWN 606*.



**Clause (f)**—Right to a public office is not transferable. 6 *OLJ* 157—51 *IC* 86; so also a right to receive gifts from worshippers: 51 *IC* 86; also the right to offerings in a Hindu temple 37 *IC* 960 (*P*). The right to recover a sum of money agreed to be paid to the plaintiff and charged upon particular land with the object that certain religious ceremonies should be performed by him is transferable, where it is found that the performance of the worship is not a condition precedent to his claim. 34 *Bom LR* 198. The transfer of the rights of *mutwalli* is invalid. 47 *IC* 117—22 *CWN* 996; 8 *C*, 372; 23 *C* 645; 12 *LW* 590—1931 *L* 379; so also office of the *Dharmakarta* of a temple. 15 *M*, 419; or of *archaka* of a Hindu temple :7 *MHC* 32; 4 *M* 391; 1 *CWN* 493; 14 *WR* 239; *WR* 266; 43 *C* 28; 59 *IC* 86; 45 *M* 620—1922 *M* 197; or of *shebait* or *mutwalli* of a Muhammedan Mosque: 23 *C* 645; 22 *CWN* 996; 8 *C* 732; 7 *WR* 226; also *mirasi* office: 16 *M* 146. As to transfer of a religious office, see also 47 *B* 529 where the authorities are fully discussed. Transfer of office of *Karnam* is not valid. 20 *M* 145; so also that of *chowkidar* 31 *C* 1021. Public servant getting salary below attachable limit—Agreement with creditor for attachment and deduction of part every month not legal. See 43 *Bom LR* 758—*ILR* (1941) *Bom* 415—1941 *Bom* 389.

**Clause(g)**—The word "*pension*" implies periodical payments of money by Government to the pensioner. 57 *IA* 215-35 *CWN* 791-1931 *PC* 160 (*PC*) agreement to transfer *political pension* is void 1927 *M* 604—50 *M* 711—52 *MLJ* 622. A bonus or grant is not a pension and is transferable. 5 *M* 272; so also grant of land once for all in lieu of pension. 29 *B* 480; 30 *M* 153; 32 *A* 108; 28 *A* 104; so also *Zemindari grant* for past

service to Government is not a pension under this sub-clause. 26 *A* 616.

**Cl (h) (2)** would be inapplicable where the object to the consideration for the transfer is itself not unlawful but the transfer may be ineffective on some other ground. 122 *IC* 872—1930 *A* 1(*FB*). Where a grant prohibits transfer to a person not holding a certificate, a person not holding such a certificate is not legally disqualified to be a transferee. 1928 *R* 136—6 *R* 423—111 *IC* 105. If the consideration or object of passing a sale-deed be immoral, i.e., past or future cohabitation, the transfer would be void under section 6(h), Transfer of Property Act, read with section 23 of the Contract Act, 35 *Bom LR* 345—1933 *B* 209. A settler cannot recover back property transferred for an immoral consideration, if it has already been achieved, 44 *M* 329—39 *MLJ* 525. Inam grant burdened with temple service by family of grantee with hereditary right—Usufructuary mortgage of the same if void. 1940 *MWN* 404.

**Clause(i)**—The relinquishment by a tenant of his agricultural holding is a transfer which is prohibited by this clause. 8 *OWN* 1359.

**Scope**—15 *OC* 67—13 *IC* 613. *Vatans* of the kind of *Desaigiri Hak* in Guzrat are alienable, 45 *B* 948—23 *Bom LR* 304 a lease from year to year is transferable generally. 36 *IC*. 1006. But *tenancies from year to year of homestead lands* are non-transferable. 27 *IC* 500. The fact that by the same deed a transfer of both a transferable and non-transferable right is effected does not make the transfer of the former illegal. 39 *A* 539—15 *ALJ* 544; 122 *IC* 872—1930 *A* 1 (*FB*). As to right to transfer the *interest of an occupancy tenant* in land, see 5 *A* 121; 13 *A* 28; 28 *C* 179.

**Section 6(d)**—Suit for specific performance of agreement to sell decreed by two Courts below—Validity—Defendant having received sale consideration took refuge under the plea that property in question, being evacuee property, he had not yet received Permanent Transfer Deed that litigation in respect of such property not being over, he could not transfer the same—Such plea of defendant was brushed aside by two Courts below and plaintiff's suit was rightly decreed on basis of evidence on record whereby it was established that Permanent Transfer Deed was ready for delivery but

defendant did not collect the same in order to extend period of his possession over property in question, and that litigation with regard to the same had ended in favour of defendant—Defendant's plea that in absence of Permanent Transfer Deed and in view of section 6(d), Transfer of Property Act, 1882, suit was not maintainable, was devoid of force—Concurrent findings of two Courts below being well-reasoned and supported by evidence on record, did not call for interference. *Abdul Razzaq vs Sultan Mahmood Akbar* 1998 CLC 497.

**7. Persons competent to transfer**—Every person competent to contract and entitled to transferable property, or authorised to dispose of transferable property not his own, is competent to transfer such property either wholly or in part, and either absolutely or conditionally, in the circumstances, to the extent and in the manner allowed and prescribed by any law for the time being in force.

#### Case Law

**Section 7**—A transfer by a person who is not the owner does not bind the real owner. 1923 A 563. A man has no right to deal with property which is not his own and unless he can show some right to deal with it, either as agent or guardian of the owner or trustee or the like, any transfer which he purports to make cannot bind the lawful owner. 1923 A 563—77 IC 705.

**"Competent to contract and entitled to transfer property"**—A minor cannot transfer property. 33 C 559 (PC). A lease by

minor is void; it is incapable of ratification express or implied by the acceptance of rent by the lessor on attaining majority. 130 IC 598—1931 B 178. When he represents himself to be a major and if he has practiced fraud operating to deceive, he will be estopped from questioning the transfer. 20 B 326. A transfer to a minor is valid. 40 M 308—31 MLJ 575(FB); so also to a person who is not of a sound mind (see Contract Act Section 11) 44 A 748—1922 A 449; also to other persons who are legally disqualified

(as) a person whose property is under the Court of Wards, and other disqualified proprietors under special Acts (as) the Chota Nagpur Encumbered Estates Act (1876) 17 C 223. See also 30 AA 38; 17 CPLR 13.

"*Authorised to dispose of property not his own*" (as) *Guardians* under the Guardians and Wards Act; *Agents* (see 1923 A 563); *Trustees* under the Trusts Act and the Trustees and Mortgagees Powers Act; *executors* and *Administrators* under the Succession Act; the *Administrator-General* under the *Administrators-General Act*; the *Official Trustee*; *Manager* of a lunatic's estate; and *manager* of a joint Hindu family; as to *Manager of Malabar Tarwad*. See 39 MLJ 590. Lease on behalf of minor by his *de facto* guardians, is not initially void. 1930 L 772. But see 1931 M 147—59 MLJ 941, holding that a lease by a minor is void and the fact that it is executed by the lessee in favour of the minor lessor and not by the lessor does not cure its invalidity.

**Sections 7, 8 & 54**—Person competent to transfer—Factum of transfer—Interest in property transferred through affidavit—Effect—Every person who had ownership rights of property and was recorded as such in record of rights or other public document in which record of ownership was entered or maintained, would be deemed to be entitled to property which was subject-matter of transfer—Any person, though not owner of property but authorised by its owner legally to transfer the same was also competent to transfer such property—Where plaintiff was not owner of plot in question, in terms of section 7, Transfer of Property Act, 1882, he was not competent to transfer ownership of

same by sale-deed visualised by section 54 of the Act to be compulsorily registrable—Plaintiff could only transfer such interest or rights in plot to defendant which he had, at the time of execution of document (affidavit), in favour of defendant—Under section 8, Transfer of Property Act, 1882, only such interests in property were transferred to transferee, which transferor had, at time of transfer and those interests would pass forthwith—Every interest, short of ownership, which plaintiff had in plot in question, along with built up property, thus, passed to defendant—Plaintiff's interest in property at time of execution of affidavit, being to the extent of terms and conditions stated in agreement of sale, he could transfer only those interests—Affidavit purported to transfer interests of plaintiff in property in question, to defendant was not compulsorily registrable under section 54, Transfer of Property Act, 1882, or section 17, Registration Act, 1908—Such affidavit, however, conveyed all interests to defendant which plaintiff was capable of conveying. *Muhammad Bashir vs Muhammad Siddique* 1997 CLC 466].

**Sections 7, 8 & 54**—Transfer of property—Mode of transfer—In case of tangible immovable property of value less than one hundred rupees, such transfer could be made either by a registered instrument or by delivery of property—Primary and essential elements of sale were parties, subject-matter and the price—Parties would be buyer and seller and seller must be a person competent to transfer i.e. he must have title to the property or authority to transfer same if it was not his own—Transferor must have title to transferable property—Person

who had the ownership rights of property and was recorded as such in the record of rights or other public document in which the record of the ownership was entered or maintained, could be said to be entitled to the property which was the subject-matter of the transfer—Person though not owner of the property, but authorised by its owner legally to transfer same, was competent to transfer such property—transferor who was not owner of property in question in terms of section 7 of Transfer of Property Act, 1882, was not competent to transfer the ownership

of same by sale-deed visualised by section 54 of Transfer of Property Act, 1882 to be compulsorily registrable—Transferor could only transfer such interests or rights in the property to the transferee which transferor had at the time of execution of the affidavit in favour of transferee—Only such interests in the property could be transferred to the transferee which transferor had at the time of transfer under section 8, Transfer of Property Act, 1882. *Muhammad Bashir vs Muhammad Siddique 1997 MLD 3263.*

**8. Operation of transfer**—Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof.

Such incidents include, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth;

and, where the property is machinery attached to the earth, the moveable parts thereof;

and, where the property is a house, the easements annexed thereto, the rent thereof accruing after the transfer, and the locks, keys, bars, doors, windows, and all other things provided for permanent use therewith;

and, where the property is a debt or other actionable claim, the securities therefor (except where they are also for other debts or claims not transferred to the transferee), but not arrears of interest accrued before the transfer;

and, where the property is money or other property yielding income, the interest or income thereof accruing after the transfer takes effect.

### Case Law

**Section 8**—The object of section 8, is to stabilise title and remove from the region of pure speculation what passed in the mind of the transferor or the transferee at the date of the transfer. Per Mukherji, J—When section 8 speaks of transfer of some property, it speaks of transfer of some property which may be tangible or intangible but not mere title. But when it speaks of interest it includes title large or small. 27 ALJ 620—116 IC 1—1929 A 465 (FB). Section 8 is not a canon of construction but a rule relating to the effect of a grants, 1919 MWN 353—52 IC 239.

As far as possible, a deed of grant ought to be construed strictly against the grantor. So, a mortgage by a person of his rights in the mortgaged property would in the absence of express reservation include all interests of whatever kind possessed by him in the land. 18 CLJ 48—17 IC 494. See also 1923 N 130; 1937 N 205. As to what are "legal incidents" of property, see 5 A 324. The section applies to negotiable instruments. 38 IC 339—32 MLJ 354. The section has no application to execution sales. 39 M 283—17 MLJ 57. See also 45 MLJ 385—1924 M 187. But the principle laid down in the section may be extended to *involuntary transfers*. 130 IC 489—1931 A 62. *Vendor's lien* for unpaid

purchase-money in the lands of the vendee, when sold in execution, passes to the purchaser by virtue of the sale certificate along with the debt. 1926 M 903—51 MLJ 95.

Where a person conveyed the land as also the past mesne profits to the vendee and the latter did not sue for the profits, the right of action still continues with the transferor and section 130 is not bar to it. 1927 M 817—53 MLJ 342. On a transfer of the village, all interests of the transferor in the village will pass, unless excepted. 1927 O 240—2 Luck, 43. See also 4 A 381; 30 C 556 (1926 O 358, *Rel on*); 1941 OWN 820—1941 Oudh 507; 1941 OWN 618—1941 Oudh 395. On a transfer of a house, easements annexed thereto also pass. 15 WR 526; 6 WR 314; See also 14 C 797.

**Transfer to Hindu Widow**—Where a gift deed is executed in favour of a Hindu widow by an adopted son, giving her immovable property belonging to him and in his possession, to be enjoyed by her perpetually and as she liked, the combined operation of section 122 of the Act, read with section 8 which would apply to Hindus (after the amendment of the Act in 1929), would give rise to the presumption that the deed confers on the donee the whole of the estate which the donor is capable of transferring.

Even in the case of a deed of gift executed before 1929, i.e. before the amendment of the Act, there being no "rule of Hindu law" requiring a transfer in favour of a woman to be treated as a limited transfer, or qualified transfer, the transfer by way of gift must be treated as conferring upon the donee the whole of the interest which the transferor is capable of passing at the date of the deed and hence the donee would take an absolute estate and not merely a qualified or limited estate. *39 Bom LR 1217—1938 Bom 125.*

**Application of the section**—Under section 65, CPC, and section 8, Transfer of Property Act, a purchaser in Court sale is entitled to the property from the date of sale, and not from the date of confirmation thereof. *40 C 89 (PC); 1933 M 482—145 IC 174.* The transfer by an executor may be of not only his own interest in the estate but the whole estate. *42 C 56—41 IA 189—27 MLJ 93 (PC).* See also *40 B 69—28 IC 544.* Where immovable property is mortgaged, fixtures as well pass to the mortgagee. *44 IC 211—22 CWN 758.*

As well as all other rights in the land possessed by the mortgagor, *17 IC, 494—18 CLJ 48.* The right to the growing crop 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 the possession of the crop accrues from the date of the delivery of possession of the land. [*13 M 15 and 1919 C 588 Rel on*] *38 CWN 854—1934 C 610.* A purchaser at an auction sale is not entitled to crops sown by a stranger before the date of sale. *15 IC 619—16 CWN 1101.* Trees and shrubs rooted in the soil will also pass as being attached to the soil. *2 NWP 251; 83 IC 479—1924 N 96; 4 NLR 104.* See

also *24 A 294; 13 M 15; 22 B 610;* also the buildings erected on the land. *2 WR 123; 33 C 556, 44 IC 211.* On a transfer of land the property in the bamboo clusters standing on the land also passes to the transferee. *1932 P 344.* The enumeration of words 'locks, keys, bars, etc.', in section 8, corresponds to fittings or permanent fixtures to the house. The words 'other things provided, etc' do not include a right of access by a stair-case when the ownership of way is not an easement of necessity. *1937 N 179—ILR (1937) Nag 204.*

The phrase 'easements annexed thereto' in section 8 refers to those easements which at and prior to the transfer were existing easements. It does not refer to an easement which first came into existence as a consequence of transfer. *1937 Nag. 179.* Doors and windows also pass with the building, they having no separate existence. *11 C 164.* See also *37 C 815.* The English law as to fixtures does not apply to India. Fixture does not include machinery brought into the house for carrying on business. *45 MLJ 385—1924 M 187.* Test to determine what are fixtures under the section laid down. See *37 C 723 (PC); 1925 R 250.* As to machinery attached to the soil, see *14 BLR 201; 4 C 946.* As to fixtures on the land erected for agricultural purposes (as) wells, tanks, etc., see *28 M 539; 12 MLJ 432; (1888) Bom PJ 125; 25 M 669.* Reservation of rights cannot be inferred except from the terms of the document. *37 IC 870 (C); 35 IC 262.* Not all easements but only those annexed to the property pass with the transfer. *15 A 270.*

A *mokarari lease* by Zamindar does not pass the right to minerals to the tenant. 37 C 723. See also 33 C 203 (PC). A right of way, not continuous, does not pass: 2 M, 46; unless express words of grant are used. 7 C 670; 14 C 797. In August, 1912, one M, a Sunni Mohammedan, executed a deed of sale in respect of two villages in favour of his mother R. He died in September, 1912, and R made a wakf for both the villages in June, 1913. In December, 1917 by judgment of Court the aforesaid sale was declared to be void with result that R took nothing by the sale-deed but was entitled as an heir of her son to one-third of the villages.

**Held:** That in determining what passed by the deed of wakf and in order to ascertain R's intention in executing it, the whole transaction had to be looked at and since the sale was declared to be void the wakfnama fell with it and was inoperative even to the extent of the third share which R had acquired as her son's heir. *Quaere*—Whether section 8, Transfer of Property Act, had any application to the case 60 IA 116—55 A 83—64 MLJ 514 (PC).

**Profits accrued prior to transfer**—A transferee cannot claim profits apart from the property prior to the transfer as the legal incidents of the transferor's interest under section 8 include only rents and profits due after the transfer. 12 LW 44—58 IC 383; also 6 C 213; 47 IC 158. See also 33 Bom LR 158; 8 104 IC 409—53 MLJ 342; see further 29 CWN 953—1926 C 204 (as to whether prepayment of rent by tenant in advance with an agreement by landlord not to eject the

tenant is binding on mortgagee-purchaser). See also 1 NLR 48.

**Security for debt**—Transfer of debt carries with it the security for such debt. 26 B 305. See also 52 IC 879—1919 MWN 613 (promissory note secured by deposit of title-deeds). See also 44 M 965.

**Arrears of interest**—The arrears of interest of assigned debt must be held to have been transferred with the debt. 8 Bur LT 121—27 IC 896. But see also 27 B 330 (interest not allowed on items barred by limitation). As to apportionment of interest between the transferor and transferee, see section 36, *infra*. Where arrears of rent are transferred the interest on them being a legal incident of the arrears also passes to the transferee along with it. 7 IC 582(C). See also 30 C 213; 27 IC 896—8 Bur LT 121. Interest is only accessory to the principal. 27 B 330.

**Rights and covenants running with the land**—A right to build a pucca structure on the land of the Secretary of State for India is a right that will run with the land. 74 IC 369—1923 Oudh 114. A covenant for renewal being a covenant running with the land, where a grantee of land for a term of years transfers his interest, the right of renewal goes with the transfer unless there is an express or implied intention in the document of transfer to the contrary. 9 IBR 268—51 IC 360.

**Sections 8 & 122**—Scope and effect of —Gift by adopted son in favour of Hindu widow—Absence of words of limitation—Nature of estate conferred. See 39 Bom. LR 1217—1938 Bom 125.

**9. Oral transfer**—A transfer of property may be made without writing in every case in which a writing is not expressly required by law.

### Case Law

**Section 9**—Before the Transfer of Property Act no written conveyance was necessary. *42 C 801—42 IA, 1—28 MLJ 548 (PC)*. After the Transfer of Property Act transfer of immovable property cannot be effected in any other manner than that prescribed by this Act. See *24 M 377*. Thus an admission in a petition to the Collector or a mutation of name in the Revenue Register, or delivery of possession cannot operate as a transfer. *24 M 377*. See also *23 A 175*. Admission as to ownership—Whether operates as conveyance. See *12 P 616—1933 P 264*. As to *oral transfer*, see *120 IC 598—1930 L 9*. Grant of usufruct and not corpus requires no writing. *21 OC 360—49 IC 406*. A surrender of lease need not be in writing, nor registered. *46 IC 100—28 CLJ 220; 19 IC 124*; also a surrender of relinquishment by a ryotwari tenant of his holding under Government. *13 LW 230—61 IC 852*; also partition of *joint Hindu family property*. *10*

*CLJ 503—25 IC 498; 18 IC 524*; so also a gift of the mere usufruct of land to be enjoyed for life, *49 IC 406*; a grant for maintenance by husband to wife. *45 M 612*; transfer effected under a compromise decree. *13 MLJ 500*. Whether registration is necessary in a case where a deed of gift is executed in lieu of prior services and the donee has been let into possession, see *30 Bom LR 451*. There is nothing in the Transfer of Property Act which prohibits a *family arrangement* from being made by oral agreement; this is clear from the provision of section 9. *1935 R 355*.

**Sections 9, 123**—The Muslim owner—Transfer of property may be only by registered deed.

✍ If any Muslim desires to transfer his property in the name of somebody, he can do so only by a registered deed. *Faqirullah vs Mir Khan PLD 1958 Azad J & K 19*.

**10. Condition restraining alienation**—Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him: Provided that property may be transferred to or for the



benefit of a woman (not being a Hindu, Muhammadan or Buddhist), so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein.

### Case Law

**Section 10—Scope and applicability—** 9 Pat LT 747. section 10 embodies a sound and equitable principle which should be applied to the Punjab, though the Act has no application in the Punjab. *1924 L 647—76 IC 16*. An absolute restriction in perpetuity on every sort of alienation for any purpose by a donee of land should not be recognised and enforced. *1924 L 674; 1935 S.182*. Restraints on alienation imposed by the Legislature are binding on all parties. *13 IC 163*. see also *15 OC 67*. Where a deed of transfer at first absolutely transfers property to another, but by a subsequent clause makes the clause subject to a condition restraining the transferee from parting with or disposing of that interest to any person other than transferor, the condition amounts to an absolute restriction on the right of transfer and so is void. *27 ALJ 515—1929 A 381*.

The word "absolutely" in section 10 should be construed in a reasonable manner. Where under family arrangement a Hindu father in the Punjab governed by the Mitakshara law gave some property to his son stipulating that in respect of a portion of it, the son should not make any transfer during his father's lifetime.

**Held:** That the condition which was sought to be imposed was not absolute, as it extended only to the lifetime of the father after which the son would be free to dispose

of the property in any manner he liked and that, therefore, it was binding on the son. *155 IC 699—1935 L 503*. Restraint on alienation generally or except to a particular person or as special class is void. *27 OC 350—1925 O 125*.

Gifts subject to condition that alienation should be with the donor's consent if valid. *7 R 306*, see also *64 IC 408; 63 IC 196; 1929 A 381; 1939 All 221*.

A provision in partition deed, by which properties are allotted absolutely to the respective sharers prohibiting alienation, including mortgage, of the properties allotted in absolute interest to each sharer, except with consent of the other sharers, is repugnant and is therefore invalid. *154 IC 587—40 LW 908—1935 M 33*.

Where in a partition deed between the father and his sons in Hindu family it is provided that certain houses (which had been used as the family residence) should be held by the members of the family as tenants in common, that no member should have the right to dispose of his share to a stranger, that if any of the sons chose not to live in the houses mentioned, "he shall not be at liberty in any manner to let or lease, etc, his undivided share to a stranger to the family but shall do so only to any of his brothers or his heirs for a sum not exceeding Rs 1,000" and it is found that the price of Rs 1,000 fixed is

far below the real price of the share and that there is no corresponding obligation on the part of the other members to buy the share of the member wishing to sell, the restriction against the alienation is void.

The estate created is a tenancy in common, and the restriction against alienation amounts to an absolute restraint on alienation within the meaning of section 10, Transfer of Property Act, and therefore must be disregarded as void; the sons take the property as tenants in common without fetter. *ILR (1939) Mad 954—1939 Mad 769—(1939) 2 MLJ 345(FB)*. A condition directing the enjoyment of the usufruct of a gifted property by a third person for life is valid. *11 IC 702*. See contra *9 IC 951—13 Bom. LR 141*.

A general restriction on assignment does not apply to an assignment by operation of law taking effect *in invitum*, as a sale under an execution. *1924 N 222*; or a sale under the provision of insolvency law, *78 IC 802—1925 C 471*; or other involuntary alienation. (*Ibid*); or compulsory sale by creditors. *17 CWN 662—17 IC 284*. Where a compromise decree said that a party thereto and his heirs shall have no power to alienate or encumber the property by gifts, mortgage or sale—Held, that there was no provision in the compromise restraining sale in execution of a decree and there was nothing to prevent the property from being attached and sold. *99 IC 972—1926 S. 143(1)*. See also *1924 L 729*; *3 ALJ 621*; *25 OC 189—1922 O 236*; *47 B 597*; *24 Bom LR 449—1922 B 84*.

A compromise in a suit provided that B was to hold a certain property for his life and had no right to transfer it except for necessity and if his other property proved insufficient. There was

also a provision that if B died without leaving any heirs of his body or legal widow, then the plaintiff would become owner and the other heirs of B would have no right to succeed.

**Held:** (1) that it was the principle of English law that where an estate was created for life, for a man and afterwards to the heirs of his body then that would give him an absolute estate, and that there was nothing in the Transfer of Property Act, which recognised that there could be any remainder left over after the creation of such an estate, and that therefore, the estate which the compromise purported to set up was not an estate in which the plaintiff could claim to have any interest to restrain alienation; (2) and that the restraint on alienation by B would fail as it offended against Section 10 and amounted to an absolute restraint, *1937 ALJ 84—1937 A 235—168 IC 142*.

**Applicability to cases under Mohammedan Law**—Section 10 does not apply to cases under the Mohammedan Law nor does it apply to family settlements which are not transfers. Where the Act itself is inapplicable the Court cannot apply the principles underlying the Act except insofar as they are general principles of law. *6 OWN 169—1929 O 193*.

**Gift under Mohammedan Law**—Where a gift is made subject to a condition restraining transfer, the condition is invalid and the donee takes an absolute estate under the Mohammedan Law. *20 ALJ 466—44 A 633—1922 A, 205*.

By an ante-nuptial agreement, the husband gave certain immovable properties

to the wife as *malik mustaquil* (i.e., permanent proprietor), but with the condition superadded that she "shall not have power to transfer this property to a stranger; but the ownership thereof as family property shall devolve on her legal heirs, from generation to generation."

**Held:** That on the construction of the document, the wife took only a life-estate and that the partial restriction by it against alienations outside the family was not void for repugnancy. 7 *Luck* 257—59 *IA* 236—1932 *PC* 158—63 *MLJ* 180 (*PC*).

**Hindu Law**—There is no rule of Hindu Law that alienations may be prevented in the case of grants for maintenance and under section 10 of the Act a restraint on alienation in the case of such grants is void. 38 *M* 867—29 *MLJ* 617.

A *life interest* is just as much property as an absolute interest and any condition absolutely restraining the transfer of property for life in lieu of maintenance from disposing of that property is void. 29 *IC* 251 (*C*).

**Restraint on alienation in mortgagee deeds**—Restraint upon alienation in mortgage bonds does not prevent alienation subject to mortgagee's rights. 40 *IC* 865(*C*).

**Restraint on alienation in sale deeds**—Where a deed of sale absolutely transferred property to another but by an agreement to recover forming part of the same transaction, the purchaser was restrained from alienating the same, the restriction on alienation is void, under the principal of section 10, although the Act itself was not in force at the time of the contract, 33(*Bom*) *LR* 1296—1931 *B* 578.

**Cases of lease**—There may be a restraint on alienation in a lease-deed which is for the benefit of the lessor. A stipulation in a *darpatni* lease restraining the creation of a subordinate right is valid. 45 *C* 940—46 *IC*-129.

A condition in a lease-deed for pre-emption and pre-surrender is void under section 10, and can be enforced against transfer with notice. 9 *MLT* 484—9 *IC* 171. Condition that the lessee should not transfer the leased property, without a letter from the lessor, is not void. 36 *C* 745—10 *CLJ* 49—2 *IC* 416. In a lease a covenant against alienation is void unless it is coupled with a right of reentry. 10 *IC* 489—14 *CLJ* 614; 10 *IC* 374—14 *CLJ* 585.

Condition against transferability in perpetual lease is not illegal or void. 1942 *OA* 168—1942 *OWN* 225.

**Partition**—An agreement not to partition is enforceable though this would not restrain alienation. 29 *MLJ* 214—29 *IC* 549. Vendees or their assigns restrained from claiming partition of share purchased for all time—Court cannot enforce the condition. 1929 *L* 648.

**"Absolutely"**—A restraint on alienation for an uncertain time or of indefinite duration is invalid. 25 *OC* 189. Partial restraint on alienation qualified as to time, place etc, may be valid and binding. 11 *IC* 301—14 *CLJ* 303. See also 45 *C* 940. The vendee of a house *covenanted* to live in the house himself, not to sell it piecemeal and if he wanted to sell it to give the option of first refusal to the vendor and his heirs at a certain fixed price.

**Held:** The covenant was not void for remoteness or as a restraint on alienation. *80 IC 962—17 SLR 1*. A condition against transfer to a stranger by way of mortgage, sale or transfer otherwise would be invalid. *46 C 163*. A valid restriction does not bar a compulsory sale. *17 CWN 662—16 CLJ 354*. A gift with a condition precedent attached thereto, fails when the condition is not fulfilled. *11 IC 634(C)*.

**Sections 10 & 126—**If reconcilable—Where by a deed of gift the donor removes himself from proprietary possession of property and puts the donee in possession, he confers full proprietary title upon the donee in respect of the property transferred. Where the donor reserves to himself and his heirs the power to revoke the gift in case of alienation

by the donee it is a condition repugnant to the estate created by him. Though under section 126 of the Act the donor is permitted to impose a condition entitling him to revoke the gift, yet it could be only a condition and subject to the law of conditions in regard to the transfer of property contained in Ch. II of the Transfer of Property Act. As such, if it restricts the donee's right of alienation it is invalid by reason of section 10 of the Transfer of Property Act. There is no difficulty in reconciling sections 10 and 126 of the Act. Section 10 embodies the general principle and it applies to all transfers including gifts. Section 126 of the Transfer of Property Act could not be contended to be an absolute exception to section 10. *ILR 1939 All 298—1939 ALJ 77—1939 All 221*.

**11. Restriction repugnant to interest created—**Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction.

<sup>1</sup>[Where any such direction has been made in respect of one piece of immovable property for the purpose of securing the beneficial enjoyment of another piece of such property, nothing in this section shall be deemed to affect any right which the transferor may have to enforce such direction or any remedy which he may have in respect of a breach thereof.]

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1. Substituted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 8, for the original second paragraph. ✍

*Case Law*

**Section 11**—Change in the present section and reason for the change—“Sections 11 and 40 of the Act refer to affirmative and negative covenants in a transfer. Section 11 refers to rights as between a transferor and transferee, while section 40 relates to the rights of third parties against transferees. The words ‘to compel its enjoyment’ used in the second paragraph of section 11 and in the first paragraph of section 40, indicate that affirmative covenants for the beneficial enjoyment of one piece of the property of which the other piece has been transferred can in all cases be enforced. This paragraph seems to have been based on the observations of Lord Cottenham in 2 Ph 774, a case decided in 1848. But in later English decisions such as 8 QBD 403, the observations in Tulk’s case were not approved, and it is now settled that except in certain special cases affirmative convenience cannot be specifically enforced. Thus, in (1885) 19 Ch D 750, a covenant to spend money on the land was held as not binding on the purchaser of the land, although he had notice of the same. Indian Courts have followed the same principle. 27 (Bom) LR 73.

“We propose that the second paragraph of section 11 and the first paragraph of section 40 should be so amended as to make it clear that, although an affirmative covenant is not by itself invalid as between a transferor and transferee (section 11), negative or restrictive covenants only can be specifically enforced against a third person (section 40)”—(*Statement of Objects and Reasons*).

The principle of this section applies as much to mortgages and leases as to gifts or sale. 8 A 452. See also 24 C 44. Such absolute restraints even in decrees of Settlement Courts are not given effect to. 25 IC 743. In a transfer where condition ‘may’ be given effect to without interfering with its immediate completeness, the condition is valid. 45 IC 307. Obligation arising out of restrictive covenant may be enforced against transferee with notice. 1929 P 349. The principle of this section is recognised in Hindu as well as Mohammedan Law. 4 (Bom) LR 55 (Hindu Law); 9 ALJ 798; 27 CLJ 512 (Mohammedan Law). Where an absolute estate is conferred on the grantee, a condition requiring the grantee to reside at a particular place is of no binding effect. 58 IA 270—61 MLJ 501—35 CWN 903 (PC). A partial restraint on alienation also is void as repugnant to the absolute estate on the grantee contained a condition that the property should not in any case pass to the heirs of the daughters of the grantee—Held, it was an attempt to alter the legal course of succession to an absolute estate and was therefore void. 61 MLJ 501 (PC).

**Partition agreements**—An agreement among members of a joint family that they are only to enjoy the income does not estop them from claiming a partition. 27 IC 3 (right of a co-sharer for partition is an inseparable incident of co-ownership; and an agreement against partition is absolutely void); 7 (Bom) 538. A partition agreement that in the event of one of the brothers dying issueless, his share is to go to the others is

not void. *29 MLJ 214—29 IC 549*. The rule laid down in section 11 embodies principles of universal application which are not peculiar to those provinces only in which that statute is in force. Against parties not actually covenanting, such as the descendants or assigns of original contracting parties, a restriction against partition is void and unenforceable though it may be competent to the original parties to agreement to contract themselves out of their right to partition for their lifetime—(Per Tekchand, J) *1929 L 648*.

\* **Gifts**—Where in an absolute gift of a house the donee was not to abandon the house and go to another place, the restriction was void. *56 IC 364—44 B 304*. In Mohammedan Law a gift is valid though an invalid condition is attached to it. *22 CWN 512—27 CLJ 502*. Conditions imposed in a sale of site of certain shops restricting the making of alterations in the shops by the vendee are void being in contravention of the provisions of section 11. *40 PLR 209—1981 L. 479*. While the Court construing a document must examine the entire instrument in order to see what its effect is, the examination must be carried

out in the light of section 11, Transfer of Property Act, when the instrument is one transferring immovable property. If the examination discloses that the transferor has used words creating an absolute interest, those words must be given effect to, notwithstanding that later words are used which restrict the right of full ownership. *49 LW 591—1939 (Mad) 509—(1939) 1 MLJ 579*.

Where a portion of the arrears of maintenance due under a decree providing for payment of a certain amount every month and charging immovable properties for payment of the said amount is transferred by the holder of the decree in favour of another, the transferor is entitled to safeguard his rights in regard to the realisation of the rest of the arrears still due to him, and to stipulate that the assignee should not have the right to bring the charged property to sale. Such a restriction can be validly imposed, and would be covered by the proviso to section 11. *49 LW 172 1939 M 431*. Absolute sale of land—Deed containing a stipulation that the vendee should pay the vendor and his heirs a certain amount as rent; non-enforceability of the term. *13 Luck 662—1938 O 17—1937 OWN 1138*.

**12. Condition making interest determinable on insolvency or attempted alienation**—Where property is transferred subject to a condition or limitation making any interest therein, reserved or given to or for the benefit of any person, to cease on his becoming insolvent or endeavouring to transfer or dispose of the same, such condition or limitation is void.

Nothing in this section applies to a condition in a lease for the benefit of the lessor or those claiming under him.

### Case Law

**Section 12**—There is nothing contrary to the provisions of section 12 in the rules of the Bombay NS and SB Association providing that, as and upon the declaration of default, the defaulting member's right and interest in the Association (whether in respect of his card of membership or otherwise shall be extinguished and come to an end. *59 IA 318—56 B 374—34 Bom. LR 1178*. There would be no forfeiture of lease for involuntary alienation, unless that too was specifically

provided for in the lease. *7 B 256*. Hereditary, rent-fee, perpetual tenancies might exist without any power of alienation. *46 IC 73—37 CLJ 538*. Where one of the rules of a Provident Fund of a company was that in case a member transferred his interest in the Provident Fund during service, he was liable to forfeit the amount to the company.

**Held:** that the rule offended against section 12, and was void. *60 C 926—37 CWN 1050*.

13. **Transfer for benefit of unborn person**—Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transfer in the property.

### Illustration

A transfers property of which he is the owner to B in trust for A and his intended wife successively for their lives, and, after the death of the survivor, for the eldest son of the intended marriage for life, and after his death for A's second son. The interest so created for the benefit of the eldest son does not take effect, because it does not extend to the whole of A's remaining interest in the property.

14. **Rule against perpetuity**—No transfer of property can operate to create an interest which is to take effect after the life-time of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong.

### Case Law

**Section 14**—Rule against perpetuity—Even if the covenant is not regarded as a personal covenant it is hit by rule against perpetuities inasmuch as no specified time has been mentioned within which the repayment of the consideration is to be made to the transferee. *Md Affan vs Tazal Hoque* 27 DLR 58.

**Section 14**—Though the petitioner's covenant was not personal and it could be enforced by the heirs, it is hit by the rule against perpetuity inasmuch as no specific time was mentioned within which repayment of consideration was to be made. *Chandra Kanta Mistri vs. Sailendra Nath Sikder and another* 49 DLR 514

**Scope and applicability**—Section applies both to immovable and movable property. 20 B 511. The rule against perpetuities is applicable only to future interest in land which may possibly vest beyond the legal limit of perpetuity. 36 C 675—1 IC 626. Where the settler directed that after the death of the tenant for life and after making provision out of the trust fund for the payment of a monthly allowance to the widow for life the trustee was to hold the rest of the trust estate for the use and benefit of his son or sons to be made over to him or them on the attainment of 21 years.

**Held:** that the language of the deed pointed to an immediate vesting of the interest disposed of. *Held further*, that if the disposition was not covered by section 19 it was contingent and the vesting in interest being postponed to a period longer than that permitted under section 14, it was invalid. 58(Cal) 768—134 IC 436.

A person cannot change the rule of succession under the colour of fictitious endowment. 1 O LJ 204—24 IC 72. As to creating a series of life-estates in favour of persons unborn, see 6 OWN 549. One S gave away property to R for life, and after her death if there be any male descendants, whether born of son or daughter, to them absolutely. If R would have only daughters they were to have no power of transfer. In the absence of any issue whether male or female, living at the time of her death, the gifted property was not in any way to devolve upon her husband or his family, but it was to go to D, father of R.

**Held:** that the gift in favour of D was dependent upon the failure of the prior interest in favour of the daughters and the result was that the gift in favour of D also failed. (16 B 492, Dist) 9 Luck. 329—1934 O 35 (FB). A gift over an indefinite failure of male issue in the line of donor is void at its inception. 38 C





603—15 CWN 693—21 MLJ 1119(PC). A grant executed by a Rajah in favour of his daughter conferred an absolute estate on her and contained a defeasance clause which provided that if the heirs of the grantee, that is, her sons, their male descendants and her daughters ceased to exist, the property should revert to the Rajah and his heirs.

**Held:** the event referred to was an indefinite failure of the male issue of the grantee and the attempted gift over, was therefore void. 58 IA 270 61 MLJ 501—35 CWN 903 (PC). An interest created by a document in favour of a person for generation after generation is clearly a perpetuity and, as such, offends against section 14. 1934 A 983. A devolution of property in perpetuity is not recognised by Hindu Law. 20 IC 429.

Where at a partition among the members of a joint Hindu family a charge is created in favour of the son of Christian wife of one of the members and it is made heritable by his widow and children. Section 14 of the Transfer of Property Act has no application. If the creation of the charge was a transfer of property that transfer took place when the partition deed was executed. The charge was immediately created then and was to be inherited by his widow and children. Even if it be regarded as a transfer for life to that person followed by a transfer to his wife and children the latter would obviously be alive at his death or within a few months thereafter 1942 AWR (HC) 170. The rule applies even to Muhammadans. 73 IC 99; 26 B 319; 841. The mortgagor's right of redemption is exempt from the operation of the rule against perpetuities. 17 CWN 1053—21 IC 90. When the intention of

the parties is to create a liability in perpetuity not capable of being redeemed absolutely at any time, the transaction cannot possibly be a mortgage. An agreement to pay maintenance allowance to a person and to continue to pay to his descendants from generation to generation making it a charge over property, creates a charge and not a mortgage. The rule against perpetuity would not apply to a charge of this kind which does not amount to a transfer of interest within the meaning of sections 13 and 14.

**Application of the rule**—The test whether a covenant violates the rule against perpetuities, one must look to all possible contingencies. 63 IC 196—25 CWN 901; 9 Pat LT 747—1928 p 637; 1926 A 283. Application of the rule against perpetuities in the creation of an annuity to daughter and to her unborn son. See 50 C 266—1923 C 27. A covenant to grant land free of cost for building purposes at some future uncertain date is not a covenant running with the land and offends the rule against perpetuities and is not enforceable against the covenantor or his assignees. 48 IA 376—61 IC 702—25 CWN 770 (PC).

**Application of the rule against perpetuities: (1) To sales**—An agreement to sell or re-convey land is an agreement merely personal not creating an interest in land. Such an agreement does not offend the rule. 39 M 462—28 MLJ 471. See also 18 MLT 83—29 IC 435; 1935 C 779. An agreement to re-convey land sold to the vendor after a certain number of years on payment of a certain amount does not offend the rule. 49 M 387 51 MLJ 229. Vendor can reserve inalienable interest for himself and his descendants reverting to

vendee in the absence of vendor's descendants. 82 IC 326—1925 A 65. Transfer to vendee to take effect after extinction of the descendants of the vendor not valid. 1926 A 283—92 IC 401.

(2) to pre-emption clauses in sale-deeds—Contract of pre-emption does not offend against rule against perpetuities, no transfer of property being effected by such a contract. 49 A. 527—25 ALJ 289—1927 A 170 (FB). The rule against perpetuities applies to covenant for pre-emption. Such a covenant in a deed of exchange made binding upon the heirs and legal representatives of a party offends the rule against perpetuities and is not enforceable in law. 46 CWN 147. When no time is fixed for the performance of an agreement to convey, a contract for pre-emption cannot be enforced against the heirs of the covenantor, as being obnoxious to the rule against perpetuities. 33 M 114—24 MLJ 84.

(3) Leases—A clause entitling the lessor to terminate the lease at any time contained in a lease which is described as permanent, does not offend against the rule. 48 MLJ 463—1925 M 732. See also 98 IC 46—1927 C 41; 18 MLT 83—29 IC 435. A covenant

for renewal in a mining lease does not offend the rule against perpetuity, 12 LW 670—60 IC 591. See also 44 M 230. A clause in a lease providing that the lease should be forfeited in certain circumstances is not against the rule of perpetuities 7 IC 346 (C). A covenant to renew a lease from time to time at the lessee's option, is one running with the land and is not subject to any rule against perpetuity. 41 MLJ 94—44 M 230—60 IC 591. A covenant by a permanent lessee that in case of transfer of his interest it would be made only to lessor for a proper price, and to third parties only with the lessor's permission and that any transfer in violation of this covenant should be invalid, would be invalid under this section. 26 CWN 874; 1922 C 474.

Sections 14, 54—Agreement for sale—Not barred by the section.

The rule embodied in section 14 is intended to prevent the creation of an "interest" in property, and as a contract to sell does not by itself create interest in immovable property (section 54) the rule is not applicable to such cases. *Umar Din vs Fazal Din* PLD 1952 (Lah) 166—PLR 1952 (Lah) 196.

**15. Transfer to class some of whom come under sections 13 and 14** —If, on a transfer of property, an interest therein is created for the benefit of a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in sections 13 and 14, such interest fails <sup>1</sup>[in regard to those persons only and not in regard to the whole class].

1. Substituted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 9, for "as regards the whole class".

*Case Law*

**Section 15—Change in the present section and reason for the change—**Section 15 deals with a gift to a class. It reproduces with slight verbal alterations the provisions of section 102 of the Indian Succession Act, 1865 (now section 115 of the Indian Succession Act (1925).

<sup>1</sup>[**16 Transfer to take effect on failure of prior interest—** Where, by reason of any of the rules contained in sections 13 and 14 an interest created for the benefit of a person or a class of persons fails in regard to such person or the whole of such class, any interest created in the same transaction and intended to take effect after or upon failure of such prior interest also fails.

**17. Direction for accumulation—**(1) Where the terms of a transfer of property direct that the income arising from the property shall be accumulated either wholly or in part during a period longer than—

- (a) the life of the transferor, or
- (b) a period of eighteen years from the date of the transfer, such direction shall, save as hereinafter provided, be void to the extent to which the period during which the accumulation is directed exceeds the longer of the aforesaid periods, and at the end of such last-mentioned period the property and the income thereof, shall be disposed of as if the period during which the accumulation has been directed to be made had elapsed.

(2) This section shall not affect any direction for accumulation for the purpose of—

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1. New sections 16 to 18 were substituted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 10, for the original sections.

- (i) the payment of the debts of the transferor or any other person taking any interest under the transfer, or
- (ii) the provision of portions for children or remoter issue of the transfer or of any other person taking any interest under the transfer, or
- (iii) the preservation or maintenance of the property transferred; and such direction may be made accordingly.

### Case Law

**Section 17**—Hindu law does not discountenance directions to accumulate. 6 *MIA* 526; 25 *C* 162; 24 *C* 589; 34 *C* 5. If a charitable gift is unconditional, a direction for accumulation is invalid. 33 *IC* 102—23 *CLJ* 241. But the only result is that the income is immediately distributed in charity, and the heirs or next-of-kin are not let in. 33 *IC* 102 (105)—23 *CLJ* 241.

Where under a contingency not contemplated by the transferor, there would be an accumulation without any definite object, the transfer is contrary to the section. The following directions for accumulation are not invalid under this section:—Direction in Hindu will to accumulate income until a boy to be adopted attains 16 years of age or majority. 4 *Bom LR* 893; a direction to accumulate surplus income until it amounts to a certain sum and then spend it in charity or feeding the poor: 34 *C* 5; a testamentary direction to accumulate a fund for marriage of the testator's daughter or son. 15 *CWN* 66. A direction to accumulate for all time, or for 99 years or until a huge sum is accumulated is bad. 4 *BLR (OC)*

231; 2 *BLR (OC)* 11. Where a widow was given a life-estate over some property and was also directed to accumulate the surplus income to go with the estate to her sons after her, the direction is not invalid. 56 *IC* 373—47 *C* 76.

A dedication for religious purposes will not be invalid by reason of offending the rule against perpetuities. 24 *IC* 72—1 *OLJ* 204. See also 11 *B* 441; 6 *B* 42; 25 *C* 162; 20 *C* 116. The following would be good and valid gifts under this section—Gift for erecting or maintaining a hospital; 14 *BLR* 442; 6 *CWN* 321; gift to university or an educational institution, 31 *C* 166; or for charities, 4 *MHCR* 44; or for feeding Brahmins, 6 *B* 24; or to a temple, 23 *B* 659; or to a temple with dharmasala attached to it in which pilgrims are fed for charity, 23 *B* 659; 11 *A* 18; a gift for Sadavarti, 23 *B* 659; 14 *B* 1; or for the maintenance of the priests of a temple. 25 *C* 112; 8 *B* 432; as to validity of wakf under Mohammedan Law, see 31 *B* 136; 19 *A* 211; 31 *A* 136. In deciding the beneficial or charitable nature of the object of the gift, Courts should have regard to the customs,

habits and public opinion among the community to which the parties belong. *6 B 42*. A gift to erect a well or water-tub in the public road for cattle and other animals to drink water in hot season is good. *14 B 1*. The

following are not valid gifts:—Gift to dharma—as the word "dharma" by itself is too vague and indefinite for the Courts to enforce the same. See *18 B 136*; *17 B 351*; *23 B 725*.

**18. Transfer in perpetuity for benefit of public**—The restrictions in sections 14, 16 and 17 shall not apply in the case of a transfer of property for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety, or any other object beneficial to mankind.

**19. Vested interest**—Where, on a transfer of property, an interest therein is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith or on the happening of an event which must happen, such interest is vested unless a contrary intention appears from the terms of the transfer.

A vested interest is not defeated by the death of the transferee before he obtains possession.

*Explanation*—An intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment thereof is postponed, or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that if a particular event shall happen the interest shall pass to another person.

## Case Law

**Section 19—Trust—Interest of beneficiary whether vested or contingent—** May be determined by reference to deed— Principle to be followed.

The determination of the question as to whether an interest of a beneficiary under a trust deed is vested or contingent has to be guided generally by the principles recognised under sections 19 and 21 of the Transfer of Property Act, 1882, and sections 119 and 120 of the Indian Succession Act, 1925. Apart from this the question is really one of intention to be gathered from a comprehensive view of all the terms of a document. Further, the Court has to approach the task of construction in such cases with a bias in favour of a vested interest unless the intention to the contrary is definite and clear. *Rajes Kanta Roy vs Shanti Debi* PLD 1957 SC (Ind) 261.

—This section may be compared with section 119, Succession Act, 1925. As to what is vested interest and as to what merely a contingent interest, see 40 A 692; 47 A 496; 4 M 124; 1941 Rang. 239. The true criterion is the certainty or uncertainty of the event on the happening of which the gifts is to take effect. 4 M 124; 9 B 491. The question whether particular words create a vested interest or not is one of construction. 8 C 378; the words of the grant being construed in their plain and ordinary meaning. 28 C 621—28 IA 159 (PC).

A gift in favour of a person merely, without suspending or postponing its operation confers a vested interest and the appointment of executor or guardian for a minor donee with a direction to make over the property to him on his attaining majority

does not postpone the vesting of the estate. 28 C 621—28 IA 159 (PC). With regard to section 19 the burden of proving the contrary intention is on those who assert it and the weight of the burden is aggravated by the elimination in the explanation of circumstances which might apart from the explanation, be thought sufficient to discharge it. Vesting in interest if postponed— Postponement violating section 19. 51 C 768—1931 C 651.

*Transfer of occupancy right* in a field to a widow for life without power of transfer, with remainder to a third person, is not void and the widow cannot transfer the field even to the next possible heir. 101 IC 822—1927 N 226. Where a donor granted and conveyed to the donee property to hold the same as and from the date of the death of the donor, the vesting of the right in the donee takes place as soon as the gift was executed and registered. 1917 MWN 634—42 IC 265.

In a suit by the reversioners disputing the genuineness of a will whereby the properties of the last male owner were bequeathed to his widow, mother, etc, a compromise was arrived at whereby some of the properties were to be taken by the plaintiffs on the death of the mother, the rights secured to the two reversioners by the compromise became a vested interest and it did not pass from one to the other by survivorship but was heritable and divisible between the two donees. 8 LW 140—47 IC 723.

Where by a compromise between two brothers the elder was given a life-estate and the younger was given the remainder if he

survived the former, the estate taken by the latter is a vested and not a contingent interest. Such an interest can be proceeded against in execution. 9 Luck 173—1934 O 454. A compromise effected between R and L was as follows

In the event of R surviving L, R will be the permanent owner with powers of transfer and of transmitting inheritance of the whole of his property. In the event of R not so surviving, his male descendants, according to the rule of lineal *primogeniture*, will be entitled to the said property with powers of transfer and heritability. Held, that the words "R will be the permanent owner with powers of transfer and of transmitting inheritance" did not convey a vested interest which was liable to be defeated in case R did not survive. L 9 Luck 378—1934 O 59.

A husband by *taksinama* provided as follows:—"The property shall devolve upon B or his legal heir and B or his legal heir shall become the absolute owner of my property on the death of my wife." B during the widow's lifetime sold the widow's property and died during the life-time of the widow. The reversioner brought a suit for possession of the property. Held, that the case really came within the principle of section 24 and not section 19, and that the interest in favour of B was contingent and not vested and came to an end on his death during the lifetime of the widow. The sale made by him during the widow's life-time therefore would not affect the reversioner's right over the property after the death of the widow. 1937 P 247—168 IC 605.

**20. When unborn person acquires vested interest on transfer for his benefit**—Where, on a transfer of property, an interest therein is created for the benefit of a person not then living, he acquires upon his birth, unless a contrary intention appears from the terms of the transfer, a vested interest, although he may not be entitled to the enjoyment thereof immediately on his birth.

**21. Contingent interest**—Where, on a transfer of property, an interest therein is created in favour of a person to take effect only on the happening of a specified uncertain event, or if a specified uncertain event shall not happen, such person thereby acquires a contingent interest in the property. Such interest becomes a vested interest, in the former case, on the happening of the event, in the latter, when the happening of the event becomes impossible.

*Exception*—Where, under a transfer of property, a person becomes entitled to an interest therein upon attaining a particular age, and the transfer or also gives to him absolutely the income to arise from such interest before he reaches that age, or directs the income or so much thereof as may be necessary to be applied for his benefit, such interest is not contingent.

### Case Law

**Section 21**—Contingent interest—  
Features of. One of the features of a contingent interest is that if a person dies before the contingency disappears and before the vesting occurs, the heirs of such a person do not get the benefit of the gift. *Rajes Kanta Roy vs Shanti Debi* PLD 1957(SC) (Ind) 261.

A bequest to daughters of the testator "when they will be married" was held not to be contingent having regard to the other provisions in the will. (Case turning on the construction of the will and arising under section 111, Succession Act, 1865) 38 C 327—38 IA 7—21 MLJ 116 (PC).

**22. Transfer to members of a class who attain a particular age**—Where, on a transfer of property, an interest therein is created in favour of such members only of a class as shall attain a particular age, such interest does not vest in any member of the class who has not attained that age.

**23. Transfer contingent on happening of specified uncertain event**—Where, on a transfer of property, an interest therein is to accrue to a specified person if a specified uncertain event shall happen, and no time is mentioned for the occurrence of that event, the interest fails unless such event happens before, or at the same time as, the intermediate or precedent interest ceases to exist.



*Case Law*

**Section 23**—This section may be compared with section 124, Succession Act, 1925. See *10 C 482—11 IA 1(PC)* where it was held that principle of this section does not apply to Hindus. It is doubtful if it would still be good law in view of the new amendment of section 2 (last para), *Supra*, in which the exception contained in the old section in favour of the rules of Hindu and Buddhist laws have been removed.

**24. Transfer to such of certain persons as survive at some period not specified**—Where, on a transfer of property, an interest therein is to accrue to such of certain persons as shall be surviving at some period, but the exact period is not specified, the interest shall go to such of them as shall be alive when the intermediate or precedent interest ceases to exist, unless a contrary intention appears from the terms of the transfer.

*Illustration*

A transfers property to B for life, and after his death to C and D, equally to be divided between them, or to the survivor of them. C dies during the life of B. D survives B. At B's death the property passes to D.

*Case Law*

**Section 24**—If an estate is limited to two persons jointly and if one is not capable of taking, he who is capable takes the whole. *16 C 677—16 IA. 44 (PC)*.

object and the whole scope of the instrument and the deed must be viewed, if necessary, by reference to surrounding circumstances. *32 CLJ 453*.

If a transfer on trust constitutes a charitable gift with conditions attached to it which are illegal, the charity takes effect without the conditions. *22 CLJ 593—33 IC 657*. To determine the true construction of a deed of settlement, regard must be had to the

**Immorality**—A gift for an immoral consideration is void. *47 A 619—1925 A 437*; but a gift to which an immoral condition is subsequently attached is good. The gift is valid and the condition void. *88 IC 411—1925 A 437—47 A 612; 6 A 313*.

**Impossibility**—Mere difficulty in the performance of the condition is not to be deemed an impossibility under this section. (Shep & Brown, Transfer of Property Act.)

**Illegal or "forbidden by law"**—A condition in restraint of marriage is forbidden by law. See *11 Beng LR 129*; so also a gift of a boy in adoption for a sum paid to the natural

father. See *13 Beng LRAC 42*; so also a gift to a married woman and her husband on condition that the donor should have intercourse with the woman. *47 A 619—1925 A 437*; such a condition is not only immoral but also opposed to public policy (*Ibid*): so also an agreement to obtain a divorce in future. See *10 B 152*.

**25. Conditional transfer**—An interest created on a transfer of property and dependent upon a condition fails if the fulfilment of the condition is impossible, or is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent, or involves or implies injury to the person or property of another, or the Court regards it as immoral or opposed to public policy.

### Illustrations

(a) A lets a farm to B on condition that he shall walk a hundred miles in an hour. The lease is void.

(b) A gives <sup>1</sup>[Taka] 500 to B on condition that he shall marry A's daughter C. At the date of the transfer C was dead. The transfer is void.

(c) A transfers <sup>1</sup>[Taka] 500 to B on condition that she shall murder C. The transfer is void.

(d) A transfers <sup>1</sup>[Taka] 500 to his niece C if she will desert her husband. The transfer is void.

1. 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).

**26. Fulfilment of condition precedent**—Where the terms of a transfer of property impose a condition to be fulfilled before a person can take an interest in the property, the condition shall be deemed to have been fulfilled if it has been substantially complied with.

### Illustrations

(a) A transfers <sup>1</sup>[Taka] 5000 to B on condition that he shall marry with the consent of C, D and E. E dies. B marries with the consent of C and D. B is deemed to have fulfilled the condition.

(b) A transfers <sup>1</sup>[Taka] 5000 to B on condition that he shall marry with the consent of C, D and E. B marries without the consent of C, D and E, but obtains their consent after the marriage. B has not fulfilled the condition.

### Case Law

**Section 26**—Where a charitable gift is made upon a condition precedent the gift fails if the condition is not satisfied. 32 CLJ 453. As to what constitutes fulfilment of the condition, see also *28 M 173—1 IA 387(PC)*. Power of transfer subject to the condition of

consent being obtained of three persons—Death of two persons, consent of third, is not a substantial compliance of the condition—Consent of heirs of deceased, necessity of. *1926 A 181—90 IC 887.*

**27. Conditional transfer to one person coupled with transfer to another on failure of prior disposition**—Where, on a transfer of property, an interest therein is created in favour of one person, and by the same transaction an ulterior disposition of the same interest is made in favour of another, if the prior disposition under the transfer shall fail, the ulterior disposition shall take effect upon the failure of the prior disposition, although the failure may not have occurred in the manner contemplated by the transferor.

1. 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).

But, where the intention of the parties to the transaction is that the ulterior disposition shall take effect only in the event of the prior disposition failing in a particular manner, the ulterior disposition shall not take effect unless the prior disposition fails in that manner.

### Illustrations

(a) A transfers <sup>1</sup>[Taka] 500 to B on condition that he shall execute a certain lease within three months after A's death, and, if he should neglect to do so, to C. B dies in A's life-time. The disposition in favour of C takes effect.

(b) A transfers property to his wife; but, in case she should die in his life-time, transfers to B that which he had transferred to her. A and his wife perish together, under circumstances which make it impossible to prove that she died before him. The disposition in favour of B does not take effect.

### Case Law

**Section 27—Scope of section—**This section deals with the doctrine of acceleration of estates (i.e.) where there is a gift in remainder, expectant on the determination of a life-estate and the prior estate is void, the subsequent gift is accelerated. *10 C 482*. An award provided that the managership of certain endowed property should devolve on the next successor after it had been held by the previous one for twenty-one years. The manager, who had been appointed for twenty-one years died before the expiry of the full period.

**Held:** That the effect of the failure of the prior interest was to accelerate the subsequent interest, even though the failure may not have

taken place in the precise manner laid down in the award. *8 OWN. 1138—1932 O 161*. The failure contemplated by section 27 of the Transfer of Property Act and Section 129 of the Succession Act is the failure of a valid gift. Where the gift is *ab initio* void the subsequent gifts must also fail as provided by section 16, Transfer of Property Act, and section 116, Succession Act, *44 Bom. LR 256*. On this section, see also *33 C 947—10 CWN 695; 15 C 282*.

**Construction of section—"Interest—"**  
**Meaning of—**The word "interest" in section 28, Transfer of Property Act, has the same meaning as the "thing bequeathed" in section 131 of the Succession Act, *156 IC 33—16 Pat*

1. 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).

*LT 245.* It is a well-settled principle of law which has now been embodied in sections 28 and 30 of the Act that, in the case of a condition subsequent "if the ulterior disposition is not valid the prior disposition is not affected by it." *55 IA 180—50 A 375—55 MLJ 42 (PC)*. For form of *contingent limitation*, see *4 C 304*. There is no forfeiture of interest if the condition cannot be fulfilled because of duress. *20 C 15*. On this section, see also *39 MLJ 498—60 IC 802*. Gift of absolute estate by Hindu widow to daughters—Malik—Later provision that on death of any daughter issueless others should

take—Effect of—Construction of gift deed. *156 IC 33—16 Pat. LT 245*. The principle that an estate once vested cannot be divested is not recognised as a general rule even in the Hindu Law of Succession. Hence a clause of defeasance in a deed of partition among the Hindus, that if a particular event shall happen the interest of a particular person shall pass to another is not repugnant to any principle of Hindu Law. (NB—The question discussed in this case is not now of much practical importance in view of the recent amendment of section 2 by Act XX of 1929).

**28. Ulterior transfer conditional on happening or not happening of specified event—**On a transfer of property an interest therein may be created to accrue to any person with the condition super-added that in case a specified uncertain event shall happen such interest shall pass to another person, or that in case a specified uncertain event shall not happen such interest shall pass to another person. In each case the dispositions are subject to the rules contained in sections 10, 12, 21, 22, 23, 24, 25 and 27.

### Case Law

**Sections 28 and 31—**Relative scope and effect of—Section 28 deals with a case in which on the happening of a specified uncertain event the property transferred is to pass to a second donee, whereas section 31 refers to a mere cesser of the first donee's

interest on the happening of a specified uncertain event, in which case the property will in ordinary cases revert to the donor. *156 IC 33—16 Pat LT 245*.

(A breach of conditions subsequent on account of duress or coercion will not work

forfeiture of interest referred to in 17 CWN 39 (41).

In case of a condition subsequent, "if the ulterior disposition is not valid the prior disposition is not affected by it." See 50 A

375—55 MLJ 42 (PC). Specific trusts or estates which are valid in law are not rendered void by a subsequent illegal disposition of the remainder or residue of the estate. See 4 BLR OC 231; 9 BLR 377 (PC).

**29. Fulfilment of condition subsequent**—An ulterior disposition of the kind contemplated by the last preceding section cannot take effect unless the condition is strictly fulfilled.

**Illustration**

A transfers <sup>1</sup>[Taka] 500 to B, to be paid to him on his attaining his majority or marrying, with a proviso that, if B dies minor or marries without C's consent, the <sup>1</sup>[Taka] 500 shall go to D. B marries when only 17 years of age, without C's consent. The transfer to D takes effect.

**30. Prior disposition not affected by invalidity of ulterior disposition**—If the ulterior disposition is not valid, the prior disposition is not affected by it.

**Illustration**

A transfers a farm to B for her life, and, if she does not desert her husband, to C. B is entitled to the farm during her life as if no condition had been inserted.

**31. Condition that transfer shall cease to have effect in case specified uncertain event happens or does not happen**—Subject to the provisions of section 12, on a transfer of property an interest therein may be created with the condition superadded that it shall cease to exist in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen.

1. 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).

**Illustrations**

(a) A transfers a farm to B for his life, with a proviso that, in case B cuts down a certain wood the transfer shall cease to have any effect. B cuts down the wood. He loses his life-interest in the farm.

(b) A transfers a farm to B, provided that if B shall not go to England within three years after the date of the transfer, his interest in the farm shall cease. B does not go to England within the term prescribed. His interest in the farm ceases.

**Case Law**

**Section 31**—Cf Section 134, Succession Act, 1925. A *condition subsequent* by way of defeasance that any interest created shall cease to exist in case a specified uncertain event shall happen or in case a specified uncertain event shall not happen, can be valid. It does not follow that because the law allows such a condition being imposed, the Court is bound to enforce it in every case. 1933 O 291—10 OWN 759.

**Gift over**—In Indian law, the gift over corresponds with the terms of section 31 of the Transfer of Property Act and the condition superadded to a transfer of property that the interest should cease to exist in case a specified uncertain event shall happen or in case a certain specified event shall not happen. Where there has been no defeasance, the gift over cannot come into operation and there can be no defeasance unless some event arises which makes it impossible for the absolute title to continue. 109 IC 835—1928 O 67. See also 39 MLJ 498—60 IC 802; 24 C 646.

**Sections 31 & 28**—Relative scope and effect of—Section 28 deals with a case in which on the happening of a specified uncertain event the property transferred is to pass to a second donee, whereas section 31 refers to a mere cesser of the first donee's interest on the happening of a specified uncertain event, in which case the property will in ordinary cases revert to the donor. 156 IC 33—16 Pat LT 245.

(A *breach of conditions subsequent* on account of duress or coercion will not work forfeiture of interest referred to in 17 CWN 39 (41).

In case of a condition subsequent, "if the ulterior disposition is not valid the prior disposition is not affected by it." See 50 A 375—55 MLJ 42 (PC). Specific trusts or estates which are valid in law are not rendered void by a subsequent illegal disposition of the remainder or residue of the estate. See 4 BLR OC 231; 9 BLR 377 (PC).

**32. Such condition must not be invalid**—In order that a condition that an interest shall cease to exist may be valid, it is necessary that the event to which it relates be one which could legally constitute the condition of the creation of an interest.

**33. Transfer conditional on performance of act, no time being specified for performance**—Where, on a transfer of property an interest therein is created subject to a condition that the person taking it shall perform a certain act, but no time is specified for the performance of the act, the condition is broken when he renders impossible, permanently or for an indefinite period, the performance of the act.

**34. Transfer conditional on performance of act, time being specified**—Where an act is to be performed by a person either as a condition to be fulfilled before an interest created on a transfer of property is enjoyed by him, or as a condition on the non-fulfilment of which the interest is to pass from him to another person, and a time is specified for the performance of the act, if such performance within the specified time is prevented by the fraud of a person who would be directly benefited by non-fulfilment of the condition, such further time shall as against him be allowed for performing the act as shall be requisite to make up for the delay caused by such fraud. But if no time is specified for the performance of the act, then, if its performance is by the fraud of a person interested in the non-fulfilment of the condition rendered impossible or indefinitely postponed, the condition shall as against him be deemed to have been fulfilled.



*Election*

35. **Election when necessary**—Where a person professes to transfer property which he has no right to transfer, and as part of the same transaction confers any benefit on the owner of the property, such owner must elect either to confirm such transfer or to dissent from it; and in the latter case he shall relinquish the benefit so conferred, and the benefit so relinquished shall revert to the transferor or his representative as if it had not been disposed of,

subject nevertheless,

Where the transfer is gratuitous, and the transferor has, before the election, died or otherwise become incapable of making a fresh transfer, and in all cases where the transfer is for consideration,

to the charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred to him.

**Illustrations**

The farm of <sup>2</sup>[Ulipur] is the property of C and worth <sup>1</sup>[Taka] 800. A by an instrument of gift professes to transfer it to B, giving by the same instrument <sup>1</sup>[Taka] 1,000 to C. C elects to retain the farm. He forfeits the gift of <sup>1</sup>[Taka] 1,000

In the same case, A dies before the election. His representative must out of the <sup>1</sup>[Taka] 1,000 pay <sup>1</sup>[Taka] 800 to B.

The rule in the first paragraph of this section applies whether the transferor does or does not believe that which he professes to transfer to be his own.

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1. 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).
  2. Substituted by the Central Laws (Statute Reform) Ordinance, 1960 (XXI of 1960), section 3 and 2nd Schedule for "Sultanpur" (with effect from the 14th October, 1955).

A person taking no benefit directly under a transaction, but deriving a benefit under it indirectly, need not elect.

A person who in his own capacity takes a benefit under the transaction may in another dissent therefrom.

*Exception to the last preceding four rules*—Where a particular benefit is expressed to be conferred on the owner of the property which the transferor professes to transfer, and such benefit is expressed to be in lieu of that property, if such owner claims the property, he must relinquish the particular benefit, but he is not bound to relinquish any other benefit conferred upon him by the same transaction.

Acceptance of the benefit by the person on whom it is conferred constitutes an election by him to confirm the transfer, if he is aware of his duty to elect and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives enquiry into the circumstances.

Such knowledge or waiver shall, in the absence of evidence to the contrary, be presumed, if the person on whom the benefit has been conferred has enjoyed it for two years without doing any act to express dissent.

Such knowledge or waiver may be inferred from any act of his which renders it impossible to place the persons interested in the property professed to be transferred in the same condition as if such act had not been done.

#### **Illustration**

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

If he does not within one year after the date of the transfer signify to the transferor or his representatives his intention to confirm or to dissent from the transfer, the transferor or his representatives may, upon the expiration of that-

period, require him to make his election; and, if he does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the transfer.

In case of disability, the election shall be postponed until the disability ceases, or until the election is made by some competent authority.

### Case Law

**Section 35**—Election, doctrine of— Explained. The foundation of the doctrine of election is that a person taking the benefit of an instrument must also bear the burden, imposed thereby and that he cannot take under and against the same instrument. It is a breach to the general rule that no one may approbate or reprobate. The doctrine is based on intended intention to this extent that the law presumes that the author of an instrument intended to give effect to every part of it. There is an obligation on him who takes a benefit under a will or other instrument intended to give full effect to that instrument under which it was beyond the power of the donor or settler to dispose of, but to which effect can be given by the concurrence of him who receives the benefit under the same instrument, the law will impose on him who takes the benefit, the obligation of carrying the instrument into full and complete force and effect. If an instrument is invalid in part, what remains is sufficient to put a person to his election if he claims a benefit under it. *Muhammad Kader Ali Fakir vs Fakir Lakman Hakim* PLR 1956 Dacca 370.

Doctrine of election—The beneficiary must give effect to the instrument as a whole.

The foundation of the doctrine of election is that a person taking benefit under an instrument must also bear the burden imposed

by it and that he cannot take under and against the same instrument. It is, therefore, a breach of the general rule that no one may approbate or reprobate. The doctrine is based on intention to this extent that the law presumes that the author of an instrument intended to give effect to every part of it. 8 DLR 112 (120 rt-h col.)

An election to be binding must be with a full knowledge of the rights of the person entitled to elect. Where a person elects after creating substantial rights in favour of strangers in property which he would lose by the election, the strangers who had already acquired title would not be affected by the election. *38 A 627—43 IA 212—31 MLJ 607 (PC)*

A debtor executed a settlement conveying his property to a trustee with directions as to payment of debts, maintenance, etc. a suit by a creditor attacking this deed of settlement was compromised and the trustee executed two mortgages to the creditor in respect of his pre-settlement debts and certain other loans. An heir of the settler brought a suit to set aside these mortgages as being invalid against settled estate. It was decreed. Thereupon the creditor brought the suit on the original bonds and it was held that no question of election could arise as between these securities even on the footing that the later mortgages were

valid, as by express agreement, the original hypothecation bonds and the invalid mortgages were to be cumulative and independent securities. Still less can it arise after the mortgages had been set aside. *ILR (1938) M 646—42 CWN 565—47 LW 618—1938 PC 123—(1938) 1 MLJ 597 (PC)*.

Where a person takes a mortgage in consideration of consenting to a decree for payment by instalments in a suit on a pro-note, he can execute the decree and enforce the mortgage. The doctrine of election has no application to the case, *10 MLT. 187—11 IC 837*. As to the applicability of the doctrine of election, see also *109 IC 835—1928 O 67*. To constitute a waiver or election by Hindu widow it must be shown that she was fully aware of her right under the law and with that knowledge made an election. A *pardanashin* lady is entitled to special protection in this respect. *37 CLJ 30*. See also *(1941) 1 MLJ 349*. (applicability of doctrine of election to the case of surrender by Hindu widow.) (The doctrine of election is based on the principle of compensation and not of forfeiture.) The quantum of compensation is not what the Court looks to. ~~It only~~ sees that a party deprived of right vesting in him is recompensed by the gift of another property, whatever may be its nature or duration of enjoyment. He who accepts a benefit under a deed or a will must adopt the whole contents of the instrument conforming to all its provisions and renouncing every right inconsistent with it. The rule enunciated in

section 35 applies to Hindus. *36 MLJ 507—49 IC 527* See also *12 MIA 186, 10 MIA 340; 20 B. 316; 25 M 361; 14 B 438*. On devise of property belonging to a legatee, legatee must choose between his property and the legacy. *1925 M 164—78 IC 274*.

~~34X~~ Election can be made but once. If two remedies are open and a person takes one and fails, he cannot turn round and adopt the other. *52 IC 362*. See also *12 C. 60*. If a mortgagee obtains a decree for rent and allows it to be barred, he cannot rely on the charge for the same. *41 M 1043—35 MLJ 414; 49 IC 123*. Whether receipt of rent for land granted on permanent lease by the prior holder will amount to election of recognising the lease. See *1925 A 190—78 IC 191*.

**Different capacities**—Where a person takes a benefit in one capacity and asserts his right in another, no question of election arises. A person taking a benefit indirectly need not elect. *42 IC 18—20 OC 243*. See also *9 CLJ 19*. A person accepting a benefit under a will is not precluded from disputing a gift by the testatrix long before her death which is not the subject of the will at all though it is recited therein. *64 IC 481—1922 M 357*. Sale of property subject to mortgage—No provision for payment of debt—Vendee of part from original vendee selling to creditor reciting original sale—Creditor, if precluded from proceeding against rest of the property. *1935 M 684*.

### Apportionment

**36. Apportionment of periodical payments on determination of interest of person entitled**—In the absence of a contract of local usage to the contrary, all rents, annuities, pensions, dividends and other periodical payments in the nature of income shall, upon the transfer of the interest of the person entitled to receive such payments, be deemed, as between the transferor and the transferee, to accrue due from day to day, and to be apportionable accordingly, but to be payable on the days appointed for the payment thereof.

### Case Law

**Section 36**—Apportionment of rent— Principle of—The general principle of apportionment which is one of equity is that all rents, annuities, dividends and other periodical payments in the nature of income shall be deemed to accrue from day to day. This principle underlies the provision of section 36. *101 IC 91—1927 Oudh 605*. See also *1928 R 26; 28 CWN 1039—1924 C 1069*. In a suit by the plaintiffs as heirs of a deceased holder of an impartible estate against an executor *de son tort*, the plaintiffs are entitled to such rents and royalties due up to the date of the death of the deceased holder. Section 36 of the Transfer of Property Act embodies a rule of enquiry and that principle should be applied to a case of this nature even though the section in its terms be not applicable having regard to section 2, sub-section (d). *61 C 711*, See also *1937 M 219—(1937) 1 MLJ 77*. The section applies to transfers by act of parties and not by operation of law as execution sales. *21 C 386; 33 C 786*. See also *41 M 370—33 MLJ 618; 39 M 283*. But see *26 M 540* (contra); also *4 M*

*370*. Nor to compromise decrees. *16 P 184—18 Pat LT 162—1937 P 237*. Where there are equities in favour of a *bonafide* purchaser the principle of this section regarding apportionment of rent should be applied. *105 IC 487—6 Bur LJ 207*.

*Agricultural rents* are not apportionable, for they accrue once and for all at the time the crops are reaped and do not accrue from day to day. *5 R 803 1928 R 67(2)*. See also *21 C 383; 64 IC 178*. The section does not apply to landlord and tenant. It applies only between a *transferor and transferee*. *24 WR 219*. The principle of section 36 would also apply to the case of an assignee of a lessee claiming apportionment of rent. If the assignment be of a portion only of the premises included in a lease, the assignee is not liable for more than the proportionate rent due on what is comprised in his assignment. Where the principle of apportionment has become an incident of the tenancy by the course of dealing for a long period, an assignee is entitled to ask for apportionment of rent. *50 LW 608—1940 Mad*

21. See also 16 Pat 184—1937 Pat. 237—18 Pat LT 162. Transferee is entitled to rent from the date of his purchase to the date when the rent falls due. 102 IC. 144. An assignee of a lease is liable only for the rent accruing after the assignment. 38 M 86—23 MLJ. 695. Section if applies to execution sales of lease. 41 M 370—33 MLJ 618. See also 39 M 283; 33 C 786; 21 C 383. When the landlord assigns his interest to the tenant, rent up to assignment is claimable by landlord. 64 IC 178. Rent collected by transferor after sale—Transferee is entitled to collect the same from the transferor. See 1927 A 569—50 A 18. As between *mortgagor and mortgagee* from the day of the deposit to redeem a mortgage the property is transferred to the mortgagor and under section 36 mortgagor is entitled to collections made thereafter. 1922 A 275. As to dividends declared subsequent to purchase of shares, see 1930 A 615. Though this section does not in terms apply to suit for profits brought by one co-sharer against the *lambardar*, yet the principle underlying this section is applicable. 1932 ALJ 93.

### 37. Apportionment of benefit of obligation on severance—

When in consequence of a transfer, property is divided and held in several shares, and thereupon the benefit of any obligation relating to the property as a whole passes from one to several owners of the property, the corresponding duty shall, in the absence of a contract to the contrary amongst the owners, be performed in favour of each of such owners in proportion to the value of his share in the property, provided that the duty can be severed and that the severance does not substantially increase the burden of the obligation; but if the duty cannot be severed, or if the severance would substantially increase the burden of the obligation, the duty shall be performed for the benefit of such one of the several owners as they shall jointly designate for that purpose:

Provided that no person on whom the burden of the obligation lies shall be answerable for failure to discharge it in manner provided by this section, unless and until he has reasonable notice of the severance.

Nothing in this section applies to leases for agricultural purposes unless and until the <sup>1</sup>[Government] by notification in the official Gazette so directs.

### Illustrations

(a) A sells to B, C and D a house situate in a village and leased to E at an annual rent of <sup>2</sup>[Taka]30 and delivery of one fat sheep, B having provided half the purchase-money and C and D one-quarter each. E, having notice of this, must pay <sup>2</sup>[Taka] 15 to B, <sup>2</sup>[Taka]  $7\frac{1}{2}$  to C, and <sup>2</sup>[Taka]  $7\frac{1}{2}$  to D, and must deliver the sheep according to the joint direction of B, C and D.

(b) In the same case, each house in the village being bound to provide ten days' labour each year on a dyke to prevent inundation, E had agreed as a term of his lease to perform this work for A B, C and D severally require E to perform the ten days' work due on account of the house of each. E is not bound to do more than ten days' work in all, according to such directions as B, C and D may join in giving.

### Case Law

**Section 37**—Scope—The section applies only where the benefit of an obligation passes from one to several owners of the property. *2 M 234*. See also *25 M 26* at pp 32-33 (section does not apply where the indivisible character of the property is kept up on a transfer by inheritance, in which case all the heirs would be jointly entitled to enforce the right of the deceased, and no question of apportionment

arises. Payment of rent by tenant to assignor landlord in good faith without notice of assignment protects him. *19 IC 865—17 CLJ 372*. Though the section and section 107 do not apply directly to *agricultural leases* in the Madras Presidency, yet the principle embodied therein have been applied by the Madras High Court even to such leases. *29 M 29 (36) foll. in 26 MLJ 435 at 440; 38 M 445*.

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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).
  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).

*(B) Transfer of Immovable Property*

**38. Transfer by person authorised only under certain circumstances to transfer**—Where any person, authorised only under circumstances in their nature variable to dispose of immovable property, transfers such property for consideration, alleging the existence of such circumstances, they shall, as between the transferee on the one part and the transferor and other persons (if any) affected by the transfer on the other part, be deemed to have existed, if the transferee, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith.

**Illustration**

A, a Hindu widow, whose husband has left collateral heirs, alleging that the property held by her, as such, is insufficient for her maintenance, agrees, for purposes neither religious nor charitable, to sell a field, part of such property, to B. B satisfies himself by reasonable enquiry that the income of the property is insufficient for A's maintenance, and that the sale of the field is necessary, and, acting in good faith, buys the field from A. As between B on the one part and A and the collateral heirs on the other part, a necessity for the sale shall be deemed to have existed.

**Case Law**

**Section 38**—As to what is *reasonable care* see 6 MIA 393, which is the leading case on the subject. See also 22 A. 326; 26 B 433; 2 C 262; 28 A 508; 2 B 494; 1 B 404. Section pre-supposes an actual and completed transfer and does not apply to cases where the transaction is still incomplete. 22 B 1 at pp. 9, 10 "*Any person*" meaning of. 56 IC 492—14 SLR 12. *Bona fide* enquiry by the transferee as to the existence of legal necessity is sufficient. 92 IC 646 (N). (as to enquiries to be made by alienee from Hindu widow). See also 1927 No. 65. The purchaser from the mother of a minor as the guardian, must prove that the mother was authorised to transfer. 33 IC 444—17 Bom. LR 1134. Where the vendor has absolute power to convey certain property the vendee gets full title provided the vendor recites in the sale deed that he intends to pass full title though the recitals be false. 39 MLJ 590—601 IC 77 Specific representations by the vendor may be ground for dispensing with the necessity for enquiry by the purchaser. 20 C 296—19 IA 203 (PC); 25 M 149. The plea of want of legal necessity cannot be raised by a donee. An alienee for value can raise the question of legal necessity. 1923 N 127.



**Section 38**—Condition of completion for the transfer of property—Original allottee after payment of full sale price to the Development Authority had executed agreement for the transfer of the plot in favour of respondent—Effect—Condition of completion of construction imposed by Development Authority for transfer of property would not make the transaction invalid and restrict the passing of title to the respondent. *Sami-ul-Haq vs Maqbool Hussain Butt 1999 CLC 899.*

**Section 38**—Phrase 'circumstances in their nature variable' occurring in section 38, Transfer of Property Act, 1882—Applicability—Phrase is generally referred to a case when facts constitute a legal necessity for the transfer of immovable property by a person having limited and qualified power of disposal of such property like under the Hindu Law. *Sami-ul-Haq vs Maqbool Hussain Butt 2001 SCMR 1053.*

### 39. Transfer where third person is entitled to maintenance—

Where a third person has a right to receive maintenance, or a provision for advancement or marriage, from the profits of immovable property, and such property is transferred<sup>1\* \* \*</sup>, the right may be enforced against the transferee, if he has notice<sup>2</sup>[thereof] or if the transfer is gratuitous; but not against a transfer for consideration and without notice of the right, nor against such property in his hands.

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### Case Law

**Section 39—Change in the present section and reason for the change**—This is explained in the *Statement of Objects and Reasons* as follows:—"Section 39 is intended to protect persons who are entitled to receive maintenance or for whom provision is made for advancement or marriage from the profits

of any immovable property. The section provides that such a right can be enforced against a transferee of the property, if the transfer has been made with the intention of defeating the right and the transferee has notice of the intention. The Courts have, therefore, always required proof of the

1. The words "with the intention of defeating such right" rep by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 11.
2. Substituted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 11 for "of such intention".
3. The illustration was repealed by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 11.

intention on the part of the transferor and also of notice of the intention to the transferee. 22 A 326; 24 A 160. The illustration to the section is not consistent with the section itself and does not make any reference to the intention of the transferor. In actual practice it is impossible to adduce proof of mere intention. As stated in 12 Bom. LR 1075 at pp. 1077 and 1078, in order to enable such proof to be adduced, transferor must have announced his fraudulent intention of defeating the rights of persons entitled to maintenance and the transferee must have heard him doing so. As it is desirable to protect persons entitled to maintenance or for whom provision for advancement has been made from improvident holders of the property, it is necessary that the reference to the transferor's intention should be omitted from the section, and the section should be amended accordingly." 53 LW. 744—1941 Mad. 707—(1941) 1 MLJ 815 (within section 39 as amended has retrospective effect).

*The Select Committee* said: "We have thought it desirable to omit the illustration to section 39 instead of amending it." Section 39 does not in terms apply to the case of a charge created or declared by a decree of Court in a suit for maintenance. Such a charge created by a decree binds and is enforceable on a subsequent transferee even though he may be a *bonafide* transferee for value without notice. 160 IC 169—19 NLJ 254.

**Sections 39 and 100—Distinction between**—Section 39 of the Transfer of Property Act does not deal with a charge but with a right which falls short of it, while section 100 deals with charge itself. In the former case the charge does not arise until it is fixed by a decree or by agreement or

operation of law. 1940 NLJ 1—1940 Nag 163—1 LR (1941) Nag. 513.

**Sections 39 and 40: Scope**—A transferee claiming under a transfer before 1929, cannot by reason of the amendment of the Transfer of Property Act, in 1929, be required to do more than he was required to do by the law as it stood when the property was transferred to him. Nor can a mere omission to make inquiries be regarded as sufficient to constitute "notice" within the meaning of sections 3 and 39, Transfer of Property Act. The abstention from inquiry must be designed, and due to a desire to avoid an inquiry which would lead one to ultimate knowledge before the omission to make inquiry can be said to constitute constructive notice. 53 LW 744—1941 M 707—(1941) 1 MLJ 815. Sections 39 and 40 have no application where under an award, immovable property is charged for payment of religious expenses and maintenance. They deal with personal rights which do not arise out of a specific charge. 5 Luck. 172—1929 O 31. See 9 C 335; 27 M 268; 6 OWN 493; 2 B 494; 22 A. 326. The *right of maintenance of the wife* is not a charge on the husband's estate. Where property is transferred with the intention of defeating her right the case is governed by section 38.8 OWN 1291.

Where a Hindu husband who was on cordial terms with his wife, made a gift of his property to his wife in order to provide for her maintenance, held, that the wife was not a creditor and that the transfer in her favour could not take effect as against the claims of the husband's creditors. (*Ibid*). Junior members in an *impartible estate* are not entitled to a charge for maintenance against a transferee. 48 IC 613—3 PLJ. 648. A

*gratuitous transferee* cannot in any case defeat the right of the maintenance holder. 22 A 326. Section 39 (prior to amendment of 1929)—Scope—Hindu widow's claim for maintenance—Enforceability against *bona fide* transferee. 40 LW 678.

**Bonafide purchaser**—In order to affect a *bonafide* purchaser for value with notice, he must have notice not only of the existence of the right of maintenance but also of the existence of a charge actually created and binding on the estate. 26 SLR 269. See also 40 LW 678. Where the plaintiff was only entitled to a right to receive part of his maintenance from the profits of a village by a contract with the owner, which, being unregistered, created no charge for the same, the right cannot be enforced against a subsequent transferee for value without

notice. 9 OWN 1037. Section 39 does not in terms apply to the case of a charge created or declared by a decree of Court in a suit for maintenance. Such a charge created by a decree binds and is enforceable against a subsequent transferee even though he may be a *bonafide* transferee for value without notice. 19 NLJ 254. The holder of a decree for arrears of maintenance charged upon certain properties is entitled to enforce the same against the transferee of the properties for value with notice of the charge, even though the transferee purchased only a part of the estate. If he is obliged to satisfy the full amount of the charge, his only remedy is a suit for contribution against the owners of the remaining portion of the estate. 9 OWN. 900—1932 O 336.

#### 40. Burden of obligation imposing restriction on use of land—

Where, for the more beneficial enjoyment of his own immovable property, a third person has, independently of any interest in the immovable property of another of any easement thereon, a right to restrain the enjoyment <sup>1</sup>[in a particular manner of the latter property], or

**Or of obligation annexed to ownership but not amounting to interest or easement**—where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immovable property, but not amounting to an interest therein or easement thereon,

1. Substituted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 12, for "of the latter property or to compel its enjoyment in a particular manner".

such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation, nor against such property in his hands.

### Illustration

A contracts to sell <sup>1</sup>[Ulipur] to B. While the contract is still in force he sells <sup>1</sup>[Ulipur] to C, who has notice of the contract, B may enforce the contract against C to the same extent as against A.

### Case Law

**Section 40**—Sale by mortgagor of equity of redemption—vendee covenanting to recovery to vendor-mortgagor partition of property after redemption—vendor-mortgagor subsequently selling his right to reconveyance also to vendee—earlier sale successfully pre-empted—Pre-emptor selling his rights under the pre-emption decree to mortgagee—covenant to recovery, though personal, held, nevertheless, to be annexed co-ownership of land. 1952 PLR (Lah) 196

**Sections 40 & 54**—Contract to reconvey property—Contract annexed to ownership of land—Not a personal contract only—May be transferred.

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. Therefore, agreement of

recovery may be transferred. *Umar Din vs Fazal Din* PLD 1952 Lah. 166—PLR 1952 (Lah) 196.

Obligation annexed to ownership—Not enforceable against *bona fide* transferee.

Section 40 of the Transfer of Property Act enacts that obligations annexed to the ownership of property are enforceable against every transfer except *bona fide* transferee for consideration without notice of the obligation. The provision is in terms very similar to section 27(b) of the Specific Relief Act which makes contracts specifically enforceable against a transferee except a *bona fide* transferee for value without notice. *Suleman Khan vs Punjab Province*. 1953 PLD Lah. 388—PLR 1953 Lah 919.

**Sections 40, 54 & 130**—Right of reconveyance of immovable property is an actionable claim in the vendor which can be transferred legally.

1. Substituted by the Central Laws (Statute Reform) Ordinance, 1960 (XXI of 1960), section 3 and 2nd Schedule, for "Sultanpur" (with effect from the 14th October, 1955).

When section 130 of the Transfer of Property Act is read with sections 40 and 54 of that Act there remains no doubt that the right of reconveyance of immovable property though not an interest in the land, is an interest very much annexed to the ownership of the land; and this right is an actionable claim in the vendor which is transferable.

A right under a contract of sale or contract of reconveyance, for all practical purposes, subject to the limitations put under sections 40 and 54 of the Transfer of Property Act, stands at par with "equitable estate" of the vendee under a contract of sale of immovable property. This right though not an interest in the land, is very much annexed to the ownership of land and this rights is transferable and assignable.

Even a benamder can maintain a suit for conveyance in place of the principal.

In the present case in the absence of even such limitation in the agreement the right of reconveyance was assignable and the same was rightly and validly assigned to the plaintiffs—As such the plaintiffs have *locus standi* to institute the suit for specific performance of contract against the original vendee. *Seru Mia vs Fajilatennessa and others* 31 DLR 159.

#### Abstract

1. Scope
2. Execution Sale
3. Revenue Sale
4. Charges
5. Covenant running with the land
6. What are covenants running with the land

7. What are not covenants running with the land.

#### 1. Scope

On the section, see also notes under section 11, supra. See also 5 Luck. 172, cited under section 39. The section deals with what are known in English law as restrictive covenants. 11 MLJ 135. See also 46 A 333. A person in whom there is a reversion in property leased after the expiration of the term of 499 years is said to possess his own immovable property and where for the more beneficial enjoyment of the reversion a negative stipulation is made, the principle of section 49 should be applied. 64 CLJ 308—1936 C 727—41 CWN 203. A covenant running with the land is a restrictive covenant as the same restricts the use of the land. 1927 C 41—44 CLJ 220. Enforcement of a contract of pre-emption against transferee with notice. 48 A 12—1926 A 72. The section does not apply where the benefit or obligation arising out of contract or annexed to ownership of immovable property amounts to an easement. 39 IC 778—48 PWR 1917; 129 IC 717—1931 A 207. (See para 2 of the section); nor to a mere personal obligation to pay. 133 IC 543—1931 ALJ 429. Covenant as to rent runs with the land. 62 C 346—1935 C 368.

Where an *ekrarnama* provided that in the event of the executant not paying the allowance fixed for maintenance, the obligee was to have liberty to proceed against the properties relinquished by her and in case she was unable to realise the arrears from those properties, she might have recourse to the other properties of the obligor, no particular or specific property having been mentioned

as liable for the claim, the deed cannot be construed as creating a charge, but only an obligation arising out of a contract annexed to the ownership of immovable property which, however, cannot be enforced against a *bona fide* purchaser without notice. 138 IC 24—36 CWN 153 Vague references to antecedent contracts, in judicial sales, could not affect the purchaser's rights, 1922 PC 393. The right of reconveyance of a right of easement granted in perpetuity is a positive covenant arising out of contract and can be completely dissociated from the land itself as a right of reconveyance in respect of land sold. There is nothing which can fasten this condition on the land itself so as to make it a covenant running with the land; it is a personal covenant independent of the land. Hence a vendee from the grantor cannot without an assignment of the right sue for specific performance of the condition of repurchase. 1942 NLJ 392.

## 2 Execution Sale

"*Transferee*," means not only a private purchaser but also one in execution. 38 IC 107—5 LW 234. See also 6 OWN 493; 45 MLJ 790—1922 PC 393 (PC). Subsequent attachment does not affect the right of vendee under a prior agreement of sale. 41 LW 739—1935 M 193—68 MLJ 67.

## 3. Revenue Sale

A revenue sale held on the footing that the defendant was bound to pay assessment should be invalid if it is found that he was, in fact, entitled to hold the lands free of assessment. The purchaser in such a sale would not get a good title except by adverse possession. The doctrine of a purchaser for

value without notice does not apply to sale held by Revenue Courts. 45 B 45—59 IC 118; 38 IC 107—5 LW 224 See also 6 OWN 493 (*Distinction between execution sale in Civil Courts and sales by Revenue Courts for arrears of assessment pointed out.* 45 B 45—59 IC 118).

## 4. Charges

A transferee with knowledge of a charge on the property is bound by the charge. 41 B 372—39 IC 96—19 Bom LR 97. See also 1926 A 70; 2 A 162. See also 33 A 163—43 IA 43—20 CWN 425 (PC); 2 A 162; 36 MLJ 618 (623). Agreement in favour of wife hypothecating a property for securing a payment of a monthly allowance to her was held to be a bogus one and would not affect the purchaser for value without notice of agreement. 130 IC 299 (2)—1931 A 338. Legatees and heirs of a Zemindar are bound by a charge for maintenance created by him. 42 M 581—36 MLJ 164—49 IC 704(PC). Section 40 does not apply to cases of decrees creating a charge on property; such a charge prevails against a transferee for value without notice. 19 NLJ 254. A charge supported by consideration can be enforced even against a transferee without notice. 51 IC 963—36 MLJ 618(623). A purchaser is presumed to have constructive notice not only of the tenant's interests but also of the other equities which the tenant in possession had. 101 IC 836—1927 M 699. Notice must be clear and unequivocal notice; mere vague references are of no effect. 1922 PC 393 (396). The question of notice is a question of fact. 1931 A 338.

## 5. Covenant running with the Land

The test to find out whether a covenant runs with the land is to see whether, at its

inception, it binds the land and secondly, whether the covenant agrees with the nature, quality or value of the land. 36 C 675—9 CLJ 523. As to contract giving rise to a right of pre-emption.

#### 6. What are Covenants running with the Land

A covenant between lessor and lessee for preparation of *jama papers* is one running with the land. 42 IC 521. A partition deed between four brothers provided that if any of them was obliged to pay off the debts of the family allotted to another, the person so paying would be entitled to a charge on the properties of the other to the extent of the amount paid.

**Held:** that the clause was a restrictive covenant in the nature of an obligation annexed to the ownership of immovable property within the meaning of section 40, and it was binding on a purchaser of the properties from one of the brothers with notice of the covenant. 38 LW 463—1933 M 715—65 MLJ 390. A covenant to pay ground rent and taxes runs with the land 27 Bom. LR 553—88 IC 79. On this point, see also 46 A 33; 1925 A 400; 1926 A 70; 2 A 162; 62 C 346. A restrictive covenant runs with the land if created for the benefit of the land conveyed or of that of which the grantor remains the owner and is intended to be annexed to such land. The converse proposition also holds good, as a grantor may impose restrictions for the benefit of the land already sold as of that

remaining in his hands which he proposes to sell especially when there are mutual covenants. 12 CLJ 259—7 IC 815. See also 41 A 417—49 IC 869. Contract of *pre-emption*, if enforceable against purchaser. 46 A 333—1924 A 400; 1926 A 70. On this section, see also 1922 PC 165.

#### 7. What are not Covenants running with the Land

A covenant agreeing to restrict the use of property by owner is not a covenant running with the land and is not binding on a purchaser without notice. 59 IC 506—45 B 170—22 Bom. LR 1158. Contract to grant lease is a personal covenant and not a covenant running with the land. 23 ALJ 307—47 A 582. An obligation to pay *zar-i-chakram* cannot be said to be annexed to the ownership of immovable property within the meaning of section 40. 1931 ALJ 429. Kanom deed—Stipulation that *jenmi* is to pay compensation at specified rates—If covenant running with land. See (1940) 1 MLJ 165. A covenant by an alienee of a portion of land to pay land-revenue for the unsold portion as well cannot be enforced for all time. It is not a covenant running with the land. 19 IC, 126—11 ALJ 231; 19 IC 67—11 ALJ 212. Covenant in a *patni* lease for reconveyance to the lessor being a positive covenant does not run with the land. 98 IC 46—1972 C 41. A covenant to re-convey is only personal. It does not bind even the heirs. 35 B 258—10 IC 814—13 Bom LR 240.

**41. Transfer by ostensible owner**—Where, with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

### Case Law

Auction-sale by court—Section not applicable.

**Section 41**—Transfer of Property Act excludes an auction-sale from its purview because there the property is not sold by any person, but is sold under the orders of Court of law, and all that passes to the auction purchaser is the interest of the judgment-debtor, if any, existing in the property sold. Where an auction sale was held in spite of the decree having already been satisfied, the auction purchaser could not avail of the bar created by this section because a sale in execution of a non-existing decree is completely void and ineffective. *Azizullah vs Habibullah PLD 1956 Pesh. 19.*

**Applicability**—Plea based on equitable principles—May be raised where it was not expressly taken in pleadings.

Section 41 of the Transfer of Property Act, is based upon the principle of natural equity which must be universally applicable. It is that where one man allows another to hold himself out as the owner of his estate and someone purchases it for value from the ostensible owner in the belief that he is the real owner, the man who allows the other to

hold himself out shall not be permitted to recover upon his secret title unless he can overthrow that purchaser by showing either that he had direct or constructive notice of the real title, or that there existed circumstances which ought to have put him upon the enquiry which, if prosecuted, would have led to a discovery of the real title. Thus section 41 of Transfer of Property Act, 1882 is primarily based upon the equitable principle of estoppel, and there may be cases where such a stand cannot be taken up without proper pleas yet there may be cases where this point could be taken up as a pure question of law in view of the existence on record of all the relevant facts brought by the parties to the suit. There is no general rule that in the absence of an express plea a question such as the one arising under section 41 of the Transfer of Property Act, 1882 cannot be taken up at the hearing. *More Khan vs Iman Bux PLD 1959 (WP) Karachi 767.*

**Transferee from the ostensible owner**—When his interest protected.

The husband continued to possess the suit land after settling it to his wife and subsequently the husband sold the same land to X.



Section 41 of the Transfer of Property Act makes it incumbent on the transferee to act in good faith and to take reasonable care to ascertain that the transferor had power to make the transfer. It is obvious that the first step which the transferee is expected to take is to search the registration office to ascertain what transfers if any, had been made by the transferor. The transferee is not entitled to the benefit of section 41 of the Transfer of Property Act if he or she fails to do so. *Hasan Ali vs Azamuddin* 14 DLR 392.

—*Bona fide* transferee—A *bona fide* purchaser for value without notice of the alleged contract for reconveyance is protected under section 41 of the Transfer of Property Act. *Tazal Haque vs Md Affan* 17 DLR 613.

Transfer by ostensible owner.

The party relying on the section must establish facts which entitle him to the benefits of the rules laid down in the section. 8 DLR 159 (166 *rt-h col*)

—Real owner, when allows another to hold as the owner of an estate to recover from the purchaser of the pretended owner. 8 DLR 606 (608 *rt h col*)

—Unless he cannot overthrow that the purchaser by showing either that he had directed notice or something which amounts to constructive notice of the real title, or that there existed circumstances, which ought to have put him on an enquiry, which if prosecuted would have led to a discovery of it, the real owner has no remedy against the purchaser. *Ibid.*

**Section 41**—Purchaser from a benamder is protected under section 41 of the Transfer

of Property Act provided he satisfies the conditions laid down in the proviso to the said section—The real owner can avoid the transfer by his benamder provided no reasonable care was taken by the transferee. *Sultan Ahmed vs Waziullah* 39 DLR 329.

**Section 41**—The section is an exception to the ordinary rule that the transferor cannot convey a greater title to the transferee than he himself has. If any one seeks protection either under section 41 of the Transfer of Property Act or under section 115 of the Evidence Act, he must prove the facts entitling him to the benefits under either of the laws. *Wahida Begum vs Tajul Islam* 52 DLR 491.

**Section 41**—The ratio of judicial pronouncements is that for applicability of section 41 of the Act primarily two things must concur: (1) that the person, i.e. ostensible owner, who has no real title was clothed with the insignia of ownership with the consent, express or implied, of the real owner; and (2) that the person purchasing for value from the ostensible owner shall take reasonable care to ascertain that his transferor has authority to make the transfer. At the time of making the purchase from Narayan Chakraborty plaintiffs were very much aware that their vendor's father was alive. The plaintiffs made their purchase without making reasonable inquiry to ascertain real ownership of the property transferred by their vendor, nor did they take steps for ascertaining the correctness of the recital in the deeds in spite of being aware of the fact that real owner of the property was alive at the material time. *Rabeya Khatun & others vs Moniruddin and others* 8 BLC (AD) 121

**Section 41**—Principle underlying section 41, Transfer of Property Act, 1882—Applicability—Essentials—section 41, Transfer of Property Act, 1882, is statutory application of law of estoppel and makes exception to rule that person could not confer better title than he himself possessed—Essentials of application of section 41, Transfer of Property Act, 1882, were that transferor must be ostensible owner; that he must be ostensible owner by consent, express or implied, of real owner; that transfer should be for consideration; and that transferor had acted in good faith taking reasonable care to ascertain that transferor had power to transfer—Where person claiming relief under section 41, Transfer of Property Act, 1882 had not acted in good faith and had obtained allotment through underhand means and High Court had refused to interfere with order of cancellation of allotment, persons claiming relief thereunder, could not be allowed to press section 41 of the Transfer of Property Act—Principle embodied in section 41, Transfer of Property Act, 1882 being principle of natural equity, and equities being not in favour of appellant inasmuch as the respondents had raised construction on the land in dispute without any objection from the appellant, High Court had rightly declined to interfere with order of cancellation of allotment—Plea of protection on principle of section 41, Transfer of Property Act, 1882, was not available in Settlement matters. *Muhammad Saleem vs Fazal Ahmad* 1997 SCMR 315.

**Section 41**—Muhammadam Law—Inheritance—Distant kindred could not have inherited land in question in presence of residuaries—Where land was mutated in favour of distant kindred while residuaries

were denied such portion of land in question and distant kindred had sold such land in favour of vendees no title had passed to alleged vendees—Alleged vendor (distant kindred) having got no title in property, could pass no title to vendees, thus vendees could not claim better title than vendor herself had got—Provisions of section 41, Transfer of Property Act, 1882, would have no application to facts and circumstances of the case, for it was not a case of defect in title of vendor but was a case where she had no title at all—Judgments and decrees of Courts below being correct, no interference was warranted. *Abdul Qadir vs Allah Daad* 1997 CLC 48.

**Section 41**—Plea of bona fide purchaser—It is necessary for purchaser to produce evidence that as a man of ordinary prudence he made all efforts to satisfy himself about title of seller—Mere agreement of sale with seller who had no title vested in him would not satisfy this requirement. *Ghulam Hussain vs Muhammad Bashir* 1997 UC 525.

**Section 41**—Requisites and ingredients for availing of section 41 protection highlighted—Transferee who does not go beyond entries in Revenue Record to find out basis of these entries would not be entitled to section 41—Protection. *Muhammad Nabi vs Ghulam Yahya* 1998 AC 611.

**Section 41**—Applicability of section 41, Transfer of Property Act, 1882 and protections thereunder—Requirements. *Saeed Ahmed vs Abdul Wahid* 1999 SCMR 1852.

**Section 41**—Bona fide purchaser—Inquiries into the title of owner—Appellant filed civil suit, wherein declaration to ownership of land was sought—Step-

brothers of appellant had sold land in excess of their shares—Purchaser of disputed sale raised a plea that they were bona fide purchasers and land was purchased after making inquiry into Revenue Record—Evidence on record did not prove statement about making inquiries into title of land—Trial Court decreed the suit but lower Appellate Court reversed the findings of trial Court—Validity—Protection under section 41, Transfer of Property Act, 1882 was available only where it was proved that purchase was for consideration and reasonable care was taken to ascertain that transferor had the power to transfer. *Muhammad Nabi vs Ghulam Yahya* 1999 CLC 1771.

**Section 41—Diligent inquiry—Scope—**Transferee is bound to go beyond the entries of Revenue Record, to find out basis of such entries and to collect information about the real owner. *Muhammad Nabi vs Ghulam Yahya* 1999 CLC 1771.

**Section 41—Exception to general rule and protection—**Purchaser has to prove that he has purchased the property with express or implicit consent of owner, has made diligent and reasonable inquiries into the title of owner; has purchased for consideration and that he has acted in good faith and reasonable care has been taken to ascertain that the transferor had the power to transfer. *Muhammad Nabi vs Ghulam Yahya* 1999 CLC 1771.

**Section 41—Ostensible owner—**Suit property was owned by a firm—One of the partners of the firm, while acting as an absolute owner of the property, had given an impression to the buyer that he enjoyed the full authority to sell the same—Buyer after having taken all precautionary measures and

being vigilant had entered into a valid agreement confirming the title in his favour—Other partners of the firm had received the remaining sale price of the suit property and had acknowledged the claim of the buyer—Trial Court decreed the suit in favour of the buyer—High Court in appeal declined interference with the judgment of trial Court in circumstances. *Sami-ul-Haq vs Maqbool Hussain Butt* 1999 CLC 899.

**Section 41—Transfer of property by ostensible owner—"Caveat emptor"—**When an ostensible owner had transferred property for consideration and such transfer was questioned on ground that transferor had no legal power to alienate same, transferee could be exempted from its consequences, provided he had established that he had taken reasonable care to ascertain power of transferor and had acted in good faith—Rule of "caveat emptor" required transferee, apart from acting in good faith, to take all reasonable care to apprise himself of any defect in transferor's title or clog on his power to effect transfer—Equity of specific performance could not be enforced against a person who had, subsequently, purchased property and paid his money in good faith and without notice of original contract—Duty to ascertain as contemplated by section 41 of Transfer of Property Act, 1882, was not stipulated in Specific Relief Act, 1877—Burden on the transferee under Specific Relief Act, 1877 was less onerous and specific performance against him could be refused if same was shown that he had acted in good faith and was not aware of preexisting equity in favour of other person. *Raees Amrohvi Foundation (Regd.) vs Muhammad Moosa* 1999 CLC 296.

**Section 41**—Statutory protection under section 41, Transfer of Property Act, 1882 Conditions—Person satisfying all such conditions was entitled to the statutory protection. *Muhammad Jamil vs Lahore Development Authority 1999 SCMR 2015.*

**Section 41**—Transfer by ostensible owner—Invocation of section 41, Transfer of Property Act, 1882—Conditions enumerated. *Industrial Development Bank of Pakistan vs Sadi Asmatullah 1999 SCMR 2874.*

**Section 41**—Transfer by ostensible owner—Property had been mortgaged and the documents of title had been deposited with the creditors—Mortgagor having already divested himself of the rights in the property, after its mortgage was neither the ostensible owner of the property in question nor any express or implied consent of the creditors in that regard could be spelt out—Purchaser for consideration having purchased the property without even verifying the original documents of title, which were with the creditors, could not be said to be a transferee in good faith—An act was said to be done in good faith when the same was done with due care and attention—Provision of section 141, Transfer of Property Act, 1882, in circumstances, did not appear to be applicable. *Industrial Development Bank of Pakistan vs Saadi Asmatullah 1999 SCMR 2874.*

**Sections 41 & 122**—Mutation of gift and sale—Review—Revisional jurisdiction of High Court, exercise of—Donee of land in dispute, sold away land after about ten years from the date of attestation of gift entry in Revenue Record—Revenue Authorities, after ten years of sale of land, on their own, reviewed gift and sale mutation on ground that original owner/donor of land had transferred area in excess of his ownership by

gift mutation and reverted land covered by mutations of gift and sale to original owner/donor—Suit filed by vendee of land in dispute against said reversion was concurrently decreed by two Courts below, but High Court in exercise of revisional jurisdiction reversed concurrent judgments and decrees of Courts below and dismissed suit filed by vendee of land—Validity—Mutations of gift and sale were cancelled by Revenue Authorities in review and land was reverted to original owner/donor on ground that donor had gifted land in excess of his entitlement, but same donor after reversion of land to him, again sold same to different vendees, and Revenue Authorities did not object to such sales—Entire exercise for review by Revenue Authorities, thus, was motivated by ulterior motive—Correctness or otherwise of gift mutation was a matter between donor and donee and donee having not challenged gift mutation, High Court was not legally justified in doubting genuineness of gift mutation on ground that there was no evidence about transaction of gift except mutation. *Akbar Khan vs Khair Khanum 1999 SCMR 399.*

**Section 41**—Bona fide purchaser—Rights of—Rights of bona fide purchaser for value are protected under section 41 of Transfer of Property Act 1882. *Najam Ali Shah vs Additional Deputy Commissioner (G) 2001 YLR 2502.*

**Section 41**—Mistake in contract—Rectification—Purchase from ostensible owner—Effect—Where right of third party has been created before mistake had been detected, the provisions of section 20 of Contract Act, 1872 may not apply under section 41 of the Transfer of Property Act, 1882. *Tariq Sohail vs Defence Housing Authority 2001 YLR 1193.*

**Section 41**—Inquiry by vendees—Revoking of agency—Purchase of suit property from attorney—Plaintiff was allotted the suit land who had earlier executed power of attorney which was later on revoked—Vendees purchased the suit property from the attorney—Such transfer was assailed by the plaintiff in civil suit and the same was dismissed by the trial Court—Lower Appellate Court in exercise of appellate jurisdiction allowed the appeal and judgment passed by the trial Court was set aside—Contention raised by the vendee was that he was bona fide purchaser without notice of revocation of the agency—Validity—Registration of the revocation of power of attorney constituted sufficient notice—Record showed that after the cancellation of the power of attorney the vendees proceeded to purchase the land and that too not on the basis of original power of attorney but from the sub-agent of the attorney—Vendees should have checked up the record of the Registrar's office before acting upon the representation made by the sub-agent that the original power of attorney was still in force—Deeds in favour of vendees were without lawful authority and as such were void—Lower Appellate Court had not committed any error in passing the judgment and decree enabling High Court to interfere with the same. *Ilyas Akhtar vs Khan Zaman* 2001 MLD 1617.

**Section 41**—Ostensible owner—Protection of section 41, Power of attorney was revoked vide registered revocation deed—Effect—Where property was transferred by the attorney after registration of revocation deed, the rights of transferees were not protected under section 41, Transfer of Property Act, 1882 as the

transferees had not purchased the property from ostensible owner. *Muhammad Mushtaq Khan vs Muhammad Parvez Khan* 2001 MLD 1725.

**Section 41**—Suit for specific performance of contract—Plaintiffs had claimed that subsequent vendees of suit-land were aware of agreement earlier arrived at between the plaintiffs and original executor/vendor thereof—Subsequent vendees in their written statement had claimed to be bona fide purchasers without notice being in ignorance of earlier sale agreement—Case was covered under section 27(b) of Specific Relief Act, 1877 and unlike rigours of section 41 of Transfer of Property Act, 1882 the burden of subsequent purchasers under section 27(b) of Specific Relief Act, 1877 was very light and could be discharged by statement on oath denying the knowledge of earlier agreement—Onus to prove in positive terms attributing knowledge of agreement to subsequent vendees thereafter would shift to the plaintiff seeking performance of the contract—In absence of any evidence on record in support of the plea that subsequent vendees were aware of existence of agreement alleged by plaintiff in their plaint, suit was rightly dismissed by the trial Court and appellate Court below was not justified to set aside judgment of the trial Court. *Muhammad Ilyas vs Muhammad Sharif* 2001 CLC 1194.

**Section 41**—Specific Relief Act (I of 1877), section 27(b)—Transfer of property—Enforcement of contract—Unlike the case of purchaser who sought protection of section 41 of Transfer of Property Act, 1882, the burden on a subsequent purchaser under section 27(b) of Specific Relief Act, 1877, was much lighter and ordinarily was

discharged by a statement made by such vendee that he had no knowledge of earlier agreement. *Siraj Munir vs Sarwar Khan 2001 CLC 1509.*

**Section 41**—Transfer by ostensible owner—Provisions of section 41 of Transfer of Property Act, 1882 could be invoked if the transferee could establish that the transferor was the ostensible owner; that he was so by the consent, express or implied, of the real owner, that the transfer was for consideration and that the transferee had acted in good faith taking reasonable care to ascertain that the transferor had power to transfer. *Ibar Shah vs Ahmed Shah 2001 CLC 1021.*

**Section 41**—Transfer by ostensible owner—Purchaser has to convince the Court about his bona fide in order to claim protection of the provisions of section 41 of Transfer of Property Act, 1882. *Muhammad Umar Khan vs Aziz Begum 2001 MLD 448.*

**Section 41**—Transfer of property by ostensible owner—Protection of section 41 of Transfer of Property Act, 1882—Necessary conditions—Transferor, for application of section 41 of Transfer of Property Act, 1882 should be ostensible owner; his ownership should be by consent, express or implied of the real owner; transfer should be made for consideration, and transferee has acted in good faith taking reasonable care to ascertain that transferor had power to transfer. *Muhammad Mushtaq Khan vs Muhammad Parvez Khan 2001 MLD 1725.*

#### Abstract

1. Principle
2. Conditions for applicability
3. Scope of section

4. Ostensible owner
5. Limited owner
6. Burden of proof
7. Attestation
8. Notice
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11. "Voidable"

#### 1. Principle of the Section

Principle of the section is that "where one of two innocent persons must suffer from the fraud of a third party, the loss should fall on him who has created or could have prevented the opportunity for the fraud; and in such cases hardship is caused by the strict enforcement of the general rule that no one can confer a better or higher right to property than what he himself possesses." See Proceedings in Council, *Gazette of India Supp (1884), p 182.* See also *5 PLJ 521 at 535; 17 A 280; 85 IC 540—1925 C 993; 8 OWN 1148.* The principle of section 41 applies to mortgages. *190 IC 599—1940 L 269.* It cannot be said that section 41 has no application to an application for pre-emption. *45 CWN 735.* Though section 41 only relates to immovable property, the principle of that section can be applied where movable property, such as a decree for money, has been sold to a *bona fide* purchaser for value by the ostensible owner. Where one of two innocent persons has to suffer by the act of a third person, the person who has enabled the third person to occasion the loss must sustain it. *1942 M 28—54 LW 426—(1941) 2 MLJ 601.*

Section 41 and Evidence Act section 115—Respective scope—Right to benefit of

estoppel—Duty to make enquiries. *11 OWN 1097.*

## 2. Conditions for Applicability

Section 41 requires the following conditions for its application : (1) that it was by consent, express or implied, of the person claiming title that another person is held out as the ostensible owner of such property, (2) that such ostensible owner transfers it for valuable consideration, and (3) that the transferee has acted in good faith and has taken reasonable care to ascertain that the transferor had power to make the transfer. *48 CLJ 374.* For the application of section 41 of the Transfer of Property Act, two things must concur (1) the ostensible owner who has no real title must be clothed with the insignia of ownership with the consent, express or implied, of the real owner, and (2) the person purchasing for value from the ostensible owner should take reasonable care to ascertain that his transferor has authority to make the transfer. A person purchasing from a person who is not the real owner can only protect himself by showing that he acted as a prudent man. If he makes no enquiry into title, such as a prudent purchaser would make, or avoids prosecuting such an enquiry he cannot claim protection and the principle that a man cannot give what he has not must apply. *65 CLJ 347—41 CWN 797.*

For the operation of section 41 it must be shown that the person who transfers the property was the ostensible owner with the consent express or implied of the person interested in the property. In a case where there is no evidence to tacit consent, the mere fact that an entry was made in the survey register showing the property as

belonging to the transferor cannot be relied on as such consent. *1939 M 299—(1939) 1 MLJ 74.* In order that section 41 may apply it is not necessary that the real owner should have consented. It is sufficient if the transferor is the ostensible owner to the knowledge of the real owner. The test is that the transferee should show that he acted like a reasonable man of business with ordinary prudence. *150 IC 81—1934 ALJ 554—1934 A 193.* If any one of the essential elements mentioned in section 41 be wanting, the transferee is not entitled to the protection provided by that section. *85 IC 540—1925 C 993; 5 PLJ 521—57 IC 353.* The consent of the person interested is a consent to another person being the ostensible owner of the property and not a consent to the transfer of the property. *1937 Pesh. 58; 1936 L 816; 1941 Pesh 59* section 41 does not in terms apply either to voluntary transfers by the ostensible owner or to the rights of the successors-in-interest of the real owner or to the rights of subsequent purchasers from volunteers or from first transferees for consideration from the ostensible owner. The rights of such successors-in-interest or subsequent transferees are to be determined on general equitable principles. If the first transferee from the *benamidar* is a *bona fide* purchaser for value without notice, he acquires good title and any transferee from him with or without notice of the real title would in equity acquire a good title. If the first transferee be either a volunteer or a transferee for value but with notice, a *bona fide* transferee from him for value without notice would in equity be still protected on the principle. *44 CWN 813—71 CLJ 520—1940 Cal 565; 1940 N 7.*

### 3. Scope of Section

The condition of the section must be strictly complied with. The section does not apply to transfer *in invitum* by order of Court. 102 IC 64—1927 B 368; 21 ALJ 488—1924 A 63; 1939 NLJ 496—1940 Nag. 7 A. 1923 A 983. Where the plaintiff did not claim under the person with whose consent the seller was the ostensible owner of the property. See 1930 ALJ 686—1930 A 374. Section 41 cannot be invoked by the purchaser of the equity of redemption on the ground that he purchased from the mortgagor as ostensible owner without notice of the mortgage. 27 N LR 144. Mortgaged property standing in name of mortgagor—Mother of mortgagor present at time of negotiations finally inducing mortgagee to advance money—Mother, if can avoid mortgage. 1937 L 272. The section affords protection to *bona fide* transferees, though the real owner himself be innocent. 53 IC 970—22 OC 243. But the real owner must induce belief in the transferee that his transferor had power to transfer, and mere mutation of names is not sufficient as it does not create title. 97 IC 988—1927 N 41. The section is not confined to purchasers from the ostensible owner alone. It extends also to subsequent purchasers. 43 CLJ 452—1926 C 916. Section 41 does not apply to auction-purchasers. The "transfer" spoken of in the section must be voluntary transfer effected by an act of the ostensible owner. Consequently, auction-purchasers are not entitled to the protection afforded by section 41 or by any principle on which that section is based. 4 AWR 492; 149 IC 357—11 OWN 702—applies only to voluntary sales and has no application to Court sales. 1939 NLJ 496—

1940 Nag. 7 is inapplicable to a case where the plaintiff was at all material times a minor and incapable of consenting to his father holding himself out as the owner of the property. (36 B 446; 34 A 22 and 26 B 433. Ref) 12 R 55—1934 R 90.

The question of priority between a mortgagee and a subsequent purchaser of the same immovable property is governed by section 48. The purchaser if not protected by the provisions of section 41, when there is no proof of negligence on the part of mortgagee. But even if the mortgagee be regarded as a person interested in the property, it cannot be said that with his consent, express or implied, the owner was the ostensible owner of the property. *Quaere*. Section 41 makes no express reference to negligence. Therefore it is doubtful whether negligence can be a plea under section 41; 150 IC 145—1934 O 283. This section like section 115 of the Evidence Act applies to a case where the person sought to be estopped has acted under a *mistake of fact*. 18 NLR 27—1922 N 79. Where the real owner himself is estopped under this section to question an alienation, a *successor in interest* of the real owner is also estopped 65 IC 245—26 CWN 436. The principle of the section. does not apply to *execution creditors* even though the judgment-debtor himself may be estopped by certain considerations. 43 M 135—37 MLJ 442. Section 41 does not apply to tenancies. 1935 RD 62. The Transfer of Property Act does not apply to the North West Frontier Province but the principles underlying its sections are used by the Courts there as principles of equity, justice and good conscience under section 23, Frontier Law and Justice Regulations. 1942 Pesh. 68.



Religious Endowments are protected from the operation of the section as the idol is the shrine itself and no particular being can give consent express or implied. 73 IC 711. Applicability of section to trust property. Held, purchaser from a Mohant not protected because of negligence to make enquiry. 1930 ALJ 964. Where the mortgagors who were trustees of a religious institution mortgaged the trust properties and the mortgagee took the mortgage knowing of their character as trustees and without making sufficient inquiry; Held, that the mortgagee could not rely on Section 41 35. Bom. LR 1091—1934 B 1. The appellant claimed to be trustee of certain temple property under a certain will and a decree, but did nothing to secure that the proper entries relating to this trust property were made in the Property Register. The appellant allowed M to hold himself out as the owner in a sale of the trust property. He stood by and did not even act with reasonable promptitude when the purchaser was building upon the land. There was nothing which would have put the purchaser on enquiry to ascertain the real title of the appellant. In suit by the appellant to set aside the sale, held, that the sale could not be set aside as the provisions of section 41. were attracted in the purchaser's favour. 1937 S. 177—31 SLR 197. Idols though for certain purposes can be spoken of as minors, cannot be given the special privileges which are applicable only to flesh and blood minors who will come of age later on. The Sarbarakar acts for the idol and hence a plea under section 41, of estoppel would be available against an idol. 1942 NLJ 405.

#### 4. Ostensible Owner

45. A. 520—21 ALJ 424. See also 118 IC 718—1929 A 800; 33 CWN 994; 63 IC 125.

As to who is an ostensible owner, see 27 Bom. LR. 434 87 IC 951—1925 B 343. A person disclaiming title cannot afterwards set it up to the prejudice of third parties purchasing from the ostensible owner in good faith and for value. 5 OJ 49 45 IC 307; 22 CLJ 574—29 IC 84. Person against whose property a charge is created by a decree is not an ostensible owner. 27 Bom. LR 434—87 IC 951—1925 B 343; so also *guardians* 34 A 22; 29 A 292; *agents*, 4 But LT 74; 1 IC 525. So also a *permissive possessor* is not an ostensible owner. 41 CLJ 374—1925 C 1034. Possession by manager of property during owner's absence and transfer of registry in his name in Municipal book does not make him an ostensible owner 44 A 674—1922 A 392; 19 CWN 1055; As to *pardanashin ladies*, see 40 C 378—25 MLJ 55(PC)

A house was owned by one H, who gifted it orally to his daughter-in-law in lieu of dower. The title-deed of the house was left in possession of her husband. The house was subsequently mortgaged by him and the title-deed was handed over to the mortgagee. The mortgagee, on the other hand, tried to sell the mortgaged property. The daughter-in-law objected.

**Held:** that when she allowed her husband to retain possession of the title deed, she impliedly consented to his holding himself out as the owner of the property and hence the mortgagee was protected by section 41. Even the usual practice among the *pardanashin ladies* of allowing their husbands to manage their property could not get over the obvious fact. (1936 L 816, *Rel on*) 1937 Pesh 58. Where a vendor alienates property which stands in his name in revenue entries as sole

owner, the vendee is protected, though others may be interested in the property actually. 1927 L 666; 1936 L 405. Where property belonging to the wife was mutated in favour of the husband and the wife not only did not attempt to challenge the mutation but also allowed the husband to remain in possession, she, having allowed him to act as the ostensible owner of the property, is estopped from challenging the title of the mortgagee from the husband, where the mortgage is made in good faith and for valuable consideration. 38 PLR 90. But where the entry in the mutation register relied on by the transferee shows that other persons claimed ownership, the transfer is not by the ostensible owner 8 OWN 237—1931 O 253. A person cannot be said to be an ostensible owner with the consent of the true owner on the basis of an entry in the revenue paper when the ostensible owner's name was entered in the revenue papers in the face of the opposition of true owner and was only entered as he was in possession at the time. 28 NLR 227. Possession by servant in lieu of rendering services does not make him ostensible owner. 41 CLJ 374—1925 C 1934. A minor who has an interest in property cannot by reason of the disability of infancy give his consent, and therefore, a transferee of such property from an adult brother of the minor cannot claim the protection of section 41 as against the minor 37 PLR 112. Where some alone of several co-sharers are entered in the revenue records as owners, and on the basis of that a mortgagee entered into a mortgage with them, his title is protected under section 41. 79 IC 174—46 A 377. A sale by such co-sharers and the vendee stands in the position of the vendors and any defence

available to them is open to him as regards the title to the property. 1933 L 262—34 PLR 714. Though a bequest by the widow of property inherited from her husband is invalid, yet where the next reversioners consented not only to the will but to the getting of the legatee's name entered in the *record-of-rights* and a third person has on the faith thereof advanced a loan to the ostensible owner, i.e., the legatee, the reversioners are estopped from asserting their own title to the prejudice of the stranger. 27 NLR 283. Having regard to the provisions of the Madras Estates Land Act, a patta granted by a landholder in respect of a ryot's holding is strong *prima facie* evidence of title, and is practically a title deed to the ryot in respect of his holding, so as to enable a transferee from the pattadar to claim the protection of section 41. 51 LW 351—1940 Mad 523—(1940) 1 MLJ 791. Where a person purchases property at an auction-sale under circumstances which do not lead him to an injury, section 41 does not apply. 21 ALJ 498; 1924 A 63; 28 NLR 227. As to how far dealings by or with *benamidar* bind the real owner. All that section 41 requires is that the alienors should act as "ostensible owners" with the consent express or implied of the "persons interested." The trustees of a property come under the latter category. 37 PLR 168. A gift once legally made is irrevocable, and the donor cannot be heard to say as against the donee that it was never intended to be acted upon. As against the donor the donee acquires a good title from the date of gift. Even when the donee happens to be only an ostensible owner, the rights of third parties dealing in good faith with the donee are protected by section 41, Transfer of Property Act, much

more so when the donee has acquired not only an ostensible but a real title. 1936 A MLJ 118.

### 5. Limited Owner

When a Hindu lady cannot without legal necessity transfer a part of the estate in her possession so as to bind the reversioners, much less can she by orally transferring possession and putting such person in possession destroy the rights of the reversioners in case such person transfer the property. In such a case the transferee from such a person cannot plead estoppel under section 41, for that section refers to personal estoppels arising out of the conduct of the plaintiffs or persons through whom they are claiming, and the mere fact that the Hindu widow's estate is vested in the limited owner for the time being cannot create an estoppel against the reversioners by virtue of the consent obtained from the limited owner. 55 A. 554—1933 ALJ 1185—1933 A 493. See also 13 Mys LJ 61—39 Mys HCR 1119. Where a Hindu widow who had been unchaste and had not been living with her husband was allowed to succeed in the presence of the daughter living and enter into his property, it will hardly avail the reversioner to impeach a transaction of sale entered into by her on the ground that she was by reason of previous unchastity not lawfully entitled to succeed. If this is so, section 41 may be of assistance to the purchaser from the widow to his extent; that the daughter by her conduct led the purchaser to believe that the widow was the person entitled to present possession of the property during her lifetime. 1937 P 353. It is not open to the alienees from a Hindu widow to rely on section 41 of

the Transfer of Property Act as a defence to a suit by reversioners. The section is not applicable to cases of adverse possession and the consent of the limited owner can be operative only so far as she is concerned. It cannot bind the reversioners so long as the limited owner remains in possession. 1942 ALW 161—1942 AWR (HC) 84 (2).

### 6. Burden of Proof

The burden of proof is always on the transferee to show that he acted in good faith and that his transferor was the ostensible owner with the express or implied consent of the real owner. 1934 O 165—150 IC 922. Existence of circumstances calling for inquiry is not necessary. Where he fails to look into papers to see whether vendor has power to sell property, he is not entitled to benefit of section 41 and the mere fact that the vendor's name appears in Register D is not sufficient. 1934 P 67. But see 1934 R 313. It is not sufficient to establish merely that he made an enquiry. The vendee may have made a reasonable careful enquiry and may have ascertained the true facts, but chosen to ignore them. A finding of the absence of negligence is not therefore the same thing as a finding of good faith. A person may act without negligence but at the same time without honesty. 148 IC 742—1934 L 658.

### 7. Attestation

Real owner cannot question an alienation by the *benamidar* when he himself has allowed and attested the same. 46 IC 102; 90 IC 547; 1926 O 131; 126 PWR 1918; 20 IC 291.

### 8. Notice

A *bona fide* transfer is always protected. 9 IC 504—9 MLT 365; 48 IC 936. Under this

section notice may be either actual or constructive notice. 48 CLJ 374. A person knowing about the infirmity of title of his transferor cannot claim the benefit of this section 22 IC 673; CLJ 520—1940 Cal 565; 113 IC 373—1929 N 28; 22 IC 73 PR 1918 47 IC 367. See also 190 IC 413—1940 Rang. 184; 1922 N 226; 1928 N 308; 1929 C 626. Notice of possession by stranger amounts to notice of his rights. 20 IC 195—18 CWN 657. Possession by real owner is notice of the *benami* nature of the transaction. 46 PR 1918—43 IC 556; 1925 B 299; 29 CWN 436. A Burmese husband allowed his wife and children to hold themselves but as the sole owners of the properties and to deal with them as if they were such owners. The wife and children mortgaged the properties and the mortgagee acted in good faith and without notice of the title of the husband.

**Held:** the husband could not impugn the mortgage. 146 IC 1073—1933 R 361.

### 9. Reasonable Care

What amounts to 43 CLJ 452; 27 IC 14. The expression '*reasonable care*' means such care as an ordinary man of business or a person of ordinary prudence would take. 33 CWN 526. '*Reasonable care*' would require the purchaser to inspect title-deeds under which the vendor claims title and to ascertain if the vendor has power to transfer under the deeds. 111 IC 539—1928 M 778; 11 CLJ. 197—5 IC 334. He must also establish that he made reasonable inquiries; an entry in the revenue papers in itself is not sufficient to constitute the basis of enquiries. LR (1936) N 177—1936 N 214. What would be reasonable care is a question of fact. 36 A 308; 5 PLJ 521; 48 CLJ 374; 1929 C 83; 1927 M 1138 37 PLR 168. Each case must be decided upon its own particular circumstances. 100 IC 665—1927 M 1138. (Failure to inspect title-deeds is

not conclusive) Where the purchaser made casual inquiries of persons who were not conversant with the vendor's affairs.

**Held:** that the purchaser had not taken reasonable care. 52 CLJ 492—1931 C 144. Where there is no evidence to prove that the mortgagee took the mortgage from the ostensible owner after taking reasonable care to ascertain that the transferor had power to make the transfer and that he (mortgagee) had acted in good faith, he cannot claim protection of section 41 8 OWN 237—1931 O 253.

### 10. Enquiry

In order to support a plea under section 41 there must be proof that the party made due enquiry. 10 PLT 254—116 IC 779—1929 P 305. It is necessary under section 41 to prove not merely consideration but also good faith and due enquiry. 33 Bom. LR 356—1931 B 227—1934 R 139. Section 41 of the Act protects a person who has acquired title from an ostensible owner. Neither this statutory provision nor equity can protect a transferee unless the transferee has taken reasonable care to ascertain that the transferee had power to make the transfer. A purchaser cannot be said to have acted like a reasonable man if he has taken no steps whatever care at the registers and does not in any way ask or seek to obtain the production of the documents of title at least before the completion of sale. 1942 NLJ 353. If he makes no enquiry into title, such as a prudent purchaser would make, or avoids prosecuting such an enquiry, he cannot claim protection and the principle that a man cannot give what he has not must apply. 65 CLJ 347—41 CWN. 797. The enquiry need not extend to whether the seller's wife is *enceinte*. 26 IC 61—27 MLJ 580. Where a vendor claims title under an invalid document, title by prescription

ought to be enquired into. *27 IC 777—8 Bur LT 85*. Full and proper enquiry ought to be made in the Registration Office records. *7R 118—1929 R 117*. A mere inspection of the *khewat* should not suffice, as a sufficiently good inquiry, especially where the vendor or the judgment-debtor is a Mohammedan. *124 IC 757—1930 A 521*.

Where, had the transferee made inquiries in the village, he would have come to know that the property had long ago been sold by the transferor and that he had no interest left in the property at all which he could transfer, transferee gets no title to the land. Mere inspection of the revenue papers by the transferee is not enough. *11 OWN 421—1934 O 165*. A transferee consulting  *khasra paimash* of the municipality or police records of levy of punitive tax, cannot be considered to have satisfied the requirements of section 41. Such records have not been framed with a view to settle the ownership of properties, but only for the purpose of realisation of taxes. *1934 L 885*. Where it is found that the mortgagee had not made any enquiries he is not protected and is not entitled to benefits conferred by section 41. The fact that the mortgagors' names were entered in the *khewat* is not sufficient enquiry nor the fact the Court of Wards was in possession of the property. *1942 OWN 127—1942 AWR (CC) 95*.

Where a transferee takes a transfer from an heir to a deceased who is in possession of the property without making inquiries as to whether there are other co-heirs, he is not entitled to the protection under section 41 *1934 ALJ 544—1934 A 193*. It is not enough to assert generally that enquiries should be made or that a prudent man should have made further enquiries, but some specific circumstances should be pointed out as the

starting point of an enquiry which might be expected to lead to some result. *1937 P 353*.

It is not enough for the purchaser to say that an enquiry as regards the possession of the property had been made through a servant. The transferee should place before the Court the evidence showing what enquiries had been made by the servant, so that the Court might be in a position to judge for itself whether these enquiries which the servant made could be considered to be reasonable or not. *11 OWN 702—1934 O 233*. Where a mother sold the share of her son in the estate of his father to her sister and it was not disputed that the transferor and the transferee lived in the same house together and that transferee used to write the accounts in connection with the estate for the transferor, the only reasonable presumption that could be drawn from the circumstances is that the transferee purchased the share of the son in his father's estate knowing that his share had not been paid to him. *151 IC 314(2)*. Enquiry ought to be made as to collateral before taking a transfer from the sister's son of the last full owner. *43 A 263—19 ALJ 11—64 IC 14*. As regards non-enquiry regarding co-parceners, see *86 IC 633—21 LW 295*.

Where the vendee is himself a co-sharer in the property and believes himself to be fully aware of the circumstances relating to the title of the vendors, and the vendors have been acting or ostensible owners for years and nothing has happened to put him on any further inquiry as to title. Section 41 is applicable to the circumstances of the case although the vendee does not make any inquiry as to title. *37 PLR 168*. As between members of a joint Hindu family the fact that the name of one member rather than

that of another or of all the members is used in acquisition of property, does not amount to holding out that member as the ostensible owner, and a person dealing with one member of a Hindu family can hardly say that he was misled unless he proves that he made full inquiries and could not ascertain his title. *1937 P 353—1937 PWN 144*. Dealing with the joint Hindu family property by one of the member as his own does not render the purchaser from such owner an ostensible owner. *1928 M 635—110 IC 548*. Alienee from a manager of joint family is not ostensible owner. *35 CWN. 693—1931 PC 118*. Of two innocent transferees the one who renders it possible for the owner to deal with the property a second time, must suffer for his negligence. *53 IC 397*. As to transferee from Hindu widow, see *13 RD 280*. In the Punjab transfers may be oral and frequently are so. For this reason more importance is attached to the revenue records in the Punjab than in the other provinces, as there the transfers must usually be by means of registered deed.

The searching of the registration records therefore in the case of agricultural land is not a practice commonly done. What is looked at is the entry in the revenue records. So where a mortgagee does not get his mortgage entered in the revenue records and thus allows the mortgagor to remain ostensible owner, such mortgagee cannot question the alienation made by the mortgagor to others who from the revenue records found the property free from encumbrance. The mortgagee in such a case is estopped by his own negligent conduct in not getting his mortgage entered in the revenue records. *38 PLR 1097—1936 L 405*.

#### 11. "Voidable"

There is no reason to accept the contention that the expression "voidable" in section 41 must be construed as voidable in its entirety and that the section is not applicable to cases where the whole transaction is not so voidable. *111 IC 539—1928 M 778*.

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

#### Illustration

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

operates as a revocation of B's lease subject to the opinion of the surveyor as to B's use of the house having been detrimental to its value.

**43. Transfer by unauthorised person who subsequently acquires interest in property transferred**—Where a person, [fraudulently or] erroneously represents that he is authorised to transfer certain immovable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transfer or may acquire in such property at any time during which the contract of transfer subsists.

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.

### Illustration

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

### Case Law

**Section 43**—Doctrine of feeding the grant by estoppel—The doctrine of feeding the grant by estoppel which appears as the solitary illustration to section 115 of the Evidence Act and in section 43 of the Transfer of Property Act is based on the ground that if a person, for value received, conveys what he does not own but subsequently he acquires the title, which he conveyed, then the transferee can enforce the conveyance against him. 7 DLR (FC) 70(76).

Estoppel, application and doctrine of—Section 115 of the Evidence Act is not the only section which deals with title by estoppel but there is one other section namely, section 43 of the Transfer of Property Act which deals with the same thing. However, there is a distinguishing feature.

1. Inserted by the Transfer or Property (Amendment) Act, 1929 (XX of 1929), section 13.

According to section 43 of the Transfer of Property Act, erroneous representation is enough, but under section 115 of the Evidence Act it must be made intentionally and falsely. Where there is no proof of erroneous misrepresentation and the real state of things were known to both the parties, no question of estoppel arises. *6 PLR (Dac) 181*.

The section applies to cases of fraudulent or erroneous representation made by transferor to transferee. *1951 PLR (Lah) 307*.

**Applicability**—Before section 43 can apply it is necessary that there should be misrepresentation, fraudulent or erroneous, about the right to transfer the property. If on the facts there was no such misrepresentation, the very foundation for the application of the section is gone.

What the sale deed professes to transfer is not the only subject to be considered for applying section 43. If at the time of its coming into existence facts relevant to or having a bearing on, the sale were mentioned by the vendee, and evidence about the same is not ruled out under section 92, Evidence Act, they must be taken into account in considering what the vendor professed to transfer.

Therefore, where in the sale deed executed by or in favour of B, it was stated that the property was from encumbrances but at the time of the sale 'A' expressly told 'B' that the property was subject to a charge decree, the fact that subsequently the charge holder brought the property to sale and purchased it and then 'A' purchased it from him would not entitle 'B' to claim the benefit of section 43 because there being no misrepresentation by A. Section 43 would have no application. *Zaga Rao vs Venkatakrishnayya. AIR 1946 Mad. 107*.

Contract of sale transformed into usufructuary mortgage by operation of law—Sale not subsisting.

A sale was made by an agriculturist to a non-agriculturist and by the operation of Land Alienation Act, the sale became usufructuary mortgage.

**Held:** that the contract of the sale between the parties had been extinguished by operation of law as soon as the Collector declared the plaintiff to be a non-agriculturist and changed the sale into a usufructuary mortgage. The contract of sale therefore did not subsist within the meaning of section 43, Transfer of Property Act. *Muhammad Baksh vs Mustafa Khan PLD 1956 (WP) Lah. 461—PLR 1956 Lah. 1362*.

Estoppel—Difference between the section and Evidence Act section 115.

According to section 43 of the Transfer of Property Act, erroneous representation is enough but under section 115 it must be made intentionally and falsely.

Where the real state of things was known to both the parties and there was no proof of erroneous misrepresentation, question of estoppel does not arise. *Radhasyam Gope vs Akhtarunnessa Begum PLD 1957 Dacca. 184=PLR 1956 Dacca 181*.

**Section 43**—Feeding the estoppel—Ingredients of the principles of feeding the estoppel.

What are required for application of the provision provided in section 43 regarding feeding the estoppel are: (a) erroneous or fraudulent representation by a person, having had no title or having imperfect title to certain immovable property that he was authorised to



transfer such property;(b) actual transfer of the said property by him or a consideration;(c) subsequent acquisition of title or any interest by the said person in the said property.

On the fulfilment of these conditions the transfer made by the unauthorised person would operate on the title or interest which has been acquired by the said person at the option of the transferee.

It may be said to have been *ultra vires* of the Government officer in the sense that the lands in question having been not the Government property, the Government officers were not authorised to transfer the same and no title accrued in favour of the plaintiffs on the basis of such transfer. But the Government having subsequently acquired title to the said transferred lands, there is no bar to the application of the law of feeding the estoppel.

There is no statutory provision suspending the law of feeding the estoppel and creating a bar to the claim of the property on the basis of the said law. *AS Aziz Md vs Bangladesh 31 DLR (AD)218.*

Schedule B lands being accretion to schedule A lands before the Government settle A schedule lands to the plaintiff the latter acquired no right or interest in B schedule lands by virtue of his getting A schedule lands from the Government. *AS Aziz Md vs Bangladesh 31 DLR (AD) 218.*

Transferor's right to the property accruing to him subsequent to his date of transfer enures to the benefit of the transferee. *Musammatt Khaleda Razia Khan vs Mahtabuddin Chowdhury 30 DLR (AD) 27*

Section 43. Nadabi deed may be taken to be a piece of evidence to strengthen the plaintiff's claim of the title on the principle of feeding the grant by estoppel. *Musammatt Khaleda Razia Khan vs Mahtabuddin Chowdhury 30 DLR (AD) 27.*

Option—The transferee must exercise option under the section.

In terms of section 43, of the Transfer of Property Act, 1882, it is necessary that the transferee should exercise his option if there was a fraud or erroneous representation. It is a prerequisite of the passing of property to the transferee. *SM Yaqub vs Muhammad Furniture Manufacturing Co. PLD 1958 (WP) Karachi 621.*

Real facts known to transferee—Section not applicable. The words in section 43 Transfer of Property Act. "Where a person fraudulently or erroneously represents" connote that the transferee is taken in by the representation made by the transferor. If the transferee is aware of the real facts and concurs in the stand taken by the transferor then there is no erroneous representation between the parties and the transferee is not entitled to take advantage of such representation. *SM Yakub vs Muhammad Furniture Manufacturing Co PLD 1958 (WP) Karachi 621.*

Sale deed stating sale to be free from encumbrance—Vendee need not make enquiries about encumbrances.

There is no duty cast on the vendee to make any enquiries in a case to which section 43 applies and notice of encumbrances on the part of the vendee would not make the transaction of sale any the less a sale free from encumbrances, when the document says so. *Zoga vs Venkatakrishtnaya. AIR 1946 Mad. 107. Ref. 1897 AC 156.*

**Section 43**—Where a person having partial interest in certain property, transfers a larger interest and subsequently acquired that interest, in that case the provision of section 43 of the Act applies and the transferee is entitled to get interest so acquired. *Omar Ali Sheikh vs Shamsul Alam Mridha and others* 55 DLR 257

**Section 43**—Estoppel—Feeding the grant by Estoppel, Principle of—Acquisition of right to accreted or char land—Acceptance of kabuliyat, Salami and rent, whether sufficient in law to create a tenancy of agricultural land—Application of the law of feeding the estoppel—Non-joinder of party, effect of.

**Held:** (i) The principle of feeding the estoppel as contained in section 43 of Transfer of Property Act is fully applicable to the facts of the instant case. On the fulfilment of section 43 the transfer made by the unauthorised person would operate on the title or interest which has been acquired by the person at the option of the transferee.

(ii) Since the Government found that it had subsequently acquired the right, title and interest of the lands in question under the provision of the State Acquisition Act and it having been found so by the High Court the transfer effected by Kabuliyat must operate on the right, title and interest of the Government which was subsequently acquired under the State Acquisition Act in terms of section 43 of the Transfer of Property Act. The Government having subsequently acquired title to the said transferred lands there is no bar to the application of the law of feeding the estoppel.

(ii) In terms of Order 1 rule 13 CPC all objections on the ground of non-joinder and

mis-joinder of parties ought to be taken at the earliest possible opportunity and any such objection not so taken shall be deemed to have been waived. *Abu Saber Aziz Mohammad & others vs Government of Bangladesh & others* 1 BSCD 293.

**Section 43**—Principle of feeding the estoppel—Applicability—Claim of right in property by vendor—No allegation of fraudulent or erroneous representation against vendor—Indemnity clause in sale-deed—Applicability—Part of suit-land sold to the vendee by the vendor came to be lost by them but after the execution and registration of the sale-deed—Suit-land was never owned by the vendor at the relevant time and the same was inherited only after the death of the brother of the vendor—Vendees claimed right in the land subsequently inherited by the vendor on the basis of indemnity clause present in the sale-deed—Validity—Where such later loss of land was not attributed to the vendor at any stage, the same should not have been made basis to deprive the vendor of the land lawfully owned by him by stretching the provisions of section 43 of Transfer of Property Act, 1882—Indemnity clause was for the purpose that if for any reason attributable to the vendor, the vendee lost the entire or a part of the land sold, then the vendee would be compensated by the vendor—Neither in the pleading nor in evidence, in the present case, the case was made out that the vendor had made a fraudulent or erroneous representation to the vendees while the land mentioned in the sale-deed was sold to them, therefore, the provisions of section 43 of Transfer of Property Act, 1882, had no application—Both the Courts below had acted without jurisdiction while passing a

decree in favour of the vendees in respect of the suit land against the vendor—Judgments and decrees of both the Courts below were set aside and the suit filed by the vendees was dismissed. *Muhammad Ali vs Rabnawaz 2001 YLR 1282.*

**Section 43**—Principle of feeding the estoppel—Applicability—Transfer contemplated under section 43, Transfer of Property Act, 1882 ought to have been the result of a fraudulent or erroneous representation on the part of the transferor that he was authorised to transfer the property transferred. *Muhammad Ali vs Rabnawaz 2001 YLR 1282.*

**Section 43**—Imperfect title of vendor—Vendee, bona fide purchaser for consideration—Compensation from other property by vendor—Subsequent acquisition of title by vendor—Registered sale-deed was executed in favour of the vendee and possession was handed over—After death of the vendor proceedings against the vendee were initiated before Revenue Authorities on the ground that the vendee was wrongly put into possession over certain portion of land—Predecessors of the vendee filed a civil suit regarding compensation from the other property owned by the vendor—Validity—None of the defendants had challenged the validity of the sale-deed and the same was proved before trial Court in accordance with law without any objection—Such sale-deed was binding on the successors of the vendor who were liable to compensate the plaintiffs from the property left by the vendor according to the proportionate shares inherited by them—Judgments and decrees passed by the Courts below were modified—Plaintiffs were declared owners of the suit

property in circumstances. *Darvesh Ali vs Munir Khan 2001 CLC 1431.*

**Section 43**—Transfer by unauthorised person—“Feeding the estoppel”, principle of—Applicability—Where on fraudulent or erroneous representation that he is authorised to transfer certain immovable property, a person proceeds to transfer the same for consideration, then till such time that the contract of transfer subsists, such transfer at the option of the transferee operates on any interest which the transferor may acquire in any such property sold on fraudulent or erroneous representation of the transferor. *Muhammad Hayat vs Abdul Rahim 2001 MLD 1524.*

**Section 43**—Transfer by unauthorised person—Valid title of transferor—Inquiry by transferee—Decree was passed in favour of the transferor by civil Court—Transferees themselves were trying to get the suit-land through pre-emption, they were satisfied of a valid title of the transferor on the basis of Court decree—Effect—Where the transferor had not made fraudulent or erroneous representation, provisions of section 43 of Transfer of Property Act, 1882, were not applicable. *Muhammad Hayat vs Abdul Rahim 2001 MLD 1524.*

**Section 43**—Transferor, acquiring interest in property subsequent to transfer—Effect—Where the transferor who had professedly transferred property for consideration upon a fraudulent or erroneous representation, when the transferor acquired interest in the property, under the provisions of section 43 of Transfer of Property Act, 1882, he was authorised to make such transfer of immovable property. *Darvesh Ali vs Munir Khan 2001 CLC 1431.*

**Abstract**

1. Change in the present section and reason for the change
2. Principle of section
3. Scope
4. Leases
5. Exchange
6. Mortgage
7. Case of reversioner
8. Exercise of the option

### 1. Change in the Present Section and Reason for the Change

This is explained as follows in the Statement of Objects and Reasons—Section 43 refers to a person making an erroneous representation that he is authorised to transfer certain immovable property. The underlying principle is also applicable to a case when the representation is fraudulent. The expression "erroneously" has, in fact, been construed to include all representations whether tainted or untainted with fraud. *7 A. 864; 20 C 296*. It is, however, desirable to make the meaning clear by using the word "fraudulently" along with the word "erroneously."

### 2. Principle of Section

Section 43 is only an embodiment of the principle of estoppel. It is expressed variously, sometimes, as feeding the grant by estoppel, at another time, no person is allowed to derogate from his own grant, and yet again by the principle that equity considers that one which ought to be done. But under the guise of section 43 the Court cannot uphold a transfer of property hidden by law. *110 IC 357—1934 R 51; 1930 MWN 1054*. Sale by the reversioners of a Hindu widow. No estoppel when there is no representation. *56 IA 74—33 CWN 289—*

*1929 PC 56 (PC)*. Agreement between two persons that each will not question the rights of the other—One party subsequently acquiring the rights of the other in his property—Estoppel. See *118 IC 466*. If there is a sale or pledge to a *bonafide* purchaser or pledgee for value by one who has no title, if that person subsequently obtains a title, it enures to the benefit of the purchaser or pledgee. *45 MLJ 516—56 M 852 (FB)*. Section 43 does not apply to a case where there is no consideration. *31 A 53*; and where there is no erroneous representation on the part of the transferor, that he is authorised to transfer the property at the date of the transfer. *31 A 53—1 IC 818; 68 IC 203=27 CWN 918*.

There can be no estoppel in favour of one against the other if both parties knew the true state of facts. *9 Luck. 395—148 IC 367—11 OWN 145—1934 O 112*. Section 43 of the Act does not apply to a transferee who is not proved to have been misled by erroneous representations of the transferor as to his power to transfer. *59 IC 275—12 LW 449; 48 A 150*. Section 43 does not impose on the transferee any duty to make an inquiry into the true extent of the interest of the transferor in the property transferred. *1936 OWN 1241—1937 O 127*. But see *20 OC 72—39 IC. 186*, holding that it is not necessary that the transferee should have believed in and acted upon the erroneous representation. A Hindu who lends money on a mortgage by a Hindu widow must be deemed to be aware of the elementary principles of Hindu law as to the limited interest of a widow inheriting the property of her deceased husband; and such a transferee cannot claim the benefit of section 43, Transfer of Property Act. *151 IC 561—1934 A. 969*. An abandonment of a claim to

property in a suit is not a transfer contemplated by section 43: 1936 A MLJ 124. Section is not applicable to void sales. 107 IC 872—1928 O 153; 25 MLJ 635; 24 MLJ 881. Section 43 presupposes an attempt to transfer property which is transferable by law and does not extend to cases of transfers of property which cannot be transferred under section 6(a) of the Act, (30 M 255; 31 B 165; 1913 MWN 415, Rel) 20 OC 155—4 O LJ 380—39 IC 540.

The Illustration to section 43 of the Transfer of Property Act is repugnant to section 6(a) of the Act amongst good law. The right of a presumptive manner to succeed to the property on the right of the limited owner in possession is only a *spes successionis* and its transfer is invalid, though in form it purports to be a conveyance of a present interest in the property. The transfer, being expressly forbidden by section 6(a) does not become valid by the application of section 43 of that Act on the vendor subsequently succeeding to the property, 146 IC 965—38 LW 610—1933 M 795—65 MLJ 588. There is a distinction between a transfer which is professedly one of mere right. e.g., a right of reversion or expectancy and a transfer of specific property which the transfer erroneously represents to be authorised to transfer, though he may have, for the time being, merely a reversionary right therein. Transfers of the former class would obviously fall within the purview of section 6 (a) and would be void *ab initio* while those of the latter class would be governed by section 43: 130 IC 821—1931 N 51. See also 4 AWR 1121. It is not necessary that the option under the section should be exercised immediately after the right to do so is attained. 20 OC. 72—39 IC 186.

### 3. Scope

The section does not apply to execution sales because the judgment debtor's title is not guaranteed by the decree-holder. 40 C. 173—17 CWN 137; 4 C. 677. See also AWR 492; 40 PLR 202—1938 Lah. 360. The section applies when the contract of transfer subsists at the time of the acquisition of title. 10 IC. 443. The section applies when a person grants a permanent lease professing a higher status than that of a ryot and subsequently acquires absolute rights. 105 IC. 290. See also 1939 Pat. 116. A sale by OR. before the passing of the vesting order becomes effective when such order is passed subsequently, both by reason of its retrospective operation and by virtue of section 43 of this Act. 1927 MWN 794. The benefit of the section will apply against all persons claiming under the transferor other than a purchaser for value without notice. 27 IC. 982—19 CWN 1272. The acquisition of the property may be by inheritance. The transfer is not void as that of a *spes successionis* 29 IC. 439—29 MLJ 733; 1927 M 649—53 MLJ 218. See also 55 IC 698; 41 M 749—34 MLJ 563.

Where in the case of a sale an erroneous representation is made by the transferor that he is the full owner of the estate sold (though, in fact, he merely has *spes successionis*), then if transfer happens later to obtain the real interest, the previous transfer can operate on that interest. It is the duty of the court to reconcile section 43 with section 6, if possible, and the operation of section 6 must be confined to cases in which the transfer purports to be that of *spes successionis*, or where transferee knows that the transferor has no more to give. ILR (1938) Bom. 155—

40 Bom. LR 147—1938 Bom. 228. See also 1939 Pat. 116. Where a person who has no title to a certain property mortgages that property as his own, but soon afterwards acquires title to the property by purchase, the property, at the option of the mortgagee, becomes liable to the mortgage. 172 IC. 707—41 CWN. 1124. *Sale of partnership property by one partner—Sale of same property to different person by the remaining partner—Allotment of that property to one of partners in subsequent arbitration proceedings—His transferee can claim benefit of section 43.* ILR (1940) A 674—1940 ALJ 592—1940 A 453.

Where a Mohammedan husband makes his wife accept certain property in lieu of dower in the understanding that his father has permitted him to transfer it and hence he is competent to alienate it and the wife is not aware that the property does not belong to her husband, it amounts to a misrepresentation,, persuading the transferee to marry the transferor, and the wife is, under section 43, entitled to enforce her claim against her husband, when, on the death of his father, he becomes the owner of the property. 162 IC 900—1936 Pesh. 103

And if the husband transfers the property to his wife by a deed of relinquishment, the transaction is *bona fide* and for consideration and cannot be challenged as being fraudulent by a creditor of the husband who subsequently attaches the property belonging to the husband; it cannot be attached and sold in execution of a decree obtained against the husband. (*Ibid*) The acquisition of title may be by purchase. 50 IC 778. If the property sold is under the Collector's management, the

seller must convey the property after the Collector's management ceases. 26 B 510—16 IC 570—14 Bom LR 598.

Where a nontransferable occupancy holding was mortgaged by the raiyat and on the death of the latter the landlord settled the lands with another on footing that the widow had abandoned the holding and obtained rent but he also brought the property to sale in execution of his mortgage-decree and purchased the same and the person who was subsequently inducted into the land sued for recovery of possession. Held: that the settlement in favour of the subsequent lessee was valid and could be enforced by reason of the principles contained in section 43. 58 CLJ 145—37 CWN 1144.

#### 4. Leases

The rule in this section also applies to leases. 2 CLR 328; 19 CWN 143—23 IC 69; 53 IC 96. Where lands were held from the Government under a temporary settlement, but permanent sub-leases were created, renewal of the Government settlement operated in favour of the lessees. 19 CLJ 380—23 IC 16—18 CWN 907. See also 27 IC 785—28 MLJ 44; 53 IC 96—4 Pat LJ 505. But See 40 IC 581—33 MLJ 370.

#### 5. Exchange

Stands on the same footing as sale. 60 IC 819—33 CLJ 184.

#### 6. Mortgages

This section applies also to mortgages, and a mortgagee can enforce his charge on any interest which his mortgagor may acquire in the mortgaged property subsequent to the

mortgage, although he had no such interest at the time of the mortgage. 3 Pat LT 401—1922 P 347;35 A 382—9 IC 298;153 IC 984—1935 ALJ 214—1935 A 269. Two groves with some other property of the mortgagor were mortgaged for the purpose of purchasing the very two groves from its owner.

**Held:** that the mortgage was enforceable against the groves on the principle of feeding the grant by estoppel, there being no third party's interest intervening between the execution of the security and the execution of sale deed. 1931 ALJ 72—1931 A 275. On the date of the mortgage in favour of the plaintiff, the defendant was an undischarged insolvent. At the time of the suit by the mortgagee, the insolvent had been discharged and the mortgaged property revested in the defendant.

**Held:** that an alienation by an undischarged insolvent of property belonging to him was not void, but only voidable at the option of the Court or the receiver and that the mortgagee was, under the circumstances, entitled to enforce the mortgage by sale of the mortgaged property. 55 A 503—1933 ALJ 475—1933 a 449. A contract mortgaging a *spes successionis* in the Punjab, where the Act is not in force, can be enforced as an agreement to convey the estate when it falls into possession. Where a person mortgages a certain land as his own property without purporting to mortgage his reversionary rights therein, the mortgage is not void *ab initio* and in any event the case is fully covered by the principles underlying section 43 of the Transfer of Property Act 35 PLR 732—1934 L 996.

So also where a Hindu coparcener executes a mortgage to certain property reciting in the mortgage deed that he is separate from the other members of the family, and subsequently on a partition the mortgagor gets properties allotted to him, the mortgage lien is transferred to the property which he gets on such partition. 16 P 230 section 43 is not applicable to cases of transfers of property which by law was not transferable. Where a father in joint Hindu family in Oudh alienates ancestral property without necessity and there is a subsequent division in the family, but the mortgage clearly indicated that there was a possibility of the transaction being assailed, there is neither a fraudulent or erroneous representation, nor a subsisting contract, inasmuch as the mortgage was void *ab initio* and hence the principle embodied in section 43 are not applicable to the case. 1940 OWN 982—16 Luck 484—1941 Oudh. 123. Mortgage of property not transferable under law in force at the time—Subsequent change of law making it transferable—Effect—Enforceability of mortgage. 1937 AWR 174—1937 All. 287. Mortgage by minor—Fraudulent concealment of minority—Suit to enforce mortgage after majority—Plea of minority and consequent invalidity of mortgage—Estoppel. 1937 AWR 661—1937 All. 610 (FB) Mortgage by owner of property—Subsequent disappearance—Mortgage not heard off for over seven years—Presumption of death—Sale by heir of mortgagor—Validity—Suit by vendee of possession—Maintainability—Decree on mortgage can be used as a shield, 1937 M 16.

### 7. Case of Reversioner—Case of Reversioners

Where the paternal uncle of the last male-holder and his son as the *presumptive reversioners* to the estate brought a suit to set aside the alienation made by the widow and compromised the dispute with the alienee by which the uncle acting on his own behalf and on behalf of his minor son (the plaintiff) executed a sale-deed in respect of half of the property in favour of the alienee and subsequently after the death of the widow and the opening of his succession, the plaintiff brought a suit to set aside the alienation.

**Held:**(1) that the plaintiff cannot under section 43 be allowed to set up his title:(2) that he was bound by the act of affirmation of his father in having compromised the dispute

with the alienee and having purported to sell one half of the property to him. *1933 M 856—65 MLJ 772*. Where the reversioners join in an alienation by the limited owner, they are not estopped from questioning the necessity for the alienation on the death of the limited owner. The doctrine of title feeding the estoppel is inapplicable. *46 C 566—28 CWN 521; 48 C 530—25 CWN 496*.

**8. Exercise of the Option—**Non-repudiation of a transfer when the misrepresentation of the transaction came to be known is an exercise of an option. *33 IC 975*. Option need not be exercised immediately after the right to do so is attained. *39 IC 186—20 OC 72*. As to the meaning of the words "during which the contract of transfer subsists." See *18 M 492*.

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

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



## Case Law

**Section 44**—Usufructuary mortgagee of a share in property—Rights of—May sue for partition

A usufructuary mortgagee of a share of an immovable property acquires his transferor's right to joint possession and he is entitled to bring a suit for partition.

A suit for partition is maintainable at the instance of the usufructuary mortgagee whether he is in actual possession or out of possession if the mortgagee is a party to the suit and the suit mortgaged land, provided it is necessary for giving effect to the mortgage. *Muhammad Eshaque vs Afzal Ahmad. PLD 1961. Dacca, 831 (DB).*

—Undivided family—Position of house sold to stranger—Purchaser not entitled to joint possession with other sharers.

The provisions in second paragraph of section 44 of the Transfer of Property Act though couched in negative language are not of a negative nature and lay down that a stranger purchaser of dwelling house of an undivided family is not entitled to get joint possession or other common or part enjoyment of the house. His only remedy is to file a suit for partition and for specific possession on partition of his share, subject to the right of the co-sharers under section 4 of the Partition Act. Instead of availing himself of that right if such purchaser tries to take forcible possession, the remedy of a co-sharer is to seek protection of the court of law by a suit for injunction restraining such a transferee from entering into possession of the undivided dwelling house. *Md Habibullah vs Pranballav. 9 DLR 119; PLR*

*1957 Dacca. 309. Diss 55 CWN 289 Rel 5 Bom 499; Dist 46 CWN 407.*

A member of an undivided family can maintain a suit for injunction restraining a stranger-purchaser of a portion of a joint property from taking possession of the property. *9 DLR 119.*

Instead of availing himself of that right that is, his bringing of a partition suit for a specific possession of share if such purchaser tries to take forcible possession, a co-sharer can bring a suit for injunction restraining such a transferee from entering into possession of the undivided dwelling house. *Ibid.*

With reference to the Partition Act it has been held that the term "dwelling house" includes not only the structure of the building but also adjacent buildings, cartilage, courtyard, garden or orchard and all that is necessary to the convenient occupation of the house; and that the phrase undivided family is not limited to Hindus but includes any group of persons related in blood who live in one house under one head, and that it applies if they are undivided qua the dwelling house which they own. The same construction applies to the words used in this section and it is not necessary that the family should have constantly lived in the dwelling house. *Mulla's Transfer of Property Act (2nd edition) page 200.*

**Scope of Section**—Section does not override the provisions of Hindu Law. *37 IC 168—31 MLJ 275; 13 M 275.* Section applies to all kinds of transferees, including mortgagees and lessees. *3 ALJ 474; 27 M 361 at 367.*

**Partition**—The section provides for partition as a means of making the possessory right available. *25 IC 401*. A transferee of the share of a joint owner in a particular property, may sue for partition of that property alone. *33 IC 17—23 CLJ 231*. A stranger purchaser cannot have joint possession of family dwelling-house. *20 CWN 675*. When one co-owner transfers his right or interest in joint property, the other co-owners cannot impose on the share transferred any conditions or liabilities not affecting it (i.e.) not existing at the date of transfer. *1925N 68—80 IC 920 at p 923*. As a general principle of law it cannot be laid down that a mortgagee of undivided share of property from a tenant common is not entitled to sue for partition. He is entitled to claim partition provided that it is necessary to give effect to the transfer. Where the mortgage is not a usufructuary mortgage and the mortgagee is not entitled to possession of the mortgaged property, he would not be entitled to partition. The fact that the mortgage-deed confers on the mortgagee a right to sue for partition would not entitle him to sue for partition if in law he is not entitled to. *51 LW 511—1940 Mad*.

**Repair by Co-owner**—All co-sharers are equally liable for necessary repairs; and when on the failure of other sharers in their duty, one of them does it negligently, he is not exclusively liable for it. *80 IC 920—1925 N 68*.

Monthly Tenancy and such *temporary* rights not incapable of partition. *1929 C 710 [24 C 575, (FB) Foll] 34*.

**Section 44, Para 2: Undivided Family—Essentials**—To constitute an undivided family for the purpose of section 44, it is unnecessary that the members of the family should have

constantly resided in the dwelling-house nor is it necessary that they should be joint in mess. (*1929 C 231, Ref) 1935 M 628*, Principle of the para, enunciated in *5 B 499(504)*, procedure in such cases indicated. *35 IC 294—20 CWN 675*. Section 44 does not speak of a family dwelling-house nor does it say that the dwelling-house must be occupied either permanently or even occasionally by the undivided family. The only two requisites laid down in the section are (1) that the house must be a dwelling-house and (2) that it must belong to an undivided family. It does not matter if the house is occupied by tenants. Hence, section 44, would apply to the case of the purchaser of a share of one out of a number of dwelling-houses owned by an undivided family, which they have rented out. Where an undivided family owned dwelling-houses, which they rented out and the purchaser of a share in it claimed *mesne* profits from the date of purchase to the date of possession.

**Held:** that the proviso to section 44 applied, even though the members of the family did not reside therein, and that the purchaser was not entitled to *mesne* profits. (*18 C 10 and 1922 M 150, Dist) 1935 M 628*. See also *1929 C 231* (where there was only occasional residence by members of the joint family, who were not joint in mess); *1940 Rang. 53* The words "*undivided family*" in para 2 applies also to Mohammedan undivided family. *37 A 324(327)—5 ALJ 353 (FB)*, Foll in *12 CLJ 525 (534); 97 IC 416*. Even if it be assumed that the principle of section 44 may be applied to a transfer which has been effected by reason of proceedings in execution of a decree for the purpose of preventing a stranger to the family from obtaining joint possession of a family dwelling-house, the

proper stage for the members of the joint family to apply for an order of this nature would be at the time when a suit is instituted by the purchaser to recover possession of the property. If they allow an *ex parte* decree to be passed against them in that suit, they will be estopped from asking subsequently for an injunction restraining the purchaser from executing that decree. 46 CWN 407.

**Section 44**—The petitioner cannot claim *declaration* of title *simpliciter* unless he claims a partition for determining the respective shares of vendor and co-sharers and in spite of dismissal of the suit the issue is still open and he still reserves the right of claiming his title and entitlement to his

portion of purchased land in a properly framed partition suit. *Sabiha Khanam vs Jaitun Bibi @ Mrs Syed Moazzem Hossain Hasan and others* 3 BLC 175

**Section 44**—Suit for declaration of title and for recovery of khas possession—suit property in possession of the judgment debtor which was put to auction sale and on confirmation of possession, given to the auction purchaser who mutated her name and was in possession until she was dispossessed by the defendants—objection as to identity of the property could not be established—section 44 of the Act has no manner of application. *Praddut Kumar Das vs Mohitunnessa* 4 BSCD 225.

**45. Joint transfer for consideration**—Where immovable property is transferred for consideration to two or more persons, such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the fund; and, where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract to the contrary, respectively entitled to interest in such property in proportion to the shares of the consideration which they respectively advanced.

In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property.

*Case Law*

**Section 45**—Joint purchase of property—No shares specified—Presumption of equal shares.

N and K jointly purchased a house from one G. Plaintiff who was in possession of the house brought a suit for declaration of his title to the house.

The suit was decreed. N and K appealed from the decree. Subsequently 'N' died and his legal representatives were not brought on record within the prescribed period of limitation with the result that the appeal abated so far as N was concerned. The question was whether the abatement of appeal of N made the whole appeal incompetent.

**Held:** that if K succeeded in appeal the only effect would be that declaration granted to the plaintiff against him would cease to operate but the declaration granted against N would stand. The plaintiff could have initially instituted two separate suits against N and K and inasmuch as the suit could, in the first instance, have been brought against K without impleading N there was no legal bar to the competency of an appeal by K alone merely because the plaintiff chose to bring one suit against N and K denying his title to the suit property. *Nanak vs Ahmad Ali AIR 1946 Lah 399 (FB)*.

**Scope**—Section applies to transfers, for consideration; and is not applicable to gifts: see *34 M 80*. There is nothing in section 45 to suggest that it ought to be limited to

voluntary transfers. Section 45 applies to involuntary transfers also. *1941 C 416—200*. In absence of specification of the shares purchased by two persons in the sale-deed it must be held that both purchased in equal shares. *1929 A 817 : 87 IC 17*—Where mortgage-money is advanced by two persons and their interest specified, their interest in the mortgaged property will be proportionate to their interests *96 IC 134—1926 A 676*. The provisions of section 45 are not of any assistance in a case where the rights of the parties are determined by the contract of partnership and subsequent agreements as to the payments to be made in regard to the purchase. *1942 OWN 269—1942 OA 205*. Where a lease is executed in favour of three persons, in the absence of evidence to the contrary, the share of each must be presumed to be equal. It is for the person who claims a higher share to show by definite evidence that his share is higher. *1942 RD 562*. the Court cannot take account of the second para of section 45 until there is an absence of evidence. Where evidence is available but is not produced, the presumption under section 45, para 2 cannot be made. *87 IC 17—1925 O 369*.

**Section 45**—Agreement to sell—Evidentiary value—Mere agreement to sell by itself would not be sufficient to establish transfer of title in the immovable property and satisfactory evidence would be required to transfer any legal right, title or interest in property mentioned therein. *Afzal Ali vs Azhar Iqbal 1997 MLD 2262*.

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

### Illustrations

(a) A, owning a moiety, and B and C each a quarter share, of mauza <sup>1</sup>[Ulipur], exchange an eighth share of that mauza for a quarter share of mauza <sup>2</sup>[Mithapukur]. There being no agreement to the contrary, A is entitled to an eighth share in <sup>2</sup>[Mithapukur], and B and C each to a sixteenth share in that mauza.

(b) A, being entitled to a life-interest in mauza <sup>3</sup>[Jalkothi] and B and C to the reversion, sell the mauza for <sup>4</sup>Taka 1,000. A's life-interest is ascertained to be worth <sup>4</sup>Taka 600, the reversion <sup>4</sup>Taka 400. A is entitled to receive <sup>4</sup>Taka 600 out of the purchase-money, B and C to receive <sup>4</sup>Taka 400.

### Case Law

**Section 46**—Hindu co-widows have no distinct interest, but only a joint interest in their husband's property *M 290 PC*; see also *11 MIA*.

**Section 46**—"What is reasonable time" in each case depends upon the facts and the circumstances of the case. Fourteen years time to the parties when appears reasonable

1. Substituted by the Central Laws (Statute Reform) Ordinance, 1960 (XXI of 1960), section 3 and 2nd Schedule for "Sultanpur" (with effect from the 14th October, 1955).
2. Substituted by the Central Laws (Statute Reform) Ordinance, 1960 (XXI of 1960), section 3 and 2nd Schedule for "Lalpura" (with effect from the 14th October, 1955).
3. Substituted by the Central Laws (Statute Reform) Ordinance, 1960 (XXI of 1960), section 3 and 2nd Schedule for "Atrali" (with effect from the 14th October, 1955).
4. 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).

the court will not hold otherwise. *Abdul Quddus vs Anjuman Khatoon*. 36 DLR 312

performance of a contract it should be performed within reasonable time. *Abdul Quddus vs Anjuman Khatoon*. 36 DLR 312

—Where no time is fixed for

#### 47. Transfer by co-owner of share in common property—

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

#### Illustration

A, the owner of an eight-anna share, and B and C, each the owner of a four-anna share, in mauza <sup>1</sup>[Ulipur], transfer a two-anna share in the mauza to D, without specifying from which of their several shares the transfer is made. To give effect to the transfer one-anna share is taken from the share of A, and half an anna share from each of the shares of B and C.

#### Case Law

**Section 47**—As to the application of this section, see 18 M 492 enlargement of the transferor's share after the date of transfer.)

**Section 47**—Principle underlying section 47 has no application where transfer

of the immovable property has been effected by person who had no such right at the time of transfer. *Musammat Khaleda Razia Khan vs Mahtabuddin Choudhury* 30 DLR (AD) 27.

1. Substituted by the Central Laws (Statute Reform) Ordinance, 1960 (XXI of 1960), section 3 and 2nd Schedule for "Sultanpur" (with effect from the 14th October, 1955).

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

### Case Law

**Section 48**—This section is based on the principle that he who is prior in time has the better title in law (i.e.) one who has the advantage of time on his side should also have the advantage in law. See 7A. 568; 29 5 42; *ibid.* 46; 8 A. 409. Section 48 of the Transfer of Property Act must be read subject to section 48 of the Registration Act and so a subsequent registered mortgage is entitled to priority over an earlier oral charge, not accompanied by delivery of possession, of which the mortgagee had no notice, 36 *Bom. LR* 277—1934 B 189. "Transfer" in this section means a complete transfer, and does not include a mere contract for sale or an incomplete sale by an unregistered sale-deed where registration is compulsory. 4 B 126(FB); 8 A. 540. See also 10 C 250. On the principle of this section when there are conflicting rights they must be treated as relating to different entities. 49 IC 39—21 OC 317. See also 9 M 495; 6 B 193. As between two substituted security rights no question of priority can arise; section 48 applies only to successive mortgages of the same property. The rights in the substituted security of two rival claimants should be proportionate to the value of the original security as it stood on the date when the property mortgaged ceased to belong to the mortgagor. 48 LW 119—1938 Mad 547.

Priority is determined by the dates of the deeds and not by the dates of registration. 6 *Bom LR* 687—29 B 42; 8 B. 182, 29 B 46(51). Where two deeds in respect of the same property are executed on the same day, it is a question of fact to be specially proved as to which deed was in fact first executed and what deed will have priority. 11 CLJ 732—6 CLJ 74. The auction-purchaser of a mortgaged property is bound by mortgagee whether he had notice or not. But a purchaser from such person is not affected by the mortgage, if he had no notice. 16 IC 625—10 ALJ 114. See also on the section 14 IC 585; 79 IC 249—1923 R 41 (1).

The vendee of immovable property cannot oust from the possession of the property a tenant for cultivation admitted into the property by the mortgagee with possession. 82 IC 203—1925 L 165. Where a receiver of property is authorised by the Court to mortgage the property and raise a loan for paying Government revenue and the Court ordered the mortgage to have priority over a preexisting mortgage and the money is utilised for the payment of revenue and to save the property from sale, the mortgage so sanctioned by the Court has priority over the pre-existing mortgage. 1926 P 94. In respect of payments made to avert a sale for arrears of revenue, even though it may be subsequent to

the final decree on his mortgage, the decree-holder is entitled to a first charge on the sale proceeds in the mortgage suit in priority to the subsequent mortgagee. *35 CWN 1040—1931 PC 226—61 MLJ 343—59 C (463 PC)*.

**Section 48**—Title in land—Whether subsequent purchaser in possession from a date prior to the date of purchase of the prior purchaser in part performance of agreement for sale will acquire title. Since earlier kabalas take precedence over the subsequent kabalas the plaintiffs have not acquired any right, title and interest in the suit land on the basis of their subsequent sale deeds in respect of properties already sold to the defendant Nos. 1 and 2 by the same vendors. There is no provision of law that title on the basis of subsequent sale deeds will take effect from the date of agreement for sale if possession is delivered in part performance of the agreement. *Abdus Samad Khan vs Wazed Ali Fakir 44 DLR 495*.

**Section 48**—*Bona fide* purchaser for value without notice—The doctrine of *bona fide* purchaser for value without notice is

applicable in a case when the plaintiff wants to enforce the agreement for sale not only against the vendor but also against the transferee of the vendor's title arising subsequent to the plaintiff's agreement for sale. Plaintiff's suit is not such a suit but is a suit for simple declaration of title in the suit land and, as such, the said doctrine is not applicable in the present case. Court is to decide the case on the basis of the pleadings of the parties and evidence on record and not on the basis of its own assumption making out a third case. *Abdus Samad Khan vs Wazed Ali Fakir 44 DLR 495*.

**Section 48**—Prior right—Subsequent transfer—Lease though was not executed in favour of respondent but she was accepted as allottee in place of original allottee and she had paid all dues—Cancellation of plot without any ground and notice and subsequent transfer to other person was against all legal norms. *Muhammad Quaid Wahab vs Nuzhat Aziz; 1997 MLD 3091*.

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

#### Case Law

**Section 49**—A mortgagee, as such, has no right against the insurance company which insured the machinery of a mill against fire. *1923 R 6—11 LBR 234—67 IC 777*.



50. Rent *bona fide* paid to holder under defective title—No person shall be chargeable with any rents or profits of any immoveable property, which he has in good faith paid or delivered to any person of whom he in good faith held such property, notwithstanding it may afterwards appear that the person to whom such payment or delivery was made had no right to receive such rents or profits.

### Illustration

A lets a field to B at a rent of <sup>1</sup>Taka 50, and then transfers the field to C. B, having no notice of the transfer, in good faith pays the rent to A. B is not chargeable with the rent so paid.

### Case Law

**Section 50**—The language of the section is general, and applies not only to the case of assignment by the lessor of his interest during the tenancy, but also to a case of succession. *33 B 96 (104)*; and the person paying the rent to the ostensible or *de facto* owner is protected under this section (*Ibid*). The section is intended only to protect a *bona fide* tenant and not the lessor. *27 C 87*. *Bona fide* is necessary before the section can apply. *101 IC 647—1927 N 237*. See also *27 C 87 (FB)*; *7 CWN 454*; *19 IC 865*. In order to get the benefit of the protection of section 50 the tenant must pay rent as rent due, and must not pay rent in advance which otherwise becomes a mere loan to the mortgagor. *94 IC 538—29 CWN 953—1926 C 204*.

Such a payment cannot be pleaded by a tenant in a suit for compensation by the

assignee of the property. *9 R 470—1931 R 292*. But where the mortgagor of certain mortgaged premises let them to a tenant and received rent in advance as a condition precedent to letting, a receiver subsequently appointed in the mortgage suit cannot compel the lessee to pay rent over again. *7 LBR 268—24 IC 693*. See also *1927 C 270*. Where one of the two joint lessees knows the real owner of property but the other *bona fide* pays rent to another not the real owner, Section 50 cannot apply because the knowledge of one of them would be deemed to be the knowledge of the other also. *1942 O. A. 442*. Where a person who under the law is liable to pay rent to a particular person whose title he has recognised, makes payments without proper inquiry, to wrong person merely on the ground that the latter sends him a notice stating that he has

1. 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).

purchased those lands it cannot be said that the payment is made in good faith within the meaning of section 50. *1939 Pat 540. Tenant paying rent to landlord after notice of sale by landlord—Payment relating to period when suit was pending for cancellation of sale-deed—Tenant is protected, 67 CLJ 527—42 CWN 378.*

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

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

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

#### Case Law

**Section 51**—Valuation of improvements—If Court may make—Principle to be followed.

Section 51, Transfer of Property Act merely lays down an equitable principle and enables a Court to determine the equities between the parties. However, having regard

to the provisions of section 51, Transfer of Property Act, if the evidence enable a Court to do so, it should assess the valuation of the improvement as at a date as near as possible to the date of actual eviction rather than the date of election. *Nayayana Rao vs Sasavaraya Papp PLD 1957 SC (Ind) 127.*

**Abstract**

1. Scope and applicability
2. What are not improvements
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5. Estoppel
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7. Purchaser from Hindu widow
8. Improvements by mortgagee
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10. Improvement '*pendente lite*'
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**1. Scope and Applicability**

A person who has been evicted can claim compensation under section 51, provided he is (1) a transferee, (2) he has made the improvement, (3) he has made such improvement believing in good faith that he was absolutely entitled, and (4) he was evicted. The section does not provide for these various capacities or qualifications being filled or fulfilled by different persons. It is intended to provide for right to compensation to an individual who fulfils all the conditions laid down. 60 C 1388—1934 C 290. There is no general equitable principle entitling the person dispossessed to compensation apart from what has been laid down in section 51. Hence a purchaser of a property at a Court-sale who has been dispossessed cannot claim compensation for improvements effected by the vendor. The evictee himself must be the improver. 60 C 1388. The principles underlying section 51 have been extended in suitable cases on

equitable grounds. Where the defendants being relations of the plaintiff were allowed to occupy a house or room many years ago, and where during the interval they had spent considerable sums of money on improving the building, it is a suitable case in which the principles of section 51 should be extended on equitable grounds. 1938 ALJ 572—1938 All 342. The relief given by the section is not any species of property and such a right is neither heritable nor transferable. 60 C 1388. Although section 51 may not in terms apply to a particular case, the rule of equity embodied therein will be applied by Courts in proper cases. 27 ALJ 105—1929 A. 12. See also 51 A 454. The principle of section 51 is an exception to the maxim *quicquid plantatur solo, solo cedit* and unless the equitable grounds mentioned in this section are made out the moment the improvements are made, they belong to the owner of the land by operation of law. 1928 R 141. Section applies to both Hindus and Mohammedans. 30 M 197 (199). The section is not applicable to a purchaser at a Court-sale. 36 M 194—21 MLJ 969. Section 51 has no application to a case where improvements have been made by a trespasser who is not a transferee. 18 Lah 350—39 PLR 1016; 1937 MWN 533; 1937 Cal 129. There can be no equities in favour of a trespasser or of a person who is fraudulently in possession. Such a person cannot claim to set off the amount claimed as compensation as against the mesne profits due by him. ILR (1937) 1 Cal 203—64 CLJ 280—1937 Cal 129. Section 51 does not apply to every person who is in possession of property. It does not apply to a trespasser; it does not apply to a person who claims under a will because section 5 of the Act relates to

conveyances between living persons. *ILR (1940) Kar 241—1940 Sind 77.*

The section applies only to defective and not to defensible transfers. *107 IC 36(37).* So the transferee who has taken a sale from the father and manager of a joint Hindu family which has not been avoided by the son must be held to have believed himself in good faith to be the owner and *bona fide* amendments made by him would be protected. *107 IC 39=1928 A 41.* Though the case of a lessee holding under a lease for over 99 years may be outside the contemplation of section 51, the principle contained therein may be applied to lessees who are sought to be ejected *1935 C 62.* Under section 51 it is the person who has a better title within the meaning of the section, who has a right to decide whether to pay for improvements by the transferee or to sell his own interest to the transferee; and the transferee cannot compel the person having a better title to sell his interest to him. *1932 ALJ 54; 1942 A 210.*

Although the Transfer of Property Act has not been introduced in Marwar, yet the Courts in Marwar can very well take into consideration the general principles embodied in this Act without being bound by its technical provisions. Where, therefore, the value of the property which the plaintiff seeks to obtain in assertion of a right of pre-emption has been enhanced by the vendee spending money over it in a reasonable and *bona fide* manner and the plaintiff himself has in a way acquiesced in the construction, the vendee should be allowed compensation for such improvements, *1939 Mar LR 1 (Civ).* 'Transferee' within the meaning of section 51 includes the transferee in a

conveyance in the wider sense of the term within the meaning of the definition of section 5 of the Act, and though a title derived from a will cannot be said to be a 'transfer' within the meaning of section 5, a transfer of immovable property by oral sale can. The fact that to make such a transfer valid the property of a certain value must be conveyed by a registered instrument in writing does not affect the fact that it is a transfer within the definition of section 5, a conveyance of property between living persons, so that a person to whom immovable property of the value of Taka 100 or upwards has been transferred or purported to have been transferred by an oral sale is a transferee within the meaning of section 51 of the Act and is entitled to the benefit of section 51 provided he believed in good faith that he was absolutely entitled to the property in question. *ILR (1940) Kar, 241—1940 Sind 77.*

## 2. What are not Improvements

Spending small sums every year in the manuring and levelling of land in the course of prudent cultivation, is not improvement for which tenant would be entitled to compensation. *24 IC 879—1 LW 371.* So also moneys spent in ordinary repairs of houses and buildings are not improvements. *24 IC 918; 31 Bom. LR 461—1929 B 230.* See also Bengal Tenancy Act, section 76. A lessee spending money in connection with his lease is entitled to be reimbursed when a suit is instituted to avoid the lease. *1927 M 1023—106 IC 131.*

Right to Improvements is largely a question of fact. *111 IC 22—1928 M 349.* Section 51 does not entitle a person who has made improvements on another's land in

good faith to retain the improvements. 53 A. 334—1931 A. 277 (FB). Compensation for improvements—Decree for possession of certain property in favour of plaintiff—Defendant not keeping any accounts of income derived from it—No proof of present value of improvements made by him—Right to compensation for improvements on eviction by plaintiff. 39 PLR 729—1937 Lah 500.

Good Faith means only honest belief and may be even negligent belief 1 LW 369. See also 36 M 194; 32 M 530—4 IC 18—19 MLJ 284; 26 ALJ 887—1928 A 381. It is true that absence of proper inquiry condemns bargain as one not made in good faith. But any and every negligence does not show want of good faith within section 51 is not necessarily precluded by facts showing negligence in investigating the title. (1930 PC 297, Rel on) 1935 C 625. Improvement made by a person who does not *bona fide* believe that he is entitled to make it does not entitle him to receive compensation. 33 A 752; 23 IC 520; 1 LW 410; 1932 ALJ 54; 34 Bom LR 164; 33 C 1119; 1930 P 20. So also improvements made by a transferee from the executor of a will, the transfer in whose favour is vitiated by want of good faith will not entitle him to claim compensation from the legatee to whom the said property was bequeathed. 134 IC 259—1938 N 69. The definition of 'good faith' in the General Clauses Act as 'honestly' does not apply to the Act passed before 1897. See 25 ALJ 926—107 IC 36 (37). *Bona fides* is not incompatible with ignorance of law or even with a certain degree of negligence. 23 LW 496—1926 M 609. The question whether or not a transferee believed in good faith that he was absolutely entitled to the property cannot be subject of any hard and fast rule but

should be decided on the merits according to the circumstances of each case. 1938 OWN 28. See also 1940 Sind 77. A mortgagee from the certificated guardian of a minor without the permission of the District Judge is not entitled to compensation for improvements made by him on the mortgage being set aside, because he could not have believed in good faith that he was absolutely entitled thereto. 52 A 831—1931 A 201. "*Believing in good faith he is absolutely entitled*". Meaning. 53 A 334—1931 ALJ 273—1931 A 277 (FB).

### 3. Illustrative Cases

A person, who buys, from a person who could convey good title only under certain circumstances, in the absence of such circumstances, is not a *bona fide* purchaser for value and is not entitled to the value of the improvements under section 51. 21 LW 115—86 IC 195—1925 M 670. Where the grantee of land under an order of the Tahsildar paid the assessment in respect of the land and spent money in putting the land to good use without knowing that there was an appeal decreed against him,

**Held:** that the grantee effected his improvements *bona fide* within section 51 and was therefore entitled to the value thereof. 48 MLJ 682—1925 M 963. Two persons exchanged lands and on application for mutation owing to the absence of one of the parties, mutation was refused to be effected in his name. Such person believed in good faith to be the owner of the land and erected a building thereon. When mutation was refused, the opposite party who had given the land in exchange executed a sale-deed in favour of the person who had built on it. Thereupon a collateral of the vendor applied for pre-emption.

**Held:** that he was entitled to do so only on the payment of the full sale value of the land and costs of the building erected thereon and that section 51 applied to the case. 1933 L 540—146 IC 36. If a man enters upon land as a stranger purchaser in execution sale and effects improvements thereon, he is entitled to compensation thereof upon a reversal of the sale irrespective of any question of *bona fides*. In any event if good faith is required, an honest belief by him in the validity of his title is enough. 89 IC 18—1926 N 164.

#### 4. Knowledge

The real owner may claim land with the benefit of all improvements when they were made by a stranger with full knowledge of the title of the claimant. 35 B 182; 45 IC 242; 59 IC 813; 42 IC 428; 33 A 752. The section does not apply to *improvements by a trespasser* in law though made in good faith. 40 IC 464; 95 IC 789—1926 M 921; 18 L 350; ILR (1937) IC 203—64 CLJ 280—1937 C 129. Purchasers of property who have knowledge of prior contract of sale of the property cannot claim compensation of improvements. 41 C 852—19 CWN 89. For improvements made on land before a *dharkast* was granted compensation cannot be claimed when it was revoked. 28 IC 51—1915 MWN 148. If the improvements were made after grant of *dharkast*, compensation may be recovered. 1925 M 963—48 MLJ 682.

#### 5. Estoppel

A real owner, who knowing that money is *bona fide* spent on improvements by persons who honestly believed they had good title, nevertheless stood by and allowed the improvements to proceed, would not be allowed to eject such persons or occupants

without indemnifying them for their improvements. 29 C. 871; 18 B 66 (See also Evidence Act, section 115) 20 M 124; 29 B 580; 33 C 1119 (1129); 91 IC 1—1926 M 314. As to the effect of delay in asserting title when the vendee was spending considerable sums of money, see 54 PLR. 1915—28 IC 350. See also 56 IC 174 (Lah)

#### 6. Invalid Transfer

A lessee holding under an invalid lease cannot claim compensation of improvements before eviction under section 51 or under section 2 of the Mesne Profits Improvements Act 10 LW 137—52 IC 517. The word "*transferee*" in section 51 includes a transferee under an invalid transfer and the words "*the person causing the eviction*" include a transferor under an invalid transfer. 40 M 1134—43 MLJ 252—43 IC 138. It includes a perpetual lessee, under an invalid lease. 161 IC 834—1936 OWN 315—1937 Oudh 75. Person in possession of trust property under void trust deed cannot retain possession of the property on the ground that they spent money on the property with the consent of the executant of the deed. 12 OC 236—3 IC 549.

#### 7. Purchaser from Hindu widow

The principle of section 51 applies to a purchase from a Hindu widow where the purchaser in good faith believing himself to have acquired a good title to the property effects improvements on it. 48 IC 859 (M). See also 31 Bom LR 453—1929 b 246; 96 IC 483—1926 M 609—51 MLJ 313. An alienee from a Hindu widow has to make enquiries as to whether there was any necessity for the alienation and in the absence of same cannot be taken to have believed in good faith that he was absolutely entitled to the property in order

to claim compensations for improvements under section 51. *44 A 665 20 ALJ 524—1922 A.194*. Where a Hindu widow grants a permanent lease and the lessee makes improvements on the land although believing that she has a right to grant a permanent lease, he is not entitled to be compensated for the improvements when he is evicted by the reversioners on the widow's death. *47 A 430—1925 A 261*. A partition between two co-widows operated only during their lives and on the death of one, the whole property passes to the other. Whether one of the widows sold her share in her husband's house and on her death her co-widow brought a suit for possession, the purchaser was not entitled to the money expended by him for improvements *32 A 463—40 IC 71*.

### 8. Improvements by Mortgagee

A mortgagee in possession of the mortgaged property under a usufructuary mortgage effected improvement in the property knowing full well that he was the mortgagee and not the owner.

**Held:** the mortgagee was not entitled to compensation for the improvements in a suit for redemption by the mortgagor. *1937 N 54*. A mortgagee who believes he is the absolute owner of the property is entitled to compensation for improvements. *33 MLJ 316—42 IC 438; 37 A 81*; but not when the value of the improvements far exceeds the mortgage amount. *52 B 307—30 Bom LR 427*. Under section 51 a mortgagor is entitled to exercise the option whether he will pay the value of the estimated improvement on the one hand or on the other hand "sell his interest to the transferee at the then market value irrespective of the value of the improvement." *28 Bom LR 993—97 IC 700*.

### 9. Improvements by Tenants

A permanent lessee is not entitled to claim the benefit of section 51. So long as a transfer is subject to payment of rent or to any other condition, the transferee cannot believe that he is "absolutely entitled" to the property. *13 Luck 450—1937 O 446*. Tenants are not entitled to compensation for permanent structures created without the permission of the landlord. *43 IC 643—35 MLJ 281; 41 IC 788—33 MLJ 84; 28 IC 840; 48 IC 354*.

### 10. Improvements "Pendente Lite"

There is no right to compensation for improvements made "pendente lite" with full knowledge of the risks in doing so. *25 MLJ 324—21 IC 219*.

### 11. Improvements by Vendee

A vendee making improvements on excess area not covered by the deed, is entitled to compensation on ejection. *91 IC 1—1926 M 314*. Where the right to recover value of the improvements is decreed to the judgment-debtor, he is not entitled to remove the materials. *1928 R 141, following 97 IC 700—1926 B 599*.

Option to sell or pay compensation for improvements rests with the person entitled to evict. *40 M 1134—33 MLJ 252; 1926 B 599—97 IC 700; 38 M 710*.

### 12. Measure of Compensation

In awarding compensation Court has to consider how far the property has improved in market value and not merely the amount expended. *31 Bom LR 453—1929 B 246; 19 M 385; 20 M 129; 40 M 1134; 97 IC 700; 51 MLJ 313*. As to valuing trees planted by tenant, see *18 M 407*. Valuation once made

can be altered in proper cases, and, if necessary, according to the market value of the improvements on the actual date of eviction. *20 M 129; to M 367.*

**Growing Crops**—As to who would be entitled to growing crops on the land, see *8 A 502.*

**Section 51**—Costs of improvement—Costs of improvement could be awarded only if it was shown that same were made on the property to which concerned party had title and were made in good faith. *Tasawar Hussain Shah vs Muhammad Yusuf PLD 2001 SC (AJ&K) 27.*

~~52. Transfer of property pending suit relating thereto—~~  
 During the <sup>1</sup>[pendency] in any Court <sup>2</sup>[in Bangladesh] <sup>3</sup>[\* \*], of <sup>4</sup>[any] suit or proceeding <sup>5</sup>[which is not collusive and] in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

<sup>6</sup>[*Explanation*—For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and

1. Substituted by the Transfer or Property (Amendment) Act, 1929 (XX of 1929), section 14, for "active prosecution".
2. Substituted by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act VIII of 1973), section 3 and 2nd Schedule, for "having authority in Pakistan or established beyond the limits of Pakistan by the Central Government" (with effect from the 26th March, 1971).
3. The words "or the crown Representative" omitted by AO 1949, Scheduled.
4. Substituted by Act XX of 1919, section 14 for "a contentious".
5. Inserted by Act XX of 1919, section 14.
6. *Explanation* inserted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 14.



complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.]

### Case Law

**Section 52**—Purpose of section—Maintenance of *status quo*—Tests for application. The broad purpose of section 52 is to maintain the *status quo* unaffected by the act of any party to the litigation pending its determination. The applicability of the section cannot depend on matters of one side or the other in *bona fide* proceedings. To apply any such test is to misconceive the object of the enactment. *Gouri Dutt Mahraj vs Sukur Muhammad PLD 1948 Privy Council 117.*

—Compromise decree—Section applicable.

Section 48 applies to a compromise decree and, such a decree cannot, by reason of its very nature be expected invariably to reflect the precise relief claimed. *Gouri Dutta Mahraj vs Sukur Muhammad PLD 1948 PC 117.*

Award—Application for decree on award—*Lis* commences on the filing of application.

When a private award creates a charge for maintenance the presentation of the application to file the award must be regarded as a plaint for creating a charge over the suit properties and it would stand on the same footing as plaint in an ordinary maintenance suit where a charge is sought to be created. It

is, not, therefore, necessary to consider as to whether in any case the charge does not begin from the date of the award decree. The *lis* commences with the application to take a decree in terms of the award. Once the *lis* begins to operate, it will continue till the final satisfaction of the maintenance decree or till its satisfaction becomes unobtainable by reason of the bar of limitation. *Kallawa vs Paratta. AIR 1946 Bombay 207.*

***Lis pendens***—Interest created during pendency of suit—Decree not affected. No interest which is created during the pendency of the suit can affect any decree passed in the suit. *Pir Abdullah Shah vs Humayun PLD 1957 (WP) Lahore 1054.*

***Lis pendens***—Pending suit ending in compromise—When doctrine would apply. [The rule of *lis pendens* applies even though the pending suit ends in a consent decree or a compromise decree, but the consent or compromise must be honest and not fraudulent or collusive. A person, who takes transfer of property which is the subject-matter of a suit during its pendency, takes the risk of losing it if the result of the suit goes against the party from whom he has taken the transfer. But he takes such a risk of an adverse decision obtained in a fair and legal manner. If the final decision in the pending litigation is brought about by fraud or

collusion, it cannot be said that *lis pendens* was fairly decided and that decision cannot affect the right of the transferee *pendente lite*. *Nathu Dhoju vs Ramchand Balchand*. AIR 1946 Bom 462.

**Section 52**—Principles of *lis pendens*—Its application limited to immovable property—In matters of conjugal relationship, it has no application. *Nelly Zaman vs Giasuddin Khan*. 34 DLR 221

—Doctrine of *lis pendens* envisaged under section 52, Transfer of Property Act not applicable to pre-emption matter, since with the reconveyance of the land in pre-emption proceeding to the original owner the *lis pendens* doctrine loses its relevancy. *Md Abbas Ali vs Md Osman Ali* 37 DLR 324.

—*Lis pendens*—Mutation proceeding was initiated after the filing of the pre-emption application hit by the doctrine of *lis pendens*, *M Banik vs Nitya Ranjan* 39 DLR (AD) 75

Maintenance suit—Doctrine of *lis pendens* applicable even after the decree. The doctrine of *lis pendens* applies to maintenance actions. In a maintenance suit the decree does not terminate the litigation, but the *lis* continues even after the decree, and the transfer of the property, the subject matter of the suit, executed by the judgment-debtor after the decree, in the suit is affected by *lis pendens*. *Kallawa vs Parappa*. AIR 1946 Bom 207.

**Partition proceedings**—Do not operate as *lis pendens* for sale in execution of pre-partition debts.

It is well settled that a partition suit operates as *lis pendens* with the result that the

purchaser of an undivided share pending a suit takes only that property which is allotted on partition to his vendor. But a partition suit does not operate as *lis pendens* where a property subsequently allotted to the mother under a final decree for partition has been sold pending the partition suit in execution of a decree in respect of a pre-partition debt binding on all the members of the family and no provision is made in the partition decree for the payment of that debt, because the decree holder is entitled to proceed against the entire joint family property which, on the date on which he proceeds to sell it, is not vested in the mother to any extent. *Jamuna Devi vs Mangal Das* AIR 1946 Pat 306.

Pre-emption—Sale to a pre-emptor after pre-emption suit by another pre-emptor—Sale in pursuance of prior contract—Pre-emption suit would not be defeated.

The doctrine of *lis pendens* applies to a case where before the institution of the suit for pre-emption an agreement to sell the property has been executed by the vendee in favour of another prospective pre-emptor with an equal right of pre-emption and subsequent to the institution of the suit, in pursuance of the agreement, a sale deed has been executed and registered in the latter's favour after the expiry of limitation for a suit to enforce his own pre-emptive right. The sale in favour of the latter cannot defeat the plaintiff's suit. *Mohammad Saddiq vs Ghasi Ram*. AIR 1946 Lah 322.

Principle of *lis pendens* applies in cases of involuntary alienation, though the said section may not apply. *State Bank of Pakistan vs Khaledar Ma* 14 DLR 734.

*Lis pendens*—Possession during the pendency of the suit by a party cannot alter the rights of the parties.

The possession which a party to the suit obtains during the pendency of the suit instituted by the plaintiff cannot alter the rights of the parties in the suit for those must be determined according to the position prevailing on the date of the institution of the suit. 9 DLR 294.

Where a transfer is hit by section 52 of the Transfer of Property Act, the transferee is not entitled to hold his title against a party to the suit sought to be affected by the transfer: for a suit for specific performance of a contract operates as *lis pendens*. 5 DLR 470.

—The word "contention" (which was in the section before the amending Act 20 of 1929) in section 52 of the Transfer of Property Act refers to the origin and nature of the plaintiff with reference to the prosecution. The doctrine, therefore, becomes effective from the very moment of the institution of the *bona fide* suit which is in no way collusive. 6 DLR 550.

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

The decree-holder in the mortgage decree having put the decree into execution, the judgment-debtors applied under section 36 of the Bengal Money Lenders Act to re-open the decree. The decree was re-opened and a new preliminary decree was passed making the decretal amount payable in several instalments. Some time before the passing of

this preliminary decree, the landlord auction-purchased the holding comprising the mortgage lands at a rent sale.

The judgment-debtor having defaulted in payment of the instalment dues a final decree was passed and the decree was thereafter put into execution. The landlord who became the owner of the equity of redemption was not made a party either to the preliminary decree or to the final decree put in an objection under section 47, Civil Procedure Code saying that execution could not be against him because he was not impleaded in the suit or the proceedings.

**Held:** The landlord-objector having purchased the property during the pendency of the suit, he could not be regarded as necessary party to the suit. He became interested in the equity of redemption during the pendency of the suit and hence the doctrine of *lis pendens* under section 52 of the Transfer of Property Act must operate as a bar to his plea. 7 DLR 186.

Involuntary alienation.

It is now well settled that though section 52 itself may not apply to involuntary alienation nevertheless the principle of *lis pendens* applies to such alienation. *Ibid*.

—A transfer *pendente lite* affecting the rights of the other parties to the suit is expressly barred by section 52 of the Transfer of Property Act. 7 DLR 535.

Transfer of land during the pendency of partition suit is hit by the doctrine of *lis pendens*.

A partition suit is a suit in which the right of a party in a property held jointly with

others is determined and a new and exclusive right is created in favour of a party. Partition suit is a suit contemplated in section 52 of the Transfer of Property Act.

In this case the petitioners were inducted into the suit land during the pendency of the partition suit without the concurrence of other co-owners and the person who inducted them into the premises has not been given land which are possessed by the petitioners but he has been allotted a different saham. Co-sharer who has been allotted the saham which is in possession of petitioners is entitled to get possession of the saham allotted to him free from all encumbrances. To saddle him with encumbrances created during the litigation would render the principle of doctrine of *lis pendens* nugatory. *Wajed Ali vs Sudhir Chandra Das*, 20 DLR 513.

The word 'transferred' in section 52 Transfer of Property Act, contemplates transfer by sale, gift, mortgage, lease and exchange.

The word 'transferred' means such transfers as are contemplated by the Transfer of Property Act such as sales, gifts, mortgages, leases and exchanges. *Abdur Rouf vs Ahmuda Khatun*. 33 DLR 324

—A transfer of the land in suit being the subject-matter of the pending suit is hit by the doctrine of *lis pendens* and, as such, a transfer is not valid in law. And, consequently, such a transferee cannot apply under Order 1, rule 10(2), CPC to be impleaded as a party to the suit. *Jamaluddin vs Rabeya Begum*. 32 DLR 63.

**Section 52—*Lis pendens***—Question of bar of appeal—The doctrine of *lis pendens*

does not make alienations made during pendency of a suit void but only that such alienation will not affect the rights of other parties to the suit. It means that the purchaser *pendente lite* is bound by the result of the litigation. In the instant case, the petitioner having alleged that he had purchased the suit land and the decree passed in the suit adversely affected his interest the District Judge has committed an error of law in not according permission to the petitioner to file the appeal. *Bangladesh Leaf Tobacco Company Ltd. vs Md. Abdul Mannan* 43 DLR 7.

**Section 52**—Suit for declaration of *ex parte* decree fraudulent—Scope of such a suit—Cause of action to file and maintain such suit—falsity of claim cannot be a ground for setting aside an *ex parte* decree. Only when the plaintiff challenges an *ex parte* decree on the ground of fraudulent suppression of summons to deprive him of the opportunity of contesting the false claim in such a suit and the plaintiff can establish such allegation then such an *ex parte* decree can be set aside as fraudulent. The plaintiff having purchased the suit property during the pendency of the suit which was decreed *ex parte* the impugned decree is binding on him. They have no cause of action for the suit. *Haji Md. Ishaque and others vs Rupali Bank* 43 DLR 621.

~~Section 52~~—*Lis pendens* does not make a deed invalid, it only makes the right dependent on result of the suit. *Anil Ranjan Ghosh and another vs. Assistant Custodian of Vested and Non-Resident Property and Additional Deputy Commissioner (Revenue) and another* 49 DLR 296.

**Section 52**—Since the petitioners purchased the properties during the pendency of the suit they will be subjected to the result of the suit. *Mokthar Masum Abedin and others vs Nironjan Kumar Mondol and others* 50 DLR 341

**Section 52**—As the petitioners purchased the disputed land during the pendency of the suit when their vendor's sale deeds were under challenge, subsequent purchasers are neither necessary parties to the suit nor their presence is necessary to decide this type of suit, Moreso, the petitioners' claim is hit by the doctrine of *lis pendens*. *Jamila Khatun vs Md Lutfor Rahman @ Nefasiur and other* 3 BLC 306

**Section 52**—The pre-emption case was allowed on 27-6-1983 and the two deeds of re-conveyance were executed on 28-02-1983 and hence the trial Court has rightly found that the deed of re-conveyance is hit by doctrine of *lis pendens* under section 52 of the Transfer of Property Act. *Jahangir Alam vs Sailish Chandra and others* 6 BLC 508

**Section 52**—Doctrine of *lis pendens*—Applicability—Whether a contract entered earlier to the filing of a suit for specific performance of contract completed by a kabala during the pendency of the suit is hit by the doctrine of *lis pendens* under this section of the Act.

The plaintiff filed a suit for recovery of possession upon declaration of title, and also for measure profits, The trial Court decreed the suit. On appeal by the defendant, the suit was dismissed which was affirmed by the High Court in 2nd Appeal. In an earlier suit for specific performance of contract instituted

by the present plaintiff on 8-1-58, he obtained an *ex parte* decree on 19-8-58, and got a kabala executed by the Court on 15-6-59 and registered on 25-7-59. During the pendency of the suit, on 21-2-60, the defendant obtained two kabalas dated 22-3-58 and 29-3-58, respectively from the defendant of the earlier suit, on the basis of two agreements of dates prior to the institution thereof. The two agreement were dated 21-4-57 and 23-4-57. The question was whether the kabalas of the defendant obtained during the pendency of the earlier suit was hit by *lis pendens*. The 1st appellate Court and the High Court held that they are immune from its mischief.

**Held:** (i) The section prohibits the parties to the suit during its pendency, from transferring or creating any right on the property, which will adversely affect the rights of the other party which it may get in the decree. A stranger to the suit obviously is not included in the language of the section. The use of the words "thereto" after "any other party" is indicative of the intention of the legislature of protecting the right in the property in question of the parties to the suit. Another thing to remember is that the transfer of the right created in the property must be such as to affect the rights of the adverse party to the suit, that may be obtained through the Court. It, therefore, follows that if a third person, *bona fide*, has acquired a legal right prior to the institution of the suit, it is not hit by the doctrine of *lis pendens* as embodied in this section.

(ii) Now, if we turn to consider the character of an agreement to sell an immovable property, we find that it does not create any interest in the property, but it does

create a right in the purchaser to get a valid deed of sale executed in his favour on the fulfilment of the terms of the contract. If the contract is *bona fide* and genuine, he has acquired a legal right and the right is to get the property transferred to him. There is no language in section 52 by which this right can in any way be affected or defeated.

(iii) A person, not a party to the suit, if had entered into a *bona fide* contract to purchase the property, his right to get the property transferred to him is not hit by the doctrine of *lis pendens*.

(iv) In the instant sale two contracts of the defendant were of earlier dates and were also entered prior to institution of the suit. There is no finding of malafide or collusion. Such a right acquired earlier to the institution of the suit cannot be defeated nor can it be hit by section 52 as it does not fall within the mischief of the section.

(v) This section says that the transfer shall not affect the rights of the adverse party to the suit that might be made in the decree, but the section is silent as to the right acquired by a stranger to the suit prior to its institution. *Hafizuddin vs Mst. Hofiza Khatun 2 BSCD 179.*

**Section 52**—*Lis pendens*, doctrine of—Scope and application—Provision of section 52, Transfer of Property Act, 1882 does not preclude the transferee *pendente lite* from being made a party to the pending proceedings on the basis of such transfer—Principles. *Rashid Ahmad vs Jiwan 1997 SCMR 171.*

**Section 52**—Suit for specific performance of contract—Intervener's

application to be impleaded in pending suit—Intervener had admittedly entered into agreement with vendor (defendant) and vendor had received consideration—Intervener was also in peaceful possession of property purchased by him—Intervener's possession was not denied by plaintiff who was claiming specific performance of agreement to sell in his favour which he claimed to have been effected between him and the husband of owner of property—Intervener's possession on basis of agreement to sell had been admitted by defendant (vendor) herself and she had denied that her husband had any authority to enter into agreement with plaintiff—Intervener's application was only to join as a party in suit and Court has to see whether his impleading in such suit would be necessary in order to enable Court effectually and completely to adjudicate upon and settle all questions involved in the suit—Intervener being a person whose interest was likely to be affected by the proceedings, his application to be impleaded was allowed. *Munir Ahmad vs Rukhsana Khan 1997 MLD 536.*

**Section 52**—Suit for declaration and injunction relating to land—Interim order not to transfer the same was also issued by trial Court—During pendency of suit and currency of temporary injunction order, land in question was purchased by intervenors who, on their application to be impleaded in suit, were impleaded as defendants—Validity—No permission from Court was obtained before purchasing property in question—Transaction of sale having taken place during pendency of suit was, thus, hit by provision of section 52, Transfer of Property Act, 1882, therefore, no right had

accrued to the intervenors—Discretion of Court to implead any person as defendant or plaintiff was exercisable only for purpose of effectual and complete adjudication of all questions involved in suit—Presence of intervenors for adjudication of suit was not essential as controversy involved in suit could be resolved in their absence—Intervenors were, thus, neither necessary nor proper party to suit filed by plaintiff—Impugned order of trial Court whereby intervenors were impleaded as party to suit was set aside in circumstances. *Muhammad Yaqoob Khan vs Sahib Khatoon* 1998 CLC 1576].

**Section 52—*Lis pendens*, principle of—**Applicability—Suit land was purchased by respondent/plaintiff during pendency of civil suit with regard to the same property—Trial Court decreed the suit land. Lower Appellate Court confirmed the decision of the trial Court—Validity—Respondent/plaintiff had taken the risk of getting sale-deed executed in his favour during pendency of civil suit and same was done at his own peril—Respondent/plaintiff had the right to get his sale consideration back from the vendor of the suit land—Sale-deed during pendency of civil suit was subject to all consequences of the decree delivered by a competent Court of law—Both the Courts below did not decide the matter properly—findings of both the Courts below were reversed in revision. *Khair Din vs Muhammad Iqbal* 1999 YLR 2589.

**Section 52—*Lis pendens*, doctrine of—**Applicability—Where no notice regarding pendency of suit or proceedings was registered under section 18, Registration Act,

1908, principle of *lis pendens* was not applicable. *Rashida vs Shahzad Khanem* 1999 YLR 910.

**Section 52—Rule of *lis pendens* would** apply to person who purchased house during pendency of suit—In such a case, he would not be entitled to defend the suit independently from seller of house through whom he claimed ownership rights during pendency of suit—Findings and judgment against seller could be binding on such purchaser in same manner and to same extent as they would be binding to seller who sold house during pendency of suit against him. *Mukhtar Baig vs Sardar Baig* 1999 SCJ 585 = 2000 SCMR 45.

**Section 52—Transfer of property** pending suit relating thereto—*Lis pendens*, doctrine of—Application—Transfer of property when litigation in respect of said property was pending before Court, was to be governed by section 52, Transfer of Property Act, 1882—Principles. *Industrial Development Bank of Pakistan vs Saadi Asmatullah* 1999 SCMR 2874.

**Section 52—*Lis pendens*, principle of—**Applicability—Agreement to sell, execution of—Vesting of title in transferee in a sale *pendente lite*—Validity—Provisions of section 52 of Transfer of Property Act, 1882, do not prevent vesting of such title but only make it subject to the rights of other parties as decided in the suit—Effect of section 52 of Transfer of Property Act, 1882, is not to wipe out a sale *pendente lite* altogether, but to subordinate it to the rights based on the decree in the suit—As between the parties to the transaction, however, it is perfectly valid and operates to vest the title of the transferor

in the transferee—Broad purpose of the provisions is to maintain the *status quo* unaffected by the Act to the parties to the litigation pending its determination—No lawful jurisdiction exists to put a restrictive construction on section 52 of Transfer of Property Act, 1882, and stretch it too far by inferring that even agreement to sell which is subject to limitations as enumerated in the provisions of law cannot be executed. *Muhammad Zafar-uz-Zaman vs Faqir Muhammad PLD 2001 SC 449.*

**Section 52—*Lis pendens***, principle of—Scope—Rule of *lis pendens* is based not on the doctrine of the notice but on expediency, that is “necessity for final adjudication”. *Zafar-uz-Zaman vs Faqir Muhammad PLD 2001 SC 449.*

**Section 52—Specific performance of agreement to sell—Principle of *lis pendens*—Applicability—Reduction in the share of the defendant—Execution of agreement—Extent—Suit land was subject-matter of suit pending in the court—Defendant, at the time of execution of agreement, was exclusive owner of the suit land but her exclusive ownership was reduced to that of 1/3rd and the shares were given to some other person against whom the plaintiff had no grievance—Trial Court decreed the suit and the judgment was upheld by lower appellate Court—High Court in exercise of revisional jurisdiction set aside the concurrent judgment and allowed the revision—Validity—Defendant had agreed to sell out the land comprising of specific numbers and the same was also indicative from the agreement and plaint and thus the plaintiff would be entitled to 1/3rd of the land owned by the defendant—Judgment of High Court was set aside and the judgment and**

decreed passed by trial Court were upheld. *Muhammad Zafar-uz-Zaman vs Faqir Muhammad PLD 2001 SC 449.*

**Section 52—Transaction *pendente lite*—**Bona fide purchaser with consideration—Effect of decree over the rights of such purchaser—Validity—Such transaction, made during pendency of litigation, cannot affect the rights of any other party to the litigation, which may be acquired by it under the decree passed by the Court—Even a bona fide purchaser with consideration *pendente lite* is bound by the result of the litigation because his right in such property would be subject to the rights of the parties to the litigation as finally determined by the Court. *Muhammad Khan vs Muhammad Nawaz 2001 MLD 844.*

**Sections 52 & 53-A—**Two suits, one for declaration and the other for specific performance for agreement to sell along with applications for interim injunction—Application by appellant dismissed whereas other application by respondent was allowed—Appeals against—Respondent, after payment of Rs. 5 lac as earnest money to appellant did not take any step towards completion of agreement—He demolished incomplete house constructed at spot, removed material or utilised same, got excavated plot and raised construction of basement without sanction of map from CAD and obviously in violation of relevant rules—There is nothing on record to make out that he was willing and ready to perform his part of contract except payment of earnest money—Therefore, he is not entitled to legal benefit of section 53A of Act, 1882, neither, he is entitled to discretion of Court—Impugned order, dismissing application of



appellant is devoid of judicial propriety—Appellant cannot be restrained from getting possession of suit property—Construction by respondent was stopped—Anyhow, appellant was restrained from alienating suit property and dispossessing respondent otherwise than through due process of law—Orders accordingly. *Ahmed Saeed Kirmani vs Ashfaq Sarwar PLJ 1999 Lah. 1598 = 1999 Law Notes (Lah) 1080 = 2000 MLD 495.*

### Abstract

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### 1. Amendment of Section and reason for it

In view of difficulties created by the use of the words "active prosecution" and "contentions", it is proposed to substitute the word "pendency" for the words "active prosecution", and to omit the word "contentious," and to add an explanation to make it clear when the pendency of a suit or proceeding shall be deemed to commence and when it shall be deemed to end. Further to attract the doctrine of *lis pendens*, the suit must be pending in a Court of competent jurisdiction, and this has been made clear in the explanation. We have not thought it proper to include in the explanation cases where an order is passed against an intervener in execution proceedings, as the proper remedy in such cases is a suit under Order XXI, rule 63 of the Code of Civil Procedure, 1908. We have also excluded cases of review. It has been suggested that to avoid the difficulties that may arise by the application of the doctrine of *lis pendens*, the system of registration of suits prevailing in England should be adopted in this country at least in the Presidency-towns. This is really a question of administration and is beyond the scope of our reference." (*Statement of Objects and Reasons*).

The Select Committee said: "In the Explanation which prescribed the period during which *lis pendens* is to operate, we have provided for the case of the discharge of a decree by the relinquishment by a decree-

holder of his decretal rights." (*Report of the Select Committee*).

The amended section has no retrospective effect in its operation. 1931 N 138.

## 2. Principle of Section

The doctrine of *lis pendens* rests upon this foundation, that it would plainly be impossible that any action or suit could be brought to a successful termination if alienations *pendente lite* were permitted. The correct mode of stating the doctrine is that in *pendente lite* neither party to the litigation can alienate the property in dispute so as to affect his opponent. 40 CLJ 393—84 IC 490; 44 IC 726. The right treated by section 52 is a statutory right, and the mere fact that one has made certain admission against his own interest, would not deprive him of the right which the statute gives him. 44 CWN 783.

## 3. Nature and Scope of the Doctrine of *Lis Pendens*

'*Lis pendens*' applies only to alienations inconsistent with the right which may be established by the decree in the suit. 40 M 955—32 MLJ 374; 49 MLJ 68—1926 M 50. Section 52 only applies to rights of the other "party" involved in and arising out of the property which is the subject-matter of the suit. 64 CLJ 406—1938 C 1. Where there was not a transfer but a dealing with property, and the object was prohibited by section 52.

**Held:** that the transaction could be avoided. 11 OWN 390. A defendant will not be at liberty to erect buildings on a piece of land which forms the subject-matter of the litigation and thus compel the plaintiff to file

another suit for the removal of the obstructions which came into existence after the suit had been filed. To such a case section 52 applies. 1934 L 978. (*Lis pendens* applies even if the pending suit ends in a consent decree on compromise, but the compromise must be honest and not collusive. 151 IC 70—1934 P 270. Section 52 does not debar a transferee from one party to a suit during the pendency of the suit from impeaching the decree on the ground of fraud subsequent to the transfer. 22 OC 171—53 IC 572. For the doctrine of *lis pendens* to apply under section 52, it is immaterial whether the subsequent purchaser against whom the doctrine is pleaded was a party to the pending suit or not. 8 BR 819. Section 52, though it is in general terms, limits its own operations. In order that the doctrine of *lis pendens* may operate, the suit must be a suit in which the rights to immovable property are in issue, the "order" must be an order relating to rights in such property, and the transaction which will give place, or be made, subject to the order of the Court must be one which derogates from the other party's rights to the property in suit. Any "order" which may be made therein is subject to this limitation, that is, the order of the Court must relate to rights which the parties claim or which they might have claimed in the property involved in the suit. The Court cannot create in a party proprietary rights on grounds distinct from the property itself. The doctrine does not extend to the case of any order whatsoever. It can only apply to orders appropriate to the suit having regard to the nature of the property involved and the nature of the proceedings. 64 CLJ 406—1939 Cal 1. The words "any other party thereto" in section 52, cannot be construed as meaning only any opposite party

or any party who has opposing interest. The words are unconditional. 19 Pat LT 35—1938 Pat 487.

#### 4. "Pendency"

This word is substituted for the words "active prosecution" occurring in the old section; and consequently the question discussed in the several rulings as to when a suit or proceedings begins to be actively prosecuted, and when it ends [see for instance 42 A 319—18 ALJ 303; 4 But LT 140—12 IC 849; 14 CWN 322—5 IC 691; 40 IC 826 (M); 57 IC 952 (N)] does not rise under the present section. In the case of a mortgage suit, the *lis* continues after the decree *nisi* and the doctrine of *lis pendens* is applicable to proceedings to realise the mortgage after the decree for sale. The explanation added by the amendment Act XX of 1929 does not alter the law but only emphasises that the correct view of it is that taken by the Calcutta High Court in 2 CLJ 288; 10 P 234—1931 P 64. See also 130 IC 666—1931 M 120; 7 OWN 676—1930 Oudh 362; 1932 ALJ 54. But if the decree-holder took no active steps to execute his decree for specific performance of an agreement to execute a mortgage for nearly two years, the doctrine cannot be brought into operation. 34 Bom LR 117. As to the meaning of the word "contentious" in the old section, see 1930 ALJ 1286—1931 A 45; 1930 MWN 572; ILR (1937) Nag 452—1937 Nag 400. Suit does not cease to be contentious, simply because it ends in compromise or *ex parte* decree. 122 IC 887—1930 A 354. A foreclosure suit is a contentious one where the mortgaged property was directly and specifically in question and a usufructuary mortgage executed by the mortgagee in

favour of a third person pending the passing of the final decree with the permission of the Court comes within the old section 55 A 225—1933 A 201.

#### 5. Pendency of Suit in Wrong Court

The doctrine of *lis pendens* cannot apply where the suit concerned was pending in a Court which had no jurisdiction to entertain it at all ILR (1937) Bom 895; 39 Bom LR 1287—1938 Bom 121. Where during the pendency of a suit by a minor for partition instituted in a wrong Court, the father executes a mortgage of the family property and subsequently the plaint is returned, for presentation to the proper Court and it is so presented after an interval of time and ultimately a decree for partition is passed, the mortgagee is not affected by *lis pendens*. The suit that culminated in a decree for partition must be deemed to have been instituted only when the plaint was filed in the proper Court. 1940 NLJ 20—1940 Nag 185.

#### 6. Immovable Property

It is more than doubtful whether the principle of *lis pendens* applies to *movable property*, such as, in the particular case, money. 62 IC 900 (Pat). See also 36 B 189—14 Bom LR 9—13 IC 849; 51 C 1033. In 122 IC 189—1930 A. 380 it was held that the principle would be applicable to the transfer of a decree. The principle of section 52 may be applied to cases where the alienee of movables *pendente lite* has notice of the '*lis*'. 1 LW 587—25 IC 133. Hut is immovable property 9 IC 1 (C). A mere claim for rent is not a right to immovable property within the provisions of section 52. 90 IC 431—1926 C 191.

### 7. Misdescription of Property

It is a settled principle of law, in order to attract the doctrine of *lis pendens* the property in suit must be described with proper precision. If there is such misdescription of the property that its identity cannot be established, the doctrine of *lis pendens* cannot apply. What description will be sufficient in a particular case, would of course, depend largely on the facts of that case. 44 CWN 783. See also 49 MLJ 68. One of the conditions laid down by section 52, as creating *lis pendens* is that in a suit a right to immovable property must be directly and specifically in question. Since under the rules of procedure, immovable property in question in suit has to be specifically described in the plaint, as far as possible, a misdescription of the property in the pleadings will prevent the operation of the doctrine of *lis pendens*. But if in spite of the misdescription the property is sufficiently identified, the doctrine will apply, and an alienee who is aware of the identity of the property will be affected by *lis pendens* in spite of the misdescription.

A mere mistake in describing the situation of the property or a mis-spelling of the name of the property would not affect the doctrine of *lis pendens*. 1937 Bom 244. An error in the description cannot be of any materiality so long as the Court and the parties understand which property is in question. Fraud or collusion might alter the situation, but subject to such considerations, the description of the property is for the Court and for the parties concerned 39 Bom LR 224—1937 Bom 244.

### 8. Is Directly and Specifically in Question

In a suit to recover money borrowed by the deceased by sale of jewellery pledged and if necessary by sale of property of deceased in the hands of heirs, the property does not come specifically in question within section 52 till an order is passed for sale of the property for the balance, and therefore the plaintiff cannot claim priority over mortgages created on the property by the sons before the passing of the order. 51 C 1033—84 IC 880. A plaint in a simple money suit with a prayer added to it that the decree which may be passed be declared to be a charge upon the shares of the defendants of that suit cannot be said to be a plaint involving a claim against immovable property. 165 IC 567—1936 P 571. A proceeding under Order 34, rule 6, CPC, in which a simple money decree is passed is not a proceeding in which any right to immovable property is directly in issue and therefore a transfer made during the pendency of such proceeding is not hit at by section 52, *Transfer of Property Act*. 7 OWN 122—1930 O 93.

### 9. Applicability of the Doctrine of *Lis Pendens*

Scope of the doctrine and meaning of the word "right" explained. 51 B 37—1927 B 93; 110 IC 389. Construction and scope—Any "order" which may be made therein—Meaning of—*Lis pendens*—Operation of—Conditions. AIR 1938 C 1 64 CLJ 406. The principles of section 52 applicable to transfer of property is not applicable to suits and decrees passed in such suits, 1937 A 108.

In any case, when once the award has been put before a competent Civil Court in execution and the Court directs the sale of the

mortgaged property, any purchase made during such proceedings is made *pendente lite* and affected by the doctrine of *lis pendens*. 57 M 426. The principle is applicable to Punjab. 11 L 258—1930 L 356 (FB). Section is applicable to transfer by Muhammadans also. 124 IC 722—1930 A 462. The doctrine of *lis pendens* does not apply to the enforcement of a right which existed prior to the institution of a *lis*. 32 PLR 283. Notice of pending suit is not necessary. 1929 A 601; 62 IC 900; 20 IC 458; 1925 O 30; 1928 B 65; 130 IC 666—1931 M 120. 29 CWN 953; 39 Bom LR 224.

The doctrine is not applicable to a case where the sale is under a valid contract prior to the starting of the litigation. 45 M 774—43 MLJ 566; 1925 M 710—48 MLJ 496; 43 IC 502 (M); 39 Bom LR 224. It operates only in favour of a plaintiff and cannot be invoked by a defendant. 40 IC 826 (M). See *contra* 3 OWN (Sup) 232. Section 52 only applies to rights of the other 'party' involved in and arising out of the property which is the subject-matter of the suit. 64 CLJ 406. The section has no application where the transfer is amongst persons ranged on the same side. 41 M 458—34 MLJ 262; nor where the transferor alone is affected 41 IC 513—4 OLJ 386; (See also 33 CWN 1091—30 LW 476—1929 PC 243; nor to a *friendly suit*. 38 M 450; 27 C 77). It applies to *ex parte* decrees and compromise decrees *bona fide* obtained. 42 A 319; 29 M 26; 49 C 220; 45 MLJ 682; 49 MLJ 68; 1925 P 462; 1928 Oudh 146. The plea cannot be raised by a party who is himself guilty of laches. 42 IC 54. The property must not only be specifically and directly involved in the suit. 8 IC 1208; 1925 C 395; but it should also be

properly and particularly specified. See 49 MLJ 68.

A misdescription of the property in the pleadings will prevent the operation of the doctrine of *lis pendens*. But if in spite of the misdescription the property is sufficiently identified, the doctrine will apply and an alienee who is aware of the identity of the property will be affected by *lis pendens* in spite of the misdescription. A mere mistake in describing the situation of the property would not affect the doctrine of *lis pendens*. 39 Bom LR 224. As to what amounts to misdescription of property so as to render the doctrine inapplicable. see 49 MLJ 68—87 IC 213—1926 M 50. Whether a Court sale in execution of a money decree, after the passing of a preliminary decree and before final decree is affected by *lis pendens*, see 1925 Oudh 496. As to applicability of the doctrine of *lis pendens* to proceedings in execution of money decree, see 1929 A 846. Where during the pendency of a pre-emption suit the vendor's son brought an action for a declaration that the sale should not affect his right to succeed on the father's death and both the suits were decreed, and after the father's death the son sued the vendee to recover the property, held, that the title of the pre-emptor was not vitiated by the doctrine of *lis pendens* 32 PLR 283. See also 96 IC 450; 86 IC 126—1925 B 176. Where after executing a security bond in favour of the Court for due performance of a decree that may be passed against the defendant, the property given as security is alienated, the rule of *lis pendens* operates. 165 IC 453—1936 MWN 443—1936 M 589.

### 10. Execution Sale

"Transfer" includes compulsory sales at Court-auction. 9 IC 840 (C). The doctrine applies to sales in *invitum* to involuntary sales and execution sales. 28 IC 898—19 CWN 152; 18 IC 177—17 CWN 413; 155 IC 1082—1935 OWN 698; 45 MLJ 825; 43 M 696—39 MLJ 456; 1929 L 589; 80 IC 453—1924 B 451; 9 IC 772; 15 CLJ 137. So also the doctrine applied to a sale in execution pending a suit by a third party for a declaration of his lien on the property which had been hypothecated to him by the judgment-debtor. 34 PLR 468—1933 L 10; and to an execution sale pending a suit by the sons of the judgment-debtor for a declaration that the property was not liable to be attached. 141 IC 448—34 PLR 531—1933 L 171. Where, during the pendency of the proceedings for ejectment before the Revenue Officer the sale takes place, the principle of *lis pendens* will apply to it. It does not matter whether the sale was voluntary or not. 165 IC 833—1935 L 512. Where sale in execution of a decree obtained on foot of a puisne mortgage takes place during the pendency of the suit on the prior mortgage, the sale in the subsequent mortgagee's suit is affected by the rule of *lis pendens* so as to make the purchaser's right subject to the result of the prior mortgagee's suit. 1933 ALJ 729—1931 A 466 (FB). See also 41 PLR 629—1939 Lah 146.

Where the first mortgagee obtained a decree for sale on the foot of his mortgage without impleading the second mortgagee and after the decree but, before the sale, the second mortgagee sued and obtained a decree for sale and the question was raised as to the rights of the purchasers under the two sales,

held, that the sale under the first mortgage decree being pending the second mortgagee's suit, the first mortgagee purchaser's rights were subject to the rights obtained under the second mortgagee's decree and auction sale thereunder. 1930 M 570—59 MLJ 39. See also 1942 ALW 532. As to transfers made by order of Court, see 1926 P 94. A suit brought under Order XXI, rule 63, CPC, is a mere continuation of the proceedings in a claim petition and all alienations during the continuance of the proceedings originated by the claim petition till the disposal of the suit brought to set aside the order passed thereon are affected by the doctrine of *lis pendens*. 42 PLR 601—1940 Lah 497 See also 1937 Rang 473.

### 11. Revenue Sale

Whether section applies also to sales for non-payment of Government revenue, see 3 PLT 296—1 P 287; 10 CLJ 590—4 IC 731; 48 LW 927; 1922 P 542; 7 R 113—1929 R 175 (arrears of Municipal tax realised under City Municipal Act). See also 1926 M 1161—51 MLJ 475 (section applies to sales for arrears of abkari dues pending suit); 26 C 766; 15 C 546; 26 M 230; 1929 B 200 (also to sales under the order of a magistrate under section 88, CrPC). See also 1938 MWN 1243; (1940) 2 MLJ 791. Although the principle of *lis pendens* would apply to involuntary sales it cannot be made applicable to sales for the recovery of Government taxes and local rates, e.g., sales under the Bombay Land Revenue Code for recovery of arrears due under a toll contract 42 Bom LR 1123. See also 48 LW 927. Applicability of section to proceedings before Registrar of Cooperative Societies or

arbitrator on reference under Cooperative Societies Act. See 1942 Mad 24 (1941) 2 MLJ 588.

### 12. Pre-emption Suit

Doctrine of *lis pendens* applies also to pre-emption suits 88 IC 202=1925 A 502; 49 A 516—1927 A 336; 9 Luck 475—1934 O 303; 24 IC 32—17 OC 150; 89 IC 219—23 ALJ 615. But it does not affect the validity of the sale effected by the vendee during the pendency of the pre-emption suit to a person possessing a right of pre-emption equal to that of the pre-emptor. 11 L 258—1930 L 356 (FB). See also 32 PLR 283—1931 L 435. Persons claiming superior right to pre-empt, whether can claim notwithstanding *lis pendens* 27 ALJ 537—1929 A 440. Doctrine of *lis pendens* does not apply where pre-emptors had obtained decree before declaratory suit. 1929 L 589 See also 96 IC 450.

### 13. Suit for Dower

Section applies to a suit for dower by a Mohammedan wife in which a claim is made for charge of possession of the property. See 4 C 402; 19 A 504. But see 130 IC 113—1931 O. 63 where it was a mere money claim and the property left after transfer was ample. A transfer by a Mohammedan husband to his wife in discharge of his legal obligation to pay dower does not amount to a sale under section 52. 1 Luck 83—29 O.C. 108-1926 O. 186.

### 14. Administration Suit

The doctrine of *lis pendens* does not apply to administration suits. 1927 R 186; 5 R 266—103 IC 264; 2 R 4—79 IC 729; 1921

R 69; 27 LW 544—Where the creditor of the deceased was unaware of the will left by him and constituted by a residuary legatee under the will for a declaration of his rights, brought a suit against the widow of the deceased in possession of some of his properties and got a decree.

**Held:** the decree was binding on the residuary legatee and was not affected by section 52. 54 M 212—1930 M 930—60 MLJ 97. Where a person purchased property from one of the heirs pending an administration suit, held, that the doctrine of *lis pendens* applied. 7 R 734—1930 R 132.

### 15. Suit for Injunction

The doctrine of *lis pendens* applies to suits for injunction. The pendency of the suit under section 52, as it stands after the amendment of 1929, extends up to the complete satisfaction of the decree passed in the suit; and under the present law the injunction will go with the land and the decree can be executed against the legal representative and also against the transferee of the judgment-debtor. 1935 AMLJ 67.

### 16. Pauper Suit

A transfer made after the application for leave to sue in *forma pauperis* is filed but before it is registered as a suit is affected by the rule of *lis pendens*, when the immovable property transferred is specifically in issue in the suit. The fact that immovable property is not in issue at the stage of the enquiry into the pauperism does not make any difference so far as the applicability of the rule of *lis pendens* is concerned. 1936 M 853—71 MLJ 301—44 LW 427.

### 17. Mortgage Suits

A suit brought by a mortgagee cannot be affected by *lis pendens* because another mortgagee has already sued to enforce his own rights. Both have rights against the same owner and the title of each relates back to the date of his mortgage and is not created by the decree. *30 NLR 284—1934 N 36*. In mortgage suits the rule of *lis pendens* only applies to transfers by plaintiff or defendant of their respective interest after the suit including transfer by Courtsale in money decrees against either party. It does not apply to previously existing transfers including mortgages or legal proceedings to enforce such transfers by those entitled. The sale in pursuance of a mortgage decree, the mortgage having been executed before the institution of the suit, is not affected by the doctrine of *lis pendens*. *139 IC 309—63 MLJ 394*. *Lis pendens* in a mortgage suit continues until the mortgaged properties are sold. A purchase by an attaching decree-holder in execution of his money decree, after the filing of a suit on a mortgage of the same property and before the sale in execution of the mortgage decree is affected by *lis pendens* and confers no rights on the decree-holder of the decree in the mortgage suit. *18 Pat 155—1939 Pat 7*. When a mortgagor is adjudicated an insolvent during the pendency of a suit on his mortgage it cannot be said that his property is transferred or otherwise dealt with within the meaning of section 52. It cannot be said that the former owner of the property has transferred it or otherwise dealt with. His whole estate devolves on the receivers as it would devolve on his heir in case of death. *1939 NLJ 202=1939 Nag 128*. A purchaser at a sale held in execution of a

mortgage decree must be construed to have purchased both the rights of the mortgagee and the mortgagor. He is, therefore, not hit by the doctrine of *lis pendens* although the mortgage sale was held during the pendency of a suit for declaration of a charge for maintenance upon the mortgaged property, when the execution of the mortgage itself is prior to the institution of the suit. *43 CWN 666-1939 Cal 655*. See also *46 CWN 355*. A puisne mortgage cannot be created during the pendency of a mortgage suit. *43 B 240; 152 IC 1018—1935 O. 49*; though the mortgage is with the sanction of a different Court. *42 B 215*. Where, pending a suit brought by the first mortgagee, the subsequent mortgagee who was not till then impleaded in the suit assigned his interest to a third party and long after the assignment, the subsequent mortgagee was added as a party to the mortgage suit and a decree obtained against him.

**Held:** that the assignment was not affected by *lis pendens* and that the decree obtained against the subsequent mortgagee did not affect the rights of the assignee. *11 P 485*. See also *15 Pat 372*. The plaintiff purchased property in execution of his mortgage decree.

The defendant purchased a decree on a mortgage of another property of the mortgagor in favour of a Bank. Before bringing the property mortgaged to sale, the defendant obtained an order amending the decrees passed in the Bank's suit the result of which was that the property mortgaged to the plaintiff was added to that mortgaged to the Bank. The defendant purchased the property in auction-sale after the plaintiff obtained his decree and before the sale in his favour.



Plaintiff sued the defendant for possession. Held, that section 52 stood in the way of the defendant. 149 IC 187=1934 A 972. Lease granted by a mortgagor who is in possession as tenant under the first mortgagee, after the institution of a suit by the second mortgagee is affected by the doctrine of *lis pendens*. 33 Bom LR 1123=1931 B 539. When a decree for sale in a mortgage suit is passed on the Original Side of the High Court in respect of property which *lies outside* its local jurisdiction, such a decree does attract the operation of *lis pendens*. The fact that the decree is passed by consent of parties is immaterial. 58 C 598—1931 C 763. A mortgage created to discharge a mortgage on which a suit is pending is not void. 87 IC 264—1925 N 21. A private transfer of the mortgaged property by the mortgagee under a power of sale conferred by the deed is not affected by the doctrine of *lis pendens*. 45 M 774—43 MLJ 566. See also 15 Pat 372.

### 18. Lease

The doctrine applies to leases *pendente lite* 39 IC 182—21 CWN 88; 14 NLR 133. Section 52 does not apply to leases for agricultural purposes executed in the ordinary course of management of property. 1942 OWN (BR) 16—1942 AWR (Rev) 14 (2). Where future crops form the subject-matter of the suit, any transfer of such crops or the right to raise such crops during the litigation is affected by the principle of *lis pendens*. 1936 M 942—71 MLJ 638. It is wrong to think that leases for purposes of cultivation during the pendency of partition proceedings are bad under section 52. 1938 ALJ 2 Cal 181—1937 Cal 763. A permanent lease during the pendency of a mortgage suit is not in the ordinary course of management of zamindari property and hence is a nullity under section 52. 1939 OWN 325=1939 ALJ (Supp) 53. The mortgagee is not bound by lease created

by mortgagor during pendency of mortgage suit. 85 IC 522—29 CWN 94.

Where the mortgagor, after the institution of a suit on the mortgage, grants a lease of the property, taking premium or nazarana, the transfer is inoperative as against the purchaser in execution of the decree passed in the mortgage suit on two grounds: (1) the transfer is barred by section 52, (2) the taking of a premium of nazarana is prohibited by section 65. A (2) 19 NLJ 316. Where the lease is for adequate rent, it is not obnoxious to the provisions of section 52. The lessee holds the property subject to the rights of the mortgagee decree-holder. 1930 All 289. Where before the Court-sale the previous owner admitted certain trespassers into tenancy on basis of economic rent and it appeared that it was beneficial to the estate: Held, that the arrangement was not hit at by the doctrine of *lis pendens*. 18 RD 282—15 LR 343 (Rev). Both under section 52 of the Transfer of Property Act as well as according to the principle of *lis pendens*, it is necessary for an occupancy holder under a threat of ejection from it in execution proceedings for arrears of rent to obtain the permission of the Court before he could transfer the holding to a third person. A transfer without such permission is null and void and can convey no title to the vendee. 1942 OWN (BR) 227.

### 19. Suit for Specific Performance

The doctrine of *lis pendens* applies to suits for the specific performance of agreements to sell immovable properties. Court sales and private sales equally come under the doctrine of *lis pendens*. 34 CLJ 79—49 C 495; 31 Bom LR 345—1929 Bom 200; 26 Bom LR 418. As to the effect of inordinate delay in execution of a decree for specific performance, see 1931 N 138 under the old section.

### 20. Suit for Contribution

Where a person purchases another's property by private sale during the pendency of a contribution suit against such person in which a simple money decree without reference to any charge was passed, the purchase is not affected by the doctrine of *lis pendens* and is not subject to the decree passed in suit. 165 IC 567—1936 P 571.

Suits for maintenance by Hindu widow asking for a charge on her husband's property; MLJ 520; 99 IC 564. The doctrine of *lis pendens* applies to maintenance actions, and under the explanation to section 52, as amended in 1929, the *lis* continues after the decree and up to the sale in execution of the properties charged by the decree. A mortgage executed by the judgment-debtor after the decree and before the sale is therefore affected by *lis pendens*. The fact that in a suit for maintenance by a Hindu widow a charge is claimed over all the family properties which are specified in the plaint would not make any difference in the application of the doctrine, if the properties are sufficiently designated so as to make them directly and substantially the subject-matter of the litigation. 1935 M 867—69 MLJ 447. The doctrine of *lis pendens* embodied in section 52 applies to a sale made during the pendency of suit for maintenance by a Hindu widow in which property sold is sought to be made a charge for the widow's maintenance. Even though the property is sold for the debts of the widow's husband which she may be bound to pay under the Hindu law, the alienation made during the pendency of her suit for maintenance claiming a charge would be subject to the principle of *lis pendens*, and the fact that the debts are binding on the widow would not make section 52 inapplicable. 42 Bom LR 883—1940 B 395—ILR 1941 Bom 1; 1939 B 403. Where a Hindu widow has obtained a decree for

maintenance, the maintenance being made a charge on immovable properties, the holder of that decree is entitled to proceed against those properties though the properties or some of them have passed into other hands from the persons in whose hands they were at the time of the decree. The transfer is affected by *lis pendens*. The fact that the widow agreed with the transferee to release the properties in his hands from the charge for consideration does not prevent the doctrine from operating, until there is a release by her valid in law. The fact that part of the consideration for the release has been paid to the widow would not entitle the transferee to a release. The doctrine of part performance has no application to such a case, so as to override the rule of *lis pendens*. ILR (1938) Mad 829—48 LW 76—1938 M 357 (FB). See also 41 Bom LR 815—1939 B 403.

### 21. Interpleader Suit

Where a person purchases property from one of the parties after a decree creating a charge is passed in an inter-pleader suit the transfer is *pendente lite* 33 LW 391—1930 M 988—60 MLJ 79.

### 22. Partition Suit

The doctrine of *lis pendens* applies to the purchase of property during pendency of a suit for partition relating to such property where the suit is not proved to be collusive. 1934 L 457. An ordinary partition suit where there is no contest as to the fractional shares of the parties is not a suit in which the shares to the immovable property are directly and specifically in question. Section 52 does not apply to such a case. 195 IC 856—1941 C 436. See also 1938 ALJ (Supp) 20. Where a suit for partition is pending between a father and a son and the father between the preliminary decree and the final decree grants a patta of a part of

the suit property in favour of a third person, the patta cannot prevail against the decree in the suit by which property affected by patta is allotted to the son. 44 LW 861—1936 M 887. During the pendency of a partition suit by a Hindu minor against his father, a compromise was effected under which the father defendant executed a trust deed transferring all his rights in the family properties to trustees for the benefit of the minor plaintiff.

**Held:** that the arrangement did not come within the prohibition of section 52 and was not bad on the ground of *lis pendens*. 152 IC 715—36 Bom LR 738. The property should be directly and specifically involved in the *suit*. 27 C 77; 27 IC 940; but not otherwise; see 1928 N 885; 52 B 208; 1930 ALJ 1286—1931 A 45; 1938 MWN 1243; (1940) 2 MLJ 791.

### 23. Effect of Alienation *Pendente Lite*

Alienation *pendente lite* is not void, but is valid subject to the result of the pending suit. 110 IC 548—1928 M 635 55 MLJ 122—55 IA 256 (PC); 2 OLJ 291; 95 IC 213; 87 IC 995—1925 N 341; 165 IC 453—1936 M 589; ILR 1936 N 22—1936 N 125. If a property is transferred during the pendency of suit with respect to that property, the decree passed therein cannot be impeached by the transferee. 13 OC 50—5 IC 800. A Court can bind a transferee *pendente lite* by the result of litigation, even though his name be not on the record if the fact of the transfer is admitted before the Court during the course of the trial. 2 OLJ 291—30 IC 289.

### 24. Laches

When a person intermeddles with outstanding disputes, he does so at his peril, and if he chooses to stand by and let his right slide, he cannot afterwards claim to be given the benefit of his laches and placed in a better

position than his transferor to the detriment of others who have acquired rights in prepending proceedings. The law will not allow a man to say that he did not know his rights. 168 IC 1003—1937 Nag 161.

### 25. Revival of Suit

Where a suit dismissed for default is revived within a reasonable time, there would be no suspension of *lis pendens*. It will be considered to be a continuous proceeding. See 50 IC 727.

### 26. Pleadings

Plea of *lis pendens* can be entertained for the first time of appeal, if the matter can be decided solely upon evidence on record, 38 M 450.

### 27. Registration

Sale executed before but registered after suit is not affected by the doctrine of *lis pendens*. 1925 M 710—48 MLJ 496. See also 48 MLJ 399—1922 M 249; 83 IC 133—1925 M 359. But see 5 PLJ 714.

### 28. Explanation: Scope of

The explanation added to section 52 makes it manifest that *lis pendens* continues till the decree obtained in the suit is completely satisfied or discharged or the execution of the same becomes barred by limitation. Where a subsequent simple mortgagee purchased the mortgaged property in execution of a decree for sale obtained in respect of his mortgage, a later usufructuary mortgagee under a usufructuary mortgage executed prior to such auction sale who redeemed a simple mortgage earlier to that of the one on which the decree had been obtained, was held to be not entitled to claim to hold that earlier mortgage as a shield against the claim for possession by the auction-purchaser. He was also held not entitled to claim any reimbursement in respect of the earlier mortgage redeemed by him. 1940 A 141.

⊗ 153. Fraudulent transfer—(1) Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.

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

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

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

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

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

### Case Law

**Section 53**—Transfer of property—Voidable or void transaction—Entry in Revenue Record—Proof of such transaction—Plaintiff relied only on the mutation attested in his favour and produced no witness to prove the disputed transaction—Trial Court dismissed the suit but appellate Court allowed the appeal and decreed the suit—Validity—Even if mutation was incorporated in the Revenue Record, in case of dispute, person seeking benefit under the same, would not be absolved of his duty

1. Substituted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929) section 15, for the original section.

to prove the transaction—Appellate Court had grossly misread the evidence and had acted in oblivion of law while relying solely on the mutation itself to undo the findings recorded by trial Court—Where findings of the trial Court were based on proper reading of evidence on record, High Court reversed the findings of appellate Court—Judgment passed by appellate Court was set aside and that of the trial Court was restored in circumstances. *Muhammad Hayat vs Abdul Rahman 2001 MLD 1524.*

**Section 53**—Fraudulent transfer—General power of attorney issued after the death of principal—Principal in whose name general power of attorney was issued had died in the year 1958 while power of attorney was issued in the year 1970—Attorney who had made certain transactions of property in the name of principal—Validity—Power of attorney was patently illegal and based on fraud and forgery—No valid title could be transferred through a forged and fabricated deed as the whole transaction was based on fraud and misrepresentation. *Karim Dad vs Assistant Commissioner 1999 MLD 2371.*

**Section 53**—Transfer of property—voidable or void transaction—Criterion—Void transaction—Whether a legal necessity—Principles. *Abdul Majeed vs Muhammad Subhan 1999 SCMR 1245.*

**Sections 53 & 54**—Pre-emption and Sale under the Mohammedan Law, their prerequisites and principles vis-a-vis the principles embodied in the Transfer of Property Act—fully discussed—applicability of the law of registration and limitation—outlined.

The law of pre-emption under Mohammedan Law has been not superseded by the passing of the Transfer of Property Act, 1882. Under the Mohammedan Law, the sale is complete with the payment of price and delivery of possession. Under the Transfer of Property Act, completion of sale is dependent on the execution of the instrument of sale and if the value exceeds Taka 100 or upwards, on its registration. Delivery of possession is not that vital as in the case of sale under the Mohammedan Law. Mohammedan Law of pre-emption does not provide right of re-purchase from seller or buyer but it provides right of substitution, entitling pre-emptor to stand in the shoes of the buyer. The intention of the Legislature in passing the Transfer of Property Act, 1882 was not to alter directly or indirectly the Mohammedan Law of pre-emption.

Right of pre-emption under the Mohammedan Law is not dependent on registration of the deed of sale. One claiming pre-emption under the Mohammedan Law must make necessary demands on the completion of sale of the property as contemplated under the Mohammedan Law. Once the ceremonies are complete in accordance with Mohammedan Law treating the sale complete the question of limitation running from the date of dispossession of the plaintiff did not arise. If the plaintiff was in possession of the property sold on the date of sale then the filing of the suit could not be deferred beyond one year from the date of registration. *Shamsuddin Ahmed vs Asia Khatun & others 4 BSCR 202; 1 BCR (AD) 257; 33 DLR (AD) 39.*

### Abstract

1. Scope
2. Applicability
3. Subsequent transferee
4. Voidable
5. Intent to defraud
6. Defrauding creditors
7. Fraudulent preference
8. Presumption of fraud
9. Sham transaction
10. Partial consideration
11. Partition
12. Burden of proof
13. Protection of *bona fide* purchaser for value.

#### 1. Scope

The principle of the section applies to Hindus and Muhammadans, *11 B 676; 5 B 154; 10 B 616; 13 B 293*. It applies also to Punjab; *1 PLR 513; 74 PR 1912-14 IC 282; 1924 L 707; 29 PLR 114; 8 L 544-101 IC 172; 53 PR 1916-23 IC 474 (FB)*. It may also be applied to transfers by operation of law. *51 A 595-1929 A 238*. Section 53 may be extended to movables. *30 M 6; 46 M 478*. "Transfer" includes partition in joint family; *97 IC 70; 94 IC 282; 44 MLJ 513; 1926 N 355*; also surrender by widow of her widow's interest: *ILR 1936 N 69-1936 N 166*. See also *41 Bom LR 1007-1939 Bom 496*. Acquiescence in mutation comes within this section. *1938 OWN 297*. Mere preference of one creditor to another is not a transfer within the meaning of section 53. There is a distinction between transfers in bankruptcy which are bad, because they do in fact, prefer one creditor to another, and between transfers which fall under the provisions of section 53, which are bad because they are sham transactions intended to benefit the debtor and defeat or delay the creditors generally. *ILR (1939) Kar 136-178 IC 469-1938 Sind 215*. See also *42 PLR 119; 1939 Bom 508; 1938 Lah 156; 43 CWN 1131*.

Preference by a debtor shown to one of his creditors is, provided the transaction is

genuine and not tainted by fraud, no ground for avoidance merely because the other creditors happen to suffer. *38 PLR 269-1937 Lah 220*. See also *42 PLR 119; 1939 OWN 398-1939 Oudh 230*. The word 'transfer' used in section 53, is comprehensive enough to embrace all kinds of transfers, whether with or without consideration. The crucial question is one of determining the intention and motive underlying the transfer. The mere fact that a transfer is executed without consideration as in the case of a gift, will not necessarily lead to an interference that the transfer was made with intent to defeat or delay the creditors of the transferor. Each case must be examined on its own merits and it must be found upon a consideration of the entire circumstances surrounding the execution of the deed of transfer, whether it was brought about with a fraudulent intent or otherwise. Under the general law the burden of proving that a transfer is fraudulent under section 53; lies on the creditors. *1941 OWN 56-1941 Oudh 205*. Where a mortgagor effects a fraudulent lease of the mortgaged property the creditor who subsequently becomes purchaser of the property in execution of the mortgage decree can treat the lease as void under sections 52 and 53, and eject the lessee as a trespasser. *18 RD 368-15 LR 447 (Rev); 18 RD 367-15 LR 445 (Rev)*.

A fraudulent lease pending suit may be set aside. *1927 N 295*; but not a security given by the debtor on his property. *15 LR 445 (Rev)*; *1927 Nag 295*. The relinquishment of his rights by a co-parcener in favour of another co-parcener cannot be strictly said to be a transfer within the meaning of section 53. *1938 OWN 104-1938 Oudh 65*. Where a person who was borrowing money and squandering it by his extravagance and immoral habits was prevailed upon to execute a deed of relinquishment of his right in the family property in favour of his minor son with a view to protecting the property from the creditors, the relinquishment cannot be said to have been made for the purpose of defrauding any creditors. *1938 OWN 104-1938 Oudh 65*. See also *1936 Lah 222*. In determining the validity of a trust deed executed by a debtor for the benefit of his creditors, the deed must be considered as a whole. The deed is valid if it is substantially for the benefit of the creditors and not simply a device for retaining a benefit for the author of the trust at their expense. A trust the main object of which is the payment of the debts of the author of the trust, is substantially for the benefit of the creditors, and it is not hit by section 53 although there is a provision for the maintenance of the family of the author of the trust which is not inconsistent with the tenor and subject of the trust. *42 CWN 1131-1938 Cal 818*.

A suit to set aside a transfer under this section will fail if it is not brought by the plaintiffs in a representative capacity on behalf of themselves and other creditors of the defendants. *139 IC 820-34 Bom LR 862*.

See also *1933 N 169-29 NLR 246*. Even if a person is the sole and only creditor, he can, and has to, sue under section 53, in a representative capacity, on behalf of the general body of creditors. *1940 Rang LR 777-1941 Rang 76*. The statutory remedy provided by section 53, is merely supplementary to the common law right of a creditor in execution to obtain a declaration that a transfer by a decree-holder, by reason of its 'benami' character, never operated as a transfer at all and, accordingly left the property it purported to transfer available to him in execution. In such a case there is nothing to which section 53 can apply, for there is nothing which can be voidable. *ILR (1940) A 542-1940 ALJ 470-1940 All. 407*.

The primary object of an action under section 53 is to make the assets of the transferor available to the general body of creditors. If it would, then the action would in substance be an action under section 53 and would have to be instituted by, or on behalf of, all creditors. If it would not then the action cannot be regarded as one under that section. The proper test to apply when a question of this nature is raised is to see whether if the plaintiff succeeds in the action, the property claimed in the action would be available to the general body of creditors. Where there was no indication in the plaint or elsewhere that the suit was filed on behalf of or for the benefit of other creditors but, on the other hand, there was every indication in the averments of the plaint, that the plaintiff wanted only to vindicate his personal and individual rights, and not the rights of other creditors, it was held that the suit was not one under section 53. *1941 OWN 801-194 IC*

588-1941 *Oudh* 457. Where an objection is raised by the defendant that the plaintiff's suit is bad as not being brought on behalf of all creditors, the fact of existence of other creditors is a matter clearly within the special knowledge of the defendant and in such circumstances it is the duty of the defendant to produce proof of the existence of such creditors. 1942 *AMLJ* 3.

## 2. Applicability

A plaintiff to bring a case under section 53 should ask for the relief of a declaration that the transfer in question is void as regards him because he is defrauded, defeated or delayed. Where he does not sue for any such remedy, but on the contrary treats the transfer as a valid transfer, no issue under section 53 arises on the pleadings and it is not necessary for the Court to give a decision on the point. 1934 *A* 948. Though the purpose of section 53 is to protect all creditors, the fact that there is only one creditor and not more, is no reason to exclude the application of the section if it is clear that the transfer is fraudulent and made for the purpose of defeating or delaying him. But the test to be applied to cases under this section is whether the purpose of the transfer is to prefer one creditor to the other, or whether the purpose is to prefer the transferor himself. Section 53 of the Act is not intended to apply to a transferor where one creditor is preferred to another. It is intended to apply to transfers where the transferor prefers himself to his creditors where the transaction is a sham and bogus transaction. *ILR (1939) Kar* 269-1939 *Sind* 97. The principles of section 53 are in accordance with the general principles of justice, equity and good conscience and, as

such, should be taken as a guide by the Courts even in cases such as when a party bases his title on a transfer by a decree of the Court where the provisions of section 53 do not apply. 27 *ALJ* 358-1929 *A* 238-51 *A* 596. See also 44 *MLJ* 513-1923 *M* 577. The principle underlying 13 *Eliz* R5 and section 53, Transfer of Property Act, ought to be applied in India to transactions relating to the transfer of movable property upon the ground that these principles are in accordance with justice, equity and good conscience. 9 *R* 614-135 *IC* 641.

The mere fact that the judgment debtor has other property to meet the decree does not prevent the application of section 53. 1929 *A* 451. Section 53 does not apply where a transfer is effected to prejudice the rights of pre-emption of a co-sharer of the specific plots transferred. 47 *A* 424-86 *IC* 741. Considerations affecting section 53 do not apply to section 36, *Pro Ins Act*. 2 *Pat LJ* 101-38 *IC* 369. Nothing in section 53 bars the right of any transferee in good faith and for consideration. Consequently, where a transfer has been made for consideration, the fact that its effect is to delay or defeat a creditor is immaterial. 105 *IC* 356-1928 *P* 199. A *wakf* is a transfer and if executed as a device for defeating creditors it is governed by section 53 which does not in any way infringe any rule of Mohammedan Law. 27 *ALJ* 460-1929 *A* 277; 1930 *ALJ* 616-1930 *A* 462. Where a Mohammedan husband transferred property in lieu of an actual dower debt, held, that the transfer could not be impeached under this section. 1934 *L* 705; 12 *P* 297-14 *Pat LT* 611-1933 *P* 281; 1936 *ALJ* 1027-1936 *A* 600; 1936 *ALJ* 966-1936 *A* 803. But see 1936 *Pesh* 216 the principle of the section will apply in case



of voluntary remissions of debts made with a view to defeating the creditors. 27 IC 269 (M). A transfer by a debtor, for a genuine debt, of a part only of his property is not voidable under section 53. 2 LW 64-26 IC 834. There is no distinction between fraudulent alienation and fraudulent acquisition by a dishonest debtor, as each consists of a dishonest dealing with property. 1914 MWN 595-25 IC 123. Section 53 does not apply to the purchase of property in the name of another as benamidar, as there is no transfer of property. 60 B 226-38 Bom LR 251.

Where the plaint in a suit clearly states that the sale deed in question was fictitious and without consideration that it was never acted upon or, in other words, that the sale was a sham and bogus transaction and that the property purporting to be conveyed by the sale deed was never conveyed at all and that it remained the property of the vendor such a suit is not affected by section 53 and the transaction can be avoided without a suit under the section. ILR (1940) All 542-1940 ALJ 470-1940 All 407. Section 53 does not apply to cases simply where one creditor is preferred to another, and the provisions of Para 2 sub-section (1) of section 53 do not come into operation until the provisions of para 1 of that sub-section have been fulfilled. ILR (1939) Kar 136-178 IC 469-1938 Sind 215. See also 1937 Rang 531. Section 53 could have no application to a case where the deed of transfer in question is alleged to be fictitious and not that it is voidable on the ground of its execution with a fraudulent intention to defeat creditors. 1940 CWN 1057 See also 200 IC 577-1941 Mad 690. There is a distinction between a fictitious and

fraudulent transfer. In the former case there is really no transfer at all and in the latter there is a transfer but, as it is the result of a conspiracy between the transferor and the transferee to defeat the claim of others, it can be avoided by those others if they wish to avoid it. 1942 ALJ 399. The principle contained in section 53, applies to transfers of movable property also. A transfer is wholly void if part of the consideration was non-existent and the object of it was to defraud the creditors. ILR (1940) Nag 316-1938 Nag 249.

### 3. Subsequent Transferee

Transfer means voluntary transfer: An auction-purchaser at an execution sale is not entitled to impeach a previous transfer under the section. 53 IC 105; 39 B 507. But see 33 M 205-19 MLJ 741; 20 LW 538-1924 M 779; 6 PLJ 48. But the principle of the section may apply in such a case. 44 MLJ 513. A bona fide transferee even from a fraudulent transferee, is protected under section 53. 1940 Lah 198.

### 4. Voidable

The section makes a transfer only voidable. 23 CLJ 570; 28 B 639; 71 IC 409; 52 B 208-1928 B 65; 26 ALJ 524-1928 A 234; and not void: 1923 N 195; 1936 AMLJ 118. See also ILR 1936 N 183-1936 N 207. A deed of gift executed in order to defeat the donor's creditors is not necessarily void under section 53, unless it is meant by the executant to be fictitious. It is only voidable at the option of the creditors; and if the latter do not choose to avoid it, it is a perfectly valid instrument as between the parties to it. 155 IC 829-1935 RD 259. A transfer which is merely colourable and made with the intention of

defrauding creditors can be set aside by the transferor at any time before the fraud has actually taken place; but not where the fraudulent purpose has been carried out. 135 IC 244; 139 IC 92-9 OWN 275. Thus if the debt due to the creditor is paid by the transferee, he cannot complain that he has been defeated or defrauded by the transfer. 71 IC 409-1923 N 195. A creditor who chooses to affirm or accept the transaction cannot subsequently repudiate the same. 1928 A 234(235)-26 ALJ 524. Where without any special pressure upon judgment-debtor by creditor, he transferred the whole of his property to that creditor without receiving any cash consideration, and where all the consideration alleged was said to be old debts and money paid or promised to be paid to other creditors, some of which remained unpaid until date of inquiry, Held, that the transfer must be regarded *prima facie* as voidable, 1933 R 191. Where a debtor yielding to the immediate pressure exercised by one of the creditors by reasons of a suit brought by him enters into a *bona fide* compromise with him, the mere fact that by the compromise he surrenders a portion of his property to the creditor does not show that he commits any fraud or has any intention of defrauding other creditors. 42 PLR 385.

### 5. Intent to Defraud

**25 B 202**—A transfer, when executable decrees against the transferor were existing, will not by itself support an inference of an intent to defraud: 15 IC 509; 19 ALJ 87; 1926 S. 109; 126 IC 604-1930 M 665; nor the fact that the transferor and the transferee were related to each other. 3 R 71-89 IC 436. Wakf executed for the benefit of the

minor sons, provision being made for all existing debts is valid. 129 IC 333-1931 O 134. An intention to defeat a particular creditor and not creditors generally is not fraud. 25 B 202; 21 OC 97; 5 Bom LR 142; 33 IC 695; 5 Bur LJ 112-8 IC 1205. Under section 53, in addition to consideration, good faith is an essential condition of the validity of the transfer. But it is not sufficient to show want of good faith on the part of the transferor alone: the knowledge and intention of the transferee are the determining factors. Again a fraudulent preference can be attacked under the Bankruptcy Law but not under section 53 Transfer of Property Act. So long as the question does not arise under the law of Bankruptcy, a transfer made in favour of one or more creditors cannot be impeached, for what section 53 prohibits is not an instrument which prefers one creditor to another, but an instrument which removes property from the debtors for the benefit of the debtor. So long therefore as a transfer is in satisfaction of genuine debts and without reservation of any benefit to the debtor, no ground arises for impeaching it under section 53. 46 LW 927-(1937) 2 MLJ 865. Suit by creditor to set aside transfer by debtor made prior to adjudication in insolvency—Sanction of Insolvency Court—Necessity. See ILR (1941) 2 LMJ 684 (FB).

The subsequent and the prior conduct as well as the contemporaneous conduct of the transferor are all relevant and must be considered in order to decide what his motive was in transferring the property. 1938 Lah 136-180 IC 830. The mere fact that debts are due from transferor is not alone

sufficient to establish a fraudulent intention; on the other hand, it must be proved that at the time of the transfer, motive for the transaction was to defeat or delay the creditors. There can however ordinarily be no direct evidence of the existence of a fraudulent intention. This can be inferred from circumstances proved in the case. *180 IC 830-1938 Lah 136*. When the consideration for the transfer was intended to pay off some only of transferor's genuine debts, the transfer cannot be impeached. *34 C 999* (confirmed by Privy Council in *43 C 521*). See also *40 MLJ 125*. Transfer in favour of a preferred creditor is not voidable. *44 C 662 (PC)*; *17 MLJ 11, 126 IC 604-1930 M 665*; *7 OWN 123-1930 O 93*; *1928 MWN 617-1928 M 860*; *4 NLJ 149*; *3 Bur LT 112-8 IC 1205*; *5 OWN 1077-114 IC 504* (Transfer to wife in lieu of her dower debt. See also *1936 ALJ 1027-1936 All 600*); But see *1928 M 793*. In cases of conveyances from debtor to creditor the validity of such conveyance depends upon consideration and good faith both co-existing. If intention to defraud creditors is shared by a transferee, there is no good faith and the transfer will not stand though full consideration has passed. *12 L 194-1930 L 1027*. See also *13 OC 265-7 IC 614*. If the transferor is, in fact, indebted to the transferee the mere fact of his relationship with former or the circumstances that the transfer had the effect of giving one creditor preference over the others will not render the transaction fraudulent. *12 L 194-1930 L 1027; 167 IC 599-1937 R 51*.

Even a time-barred debt can be a valid consideration for a transfer *78 IC 106-1925 O 267*. See also *1930 S. 284*. But see *16 B 1*. Where a substantial portion of the transfer is

fraudulent, the whole transfer must be treated as fraudulent. *4 L 211-1923 L 423*. See also *42 PLR 613*. A transfer made to defeat an anticipated execution is not one made with intent to defraud, delay or defeat creditors within section 53. *60 IC 725-7 O LJ 699*. See also *52 IC 873 (P)*. The mere fact that a debtor retains some interest in the property sold by him would not in all cases make the transaction fraudulent as a matter of law *21 CLJ 302-9 IC 623*. Where a judgment debtor executes a deed of gift, which is merely a colourable transaction never intended to be acted upon, and continues, even after the deed, to be in possession of the property dealt with under the gift deed, and it is found that the transaction is effected in order to put obstacles in the way of the decree-holders or to defraud them, it must be held that the transfer is void against the decree-holder and he can therefore proceed to attach and sell the property. *194 IC 45-1941 Pat 394*. Converting immovable property into cash is the most obvious and effective method of defeating and delaying creditors. *46 MLJ 125-80 IC 147*. See also *126 IC 604-1930 M 665*. Where there is nothing to show that a transferor intended a sale of his immovable property as a cloak or device for his own protection and where the *bona fides* of the transfer cannot be doubted, the transfer cannot be impeached as fraudulent. *21 CLJ 441-29 IC 734*. See also *126 IC 604-1930 M 665*. A certain property was attached in execution of a money decree. No sale was effected for want of bidders and the case was closed. Subsequent to this but before a fresh attachment by decree-holder, the property was mortgaged. Held, that the previous attachment had ceased to exist, that the mortgage was

valid and that mere knowledge of the mortgagee about the long pending execution against mortgagor did not make the transfer *bona fide* as one invalid. 1933 R 199-146 IC 954. Inclusion of a debt in a document of transfer which would otherwise not be within section 53, is *prima facie* evidence of an intention to defeat and delay the creditors, and it lies upon the party who wishes to take advantage of the document to show that there was no such intention. 54 LW 76-1941 Mad 690-(1941) 2 MLJ 99. As to proof of fraud, see 8 OWN 593.

Creditor does not necessarily mean a judgment-creditor. It means any creditor. 27 B 146; 73 IC 719; 96 IC 356-1926 N 494. See also 30 MLJ 565-34 IC 778; 1923 L 478-5 LLJ 435. Section 53 applies even though a single creditor may have been defrauded and hindered in realising his debt. 2 Pat LJ 546-40 IC 685. But see also 3 Bur LT 112-8 IC 1205, *infra*. Where there is only one creditor, and the debtor transfers all his property to a stranger with a view to defeating him, the transfer could be set aside if the transferee had notice of the circumstances, and of the debtor's evil design. 126 IC 604-1930 M 665. A landlord is a creditor in respect of rents due to him from tenant. 26 C 536. A Hindu wife with a claim for past maintenance against her husband is a creditor. 101 IC 610-1927 M 657. See also 109 IC 272-1928 A 476. But see 8 OWN 1291; A Mohammedan wife to whom dower debt is due is a creditor 5 OWN 1077-114 IC 504; 167 IC 48-1937 N 1.

A person whose claim is barred by limitation ceases to be a creditor. 16 B 1. But see 1925 O 267 (contra). Even if a debt is time-barred, that may be good consideration for the purposes of section 53, though it may

also be some evidence of want of good faith. 174 IC 143-1937 Rang 471. A transfer on account of natural love and affection made *bona fide*, cannot be impeached. 26 B 577 (585). But a gift of the entire property to wife and children by a donor declared insolvent a few years after is not a transfer in good faith for valuable consideration; but he is personally liable to maintain them does not alter the question 7 L 12-93 IC 1313-1927 L 420. In a suit under section 53, the onus of proving that the gift by the husband to his wife is fraudulent and fictitious, having been effected to defraud the donor's creditors, lies upon the plaintiff. Where unimpeachable evidence is available and is not produced by him and no reason is shown for this, he fails to discharge the onus on him. 192 IC 96-1941 Oudh. 178. The presumption under the Act before the amendment of 1929 does not find a place under the amended section 53. It is only when there are creditors in existence at the time of the gratuitous transfer or when a transfer is made just before a man embarks on some very hazardous speculation that it can be presumed that the gift is made with intent to put his property out of the reach of his creditors. 1930 PC 255-60 MLJ 341 (PC); 1933 R 252; 139 IC 120-34 Bom LR 863. Where a donor had no debts on the date of the gift, there is no presumption of intent to defraud future creditors and it is for the latter to prove such an intent. 12 ALJ 1198-25 IC 183. See also 19 ALJ 299. It is doubtful whether a future creditor can avoid a void but real transfer under this section. 38 M 1071-26 MLJ 612. As to subsequent creditors, see also 5 Bom LR 255; 33 M 205; 19 ALJ 299 *on the point*.

### 6. Defrauding Creditors

"Defeating or delaying creditors"—Meaning of. *1928 MWN 617-1928 M 860; 113 IC 129*. It is not fraudulent to shield some particular property from being proceeded against by creditors so long as there are other properties from which the just dues of the creditors may be realised. *94 IC 33-1926 C 850*. See also *115 IC 330-1929 S. 94; 1934 R 308*. See also *115 IC 330-1929 S. 94; 1934 R 308*. A transfer which can be impeached under section 53, is one in which the property is removed from the creditors for the benefit of the debtor. If the debtor does not retain any benefit for himself and if it is found that the transfer was for adequate consideration and the entire consideration was expended in satisfaction of genuine debts of debtor without reservation of any benefit to the debtor and in favour of one creditor, then the transfer cannot be regarded as fraudulent within the meaning of section 53. *ILR (1937) Nag 452-1937 Nag 400*. Fraudulent transfer—Inference from circumstances. See *1938 Lah 136; 40 PLR 909-1938 Lah 564; 1939 OWN 136*. The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another, but an instrument which removes property from the creditors to the benefit of the debtor. The debtor must not retain any benefit for himself. He may pay one creditor and leave another unpaid. *179 IC 267-1938 Lah 156*. It is open to a debtor to convey his property to one of two creditors to whom he is indebted in preference to the other though it may be effected to avoid the execution of his decree by the other. He may prefer any creditor he chooses. But in doing so he must not reserve any benefit for himself. The transfer of the

property by a debtor to one creditor for a price far in excess of the debt due to him and the retention of the excess amount for his own benefit indicate an intention to defeat or delay the other creditors, especially when he has no other property left. Such a transfer is wholly void and cannot be upheld even to the extent of the amount actually due to transferee creditor. *41 Bom LR 1140-1939 Bom 508*. A mere preference of one creditor to another is not fraudulent under this section. A creditor is a transferee in good faith if the transfer is made in satisfaction of his debt, even though he is aware that proceedings had been taken by another creditor for the recovery of his debt, if his primary object is to protect himself, and not to defeat other creditors. *174 IC 143-1937 Rang 471*.

**Whether Suit by Creditor is Necessary**—Under this section avoidance by creditor need not necessarily be by suit, it can be expressed by clear conduct. See *12 LW 718-61 IC 580*. Where a creditor attaches in execution the property transferred, that is a sufficient exercise of the option to avoid the transaction. *3 Pat LT 613-1922 P 572*. The methods of avoidance are not restricted to proceedings against the property through attachment and sale for the purpose of recovering the debt. Section does not preclude recovery by other means. *12 LW 718-61 IC 580*. See also *3 Pat LT 613-68 IC 369*. The creditor can in defence to a suit by the transferee impeach the transfer as fraudulent. *43 M 760-39 MLJ 350 (FB); 50 IC 959; 16 CWN 717; 19 ALJ 299; 23 CWN 817 (PC); 50 IC 264*.

**Effect of Fraud inter partes**—As to what constitutes fraud, see *94 IC 33-1926 C 850*.

Once it is established that the parties are in *pari delicto*, the Courts will not assist an illegal transaction in any respect, that is the person who asks the Court to do something will fail 46 A 622-1924 A 668(1). See also 32 MLJ 484; 33 C 967; 23 B 406; 18 M 378; 27 C 231; 28 C 370; 31 M 97; 31 B 405; ILR 1936 N 183-1936 N 207. Where the owner of property transfers it to another for an illegal purpose and such purpose is carried into execution, neither the vendor nor his heirs can succeed in a suit to eject the vendee in possession without proving that the purpose never got beyond the stage of intention. 78 IC 260-1924 N 200. See also 1923 A 411-71 IC 441; 27 OC 175=82 IC 33 (33 C 967, *Foll*); 78 IC 359-1924 O 391. See also 65 IC 322-11 LBR 89; 65 IC 459-11 LBR 83. When the contemplated fraud is not effected, a party to the fraudulent transaction does not lose his right to be relieved from the effect of such a transaction. 19 CWN 1151-29 IC 699. See also 33 MLJ 696-45 IC 333; 13 MLT 227-17 IC 323; 18 CLJ 616-22 IC 86; 1923 A 164; 23 B 406; 28 C 370; 36 CLJ 491-1923 C 90; 24 LW 500-1926 M 1196; 27 OC 175-1925 O 120; 11 CLJ 99-1924 O 321; 36 CLJ 82-1928 C 154; 21 NLR 21-82 IC 489; 94 IC 33; 1926 C 850; 18 CWN 1331-27 IC 230; 3 LW 111-32 IC 810; 1 LW 169-23620; 52 IC 866(P) Fraud accomplished—Fraudulent transfer to defraud creditor—Transferee continuing in possession after transfer—Dispossession by transferee under fraudulent deed—Transferor, if entitled to restoration of possession 1936 R 405.

### 7. Fraudulent Preference

Though a sale in favour of creditor by which he was preferred and another creditor

lost his money is not invalid under this section, yet where only a part of the consideration was the debt due to the creditor and the rest of it is fictitious, the whole transaction is void. 34 LW 749-1932 M 182 (30 M 6 and 37 M 227, *Ref*). See also 1939 M 745—(1939) 2 MLJ 362. But if the vendee creditor has paid off four mortgages, two in his own favour and two in favour of another, the effect of setting aside the sale is that he holds the position of a mortgagee under those four deeds of mortgage. 135 IC 582; 1939 2 MLJ 362. A debt advanced to the mortgagor at the time of the execution of the deed cannot be considered as a part of his pre-existing liability to the mortgagee and no preference could be claimed for them over the debts of the other creditors. 1935 L 404.

Where there is no question of bankruptcy, the validity of a transfer is not affected by the circumstances that one creditor was preferred to the detriment of another. 136 IC 237-27 NLR 382; 1937 N 9. See also 40 PLR 1000-1938 Lah 73; 1939 OWN 136-1939 OA 306. Section 53 is directed against a transfer made in order to defeat or delay creditors generally and not one the effect of which is to give preference to one over other creditors. 168 IC 695-39 PLR 499 (1); 38 PLR 269. Where the transfer is in favour of a creditor for a pre-existing debt, the knowledge of the creditor that the transfer is likely to defeat or delay the other creditors does not make the transfer in his favour voidable under section 53. 35 PLR 163-1934 L 161. See also 1935 L 404.

A transfer by a Mohammedan in favour of his wife in satisfaction of her prompt dower debt cannot be avoided under section 53 on the mere ground that the intention was

to give preference to the wife over the other creditors, in the absence of proof that the transaction was a wholly bogus and colourable one. Even if the wife was aware that the transfer to her was tantamount to giving her such preference, the transaction itself would neither be illegal nor void *ab initio*. 1937 A 39-ILR 1937 A 153; 1937 OWN 1176-1938 Oudh 44; 1936 All 600; 1936 Pesh 216; 1917 Nag 1; 1936 All 803; Remedy of aggrieved party. 1937 All 39. See also 167 IC 48-1937 N 1.

Who can sue—A fictitious sale in fraud of creditors can be set aside by creditors only; 111 IC 251-1928 L 9. See also 1928 A 476, *i.e.*, subsequent creditors as well as those existing at the time it was made. 8 OWN 593; See also 6 Luck 397-1931 O 134; 5 Bom LR 225; 33 M 205; 19 ALJ 299; 38 M 1071. But see 121 IC 34-1930 N 51(2) holding that a person who is not a creditor at the date of the transfer cannot impeach it. One creditor alone can sue to set aside transfer under this section. But he must sue in a representative capacity and the benefit will inure in favour of all creditors. 27 B 146; 44 C 999; 30 MLJ 565; 7 Bur LT 257; 22 LW 592-1926 M 66; 12 L 262. But see also 42 M 143-36 MLJ 231. The point is made clear by the amendment of the section.

Delay or laches of one creditor does not deprive the other creditors of their rights. See 22 LW 592-1926 M 66; 12 L 262-1931 L 70(2). Notwithstanding his remedy under section 53 of the Pro Ins Act, Official Receiver can also sue under this section. 95 IC 300(1), 1926 M 826; 23 LW 643. See also 115 IC 330-1929 Sind 94; 1923 L 478. A secured creditor whose claim cannot be

defeated by a transfer cannot sue to set it aside. 19 C 336. A simple mortgagee who has obtained a decree for sale, whose right to a personal decree is not barred is a "creditor" within section 53 and can bring a suit to set aside an alienation in fraud of creditors. 2 LW 479-29 IC 62. It is only a defeated or delayed creditor or a subsequent transferee who has the option to impeach a transfer under section 53. A mere auction-purchaser of the property who is not the decree-holder himself is not a creditor, and he cannot impeach a transfer by the judgment-debtor after decree and before the sale as being fraudulent under section 53. But a decree-holder who becomes the auction-purchaser of the same property which is privately transferred after the decree and before the sale in execution is entitled to impeach the transfer under section 53. The decree-holder does not lose his right to the provision of section 53 by himself becoming the auction purchaser and if the property purchased by him at the auction had been transferred by the judgment-debtor with intent to defeat or delay him the transfer is voidable at his option. He may plead section 53 as a personal defence to a suit against him by the private purchaser, and it is not necessary for him to file a representative suit to avoid the transfer. 41 Bom LR 1104-1939 Bom 503. See also 43 LW 635-1936 Mad 408. Sections 2 (d) and 5 of the Transfer of Property Act prevent section 53 operating in the case of a *transfer under an order or decree of Court*. But where a person obtains a transfer of property under an order of Court as the result of a gross fraud by collusively instituting a suit and obtaining a decree and purchasing the property in execution thereof, the Court has power to remedy the injustice

by applying the principle of section 53 and to set aside the sale. *55 LW 422-(1942) MLJ 213.*

**Suit by Creditor under Order XXI, rule 63 CPC**—Rules of procedure laid down in section 53 do not apply to the North West Frontier Province and a suit under Order XXI, rule 63, CPC, by a decree-holder for declaration that the judgment-debtor has interest in certain property, is not bad, although not instituted for the benefit of all the creditors as required by section 53. *164 IC 153-1936 Pesh 158.* A suit under Order XXI, rule 63 instituted by a decree-holder to set aside a claim order on the ground that the sale-deed executed by the judgment-debtor to the claimant was collusive and benami and was created in order to defraud the plaintiff is not and cannot be treated as a suit under section 53, Transfer of Property Act. *62 CLJ 548-1936 C 783.* See also *1936 Pat 15.* A plaintiff who institutes a suit which is of the nature contemplated by section 53 must comply with the provisions of that section, that is, he must sue on behalf of all the creditors, not for himself alone. The fact that he is a decree-holder against whom an adverse order has been made in claim proceedings under Order XXI, rule 63, does not relieve him of the necessity for obtaining leave of the Court under Order 1, rule 8, CPC, to sue on behalf of all the creditors of the judgment-debtor. There is nothing in section 53, Transfer of Property Act which is incompatible with Order XXI, rule 63.

A suit under Order XXI, rule 63 for a declaration that the transaction relied on by the successful claimant is a bogus one and to have the transaction set aside on the footing that it is a fraud on the creditors falls under

section 53, Transfer of Property Act, and must fail, if leave of the Court is not obtained for suing on behalf of all the creditors. *ILR (1940) Mad 803-1940 Mad 789-(1940)1 MLJ 782.* See also *17 Pt 588.* When suit is brought under the provisions of Order XXI, rule 63 CPC, by an attaching creditor to establish his right to attach and bring to sale certain property, and in order to succeed *it is necessary to avoid a transfer of the property* on the ground that the transfer has been made with intent to defeat or delay the creditors of the transferor, the suit must be in the form of a representative suit on behalf of or for the benefit of all the creditors of the transferor as provided for in section 53 Transfer of Property Act and the provisions of Order 1, rule 8 will be applicable to such a suit. *39 Bom LR 917; 40 Bom LR 371; 1936 Cal 783-62 CLJ 548.* The valuation for jurisdiction of such suit must be the value of the properties transferred and not the amount of the decree sought to be executed. Again, this valuation cannot be the sum total of debts due to all the existing creditors, for the term 'creditor' includes not only creditors at the time of the assignment, but also those who subsequently become creditors. *1934 Rang 302; 136 Cal 783.*

But when the suit of the attaching creditor *does not involve the avoidance of any transfer of property*, the Act has application and the suit need not be brought as a representative suit, and its valuation for jurisdiction would be the amount of the decree sought to be executed or the value of the property whichever is less. *1934 Rang 302; 152 IC 506-1934 R 200.* A creditor had obtained a decree against the debtor but had not attached any of his property. The debtor



alienated certain property during the pendency of the suit. The creditor brought a suit for declaration that the alienations were void. The suit was not styled as a representative suit.

**Held:** there was no cause of action and the suit did not lie because it was not covered either by section 53, Transfer of Property Act or Order XXI, rule 63 CPC, or by section 42, Specific Relief Act. *160 IC 444-1936 Pesh 15*. See also *17 Pat 588; 1937 OWN 1169*. Where the judgment-debtor transfers his property in trust to the trustee who brings a suit for a declaration that property which is the subject of the charge by a consent decree because it is trust property and not the property of the judgment-debtor, it is open to the attaching creditor to plead in defence that the transfer was in fraud of creditors. *ILR (1939) Kar 269-1939 Sind 97*. Objection as to frame of suit cannot be taken in appeal for the first time. *1934 R 308-1935 R 275; 1936 AMLJ 104*.

### 8. Presumption of Fraud

Gratuitous transfers are not always fraudulent. *1900 AC 323* See also *40 PLR 462-1937 Lah 847*. (Gift to daughter). The mere fact of indebtedness of a person is not sufficient to raise a presumption that a gift made by him was made with the intention of defrauding the creditors. *39 PLR 490*. And if the transferor has, subsequent to his transfer, satisfied some of his creditors it shows that the transferor was in a position to satisfy all creditors. *74 PR 1912-14 IC 232*. See *24 CWN 145; 1923 N 334; 8 L 544-1927 L 420; 1927 R 331; 109 IC 272 (2)—1928 A. 476(2); 20 M 465; 3 LW 287-34 IC 744; 27 B 322; 9 IC 623-43 IC 256; 25 B 202; 23 CWN 817 (PC); 47 IC 932 (C); 10 IC 647; 104 IC 557-*

*6 Bur LJ 145; 1927 A 731; 102 IC 92; 7 Bom LR 267* (as to the circumstances under which the Court may presume fraud under the 2nd paragraph of the old section). Now that the paragraph is omitted, the Court has to consider all the circumstances of the case before coming to the conclusion as to fraud; ordinarily there can be no direct evidence to prove the fictitious and collusive nature of a transaction and this can be established and inferred mainly by circumstantial evidence. *123 IC 573-1930 L 12; 164 IC 933; 1937 O 349; See also 1938 Oudh 330; 1937 Pat 609*.

In looking at a transaction for purposes of section 53 one must look to the intention of the transfer and not to the motive. Where the motive of the transferor was to safeguard the maintenance of his family, but the intention was clearly to put the properties out of the reach of creditors, the transfer is one intended to defeat or delay creditors *42 CWN 34*. Where a wife, in order to safeguard herself against the future improvidence of her husband, who is a spend-thrift, secures a gift of property in her favour as a provision for her future maintenance and the donor is not shown to be in debt or in embarrassed circumstances at the time of the gift, such a transaction cannot be held to be a transfer made with intent to defeat or delay the creditors of the transferor. *162 IC 922-1936 L 222* See also *1938 Oudh 65*.

The husband executed a *hiba bil ewaz* in favour of his wife in lieu of dower. The deed conveyed all properties movable and immovable including the house-hold effects. The couple had been married for over 15 years and no explanation was forthcoming as to why the donor thought of making the gift just at the time when a suit had been instituted against him by one of the creditors.

It was also found that no physical possession of the property had been transferred to the donee.

**Held:** that the deed was not a genuine transaction that it was made with the object of defrauding creditors and was invalid under section 53. 8 OWN 794-134 IC 415. See also 1936 ALJ 966-1936 All 803. The judgment-debtors made a deed of gift of a field as *wahiwatdars* of a Devasthanam. The gift deed was actually registered after the field had been attached. There was no evidence to show that there was any dedication to the Devasthanam. The judgment-debtors described the field in gift deed as "our land".

**Held:** that the gift was not *bona fide* but was made to delay or defeat the claims of the creditors. Hence the gift must be deemed as voidable. ILR 1936 N 69-165 IC 944-1936 N 166. Where the donor was indebted to several persons at the time of the alleged gift and it is proved that thereafter he dealt with the property as if it were his own and that within five months of the gift he effected an equitable mortgage on the property by depositing its title deeds, the only inference to be drawn from these circumstances is that either this transaction was wholly fictitious or that it was intended to defeat and delay creditors. 39 PLR 660-1937 Lah 819. Each case under section 53 must be decided on its own facts. Where a gift is alleged to have been made orally some time after a decree had been passed against the donor, that circumstance by itself is sufficient to raise a presumption that the object of the gift was to defeat or at least to delay the creditors. 1938 OWN 922-1938 Oudh 230. Grossly inadequate consideration may be evidence of fraud 5 Bom LR 213; 44 B 767; 44 A 748; but see 1924 N 124. In the case of a mortgage,

consideration cannot be said to be inadequate. 12 Lah LJ 107-1931 L 213.

### 9. Sham Transaction

Section 53 has no application to a sham sale-deed not intended to pass title though intended to defeat creditors. Such a deed does not require to be set aside. It is void and of no effect. 11 LW 136-55 IC 766; 30 MLJ 565-34 IC 778. See also 99 IC 443(1); 55 IA 256-55 MLJ 122-1928 PC 139 (PC); 1927 M 1104; 99 IC 443. But see also; 1925 B 287-27 Bom LR 205; 56 IC 873.

### 10. Partial Consideration

Where the transfer is fraudulent and is effected with a *malafide* intent the mere fact that a portion of the consideration is actually paid will not clothe the transaction with reality and take it out of the operation of section 53. 43 IC 956 (M). See also 1930 MWN 1145; 1939 Mad 743-(1939)2 MLJ 362; 40 PLR 613; 1923 Lah 423. Where a transaction is intended to defeat and delay creditors, the mere fact that a portion of the consideration was paid is no ground for not setting aside the transaction entirely. When a debtor with a view to defeating and delaying his creditors colludes with one of his creditors and creates a mortgage in his favour for a consideration which is partly fictitious and partly made up of a true money debt due to the creditor, on the finding that the transaction, as a whole, was a collusive transaction intended to defeat and delay creditors; the transaction should be set aside as a whole and the creditor who is a party to the fraud should not be allowed the protection of the transaction to the extent of his prior debt discharged thereby. There is no distinction in this respect between fraudulent

transfers by way of mortgage and fraudulent transfers by way of sale. 54 LW 76-1941 Mad 690-(1941)2 MLJ 99.

Where part of the consideration of a mortgage executed in favour of a creditor is proved to be fictitious and this fictitious part of the consideration is put in the bond in order to protect the mortgagor's property from his other creditors, it is a transfer made to defeat and delay creditors and by virtue of section 53 it becomes voidable *in toto*, and cannot be enforced partially in respect of the consideration which was actually paid. ILR (1941)1 Cal 536-74 CLJ 111-45 CWN 498-1941 Cal 378. See also (1941)2 MLJ 99; 12 L 194-1930 L 1027 (transfer wholly void); 24 MLJ 266-18 IC 768; M 29.

The fact that an assignment is set aside as being in fraud of creditors under section 53 does not prevent the Court from declaring a charge on the property assigned to the extent of the payment made by the assignee towards the redemption of the previous mortgage. 43 C 269-20 CWN 188-29 IC 580; 21 CWN 410-29 IC 690. The transferee is entitled to get credit only for the mortgage debt binding on the property that he may have discharged as part of the consideration for the document and not for the money debts of the transferor discharged by him. 131 IC 833-1931 M 513; 1934 M 587-67 MLJ 585. Payment by transferee of revenue and encumbrance on property ought to be refunded on setting aside transfer. 1933 R 191.

### 11. Partition

A partition among the members of a joint Hindu family is a transfer to which section 53 would be applicable. 24 LW 180-97 IC 70. But see. 10 LW 498-54 IC 146; 25 ALJ 873. See also 44 MLJ 513-1923 M 597; 106 IC

519-1928 A 29. A *mala fide* partition effected between father and son and entered into for the sole purpose of defeating the claims of the creditors of the father is voidable under section 53, though a partition does not come strictly within the letter of section 53. 94 IC 282-1926 N 355. On a reference to arbitration, a partition of joint family properties was made by which the bulk of the properties was given to the only son and a monthly allowance to the father. The partition was attacked as a fraudulent transfer, and the plaintiff relied, in proof of fraud, on the presumption under section 53(2):

**Held:** that assuming that the partition was a transfer, the consideration was natural love and affection which could not be said to be grossly inadequate that the award could not be said to be altogether one-sided since the father got residence, maintenance and an allowance under the award and that therefore no presumption of fraud could be made therefrom. 139 IC 820-34 Bom LR 862-1932 B 498.

### 12. Burden of Proof

The burden of proof lies on the person impeaching the transfer. 6 C 265; 21 C 612; 17 MLJ 11; 3 R. 71-89 IC 436; 123 IC 573-1930 L 12; 126 IC 604-1930 M 665; 62 IC 356-25 CWN 409 (PC); 60 IC 825-19 ALJ 87; 4 Bur LT 163-11 IC 781. But when the circumstances raise a presumption of fraud, the burden of proving *bona fides* is on the transferee. 104 IC 557; 168 IC 53-1937 OWN 391. Ordinarily speaking when a transaction is attacked under section 53, the burden lies on the attacking party to show in the first instance that the transaction was a fraudulent one intended to defeat and delay creditors. Where a *prima facie* case has been made out on that basis, then the burden shifts to the

alienee to show that he is a transferee in good faith for valuable consideration. 54 LW 76-1941 Mad 690 (1941) 2 MLJ 99-200 IC 577; 1940 All 407. In a suit under section 53, the plaintiff cannot succeed in avoiding the transfer on the ground that it had been done with intent to defeat or delay the creditor of the transferor unless he succeeds in showing that the transfer, although genuine, was fraudulent within the meaning of the section. 1941 OWN 801-1941 OA 519-1941 Oudh 457.

However suspicious a transaction may be, there must be evidence on which the fraudulent intention must be made out. 112 IC 228-1928 M 793. See also 23 IC 341; 21 IC 333; 1934 R 308. Transfer in part consideration of debts due to transferee. Burden of proving alleged debts is on transferee. 1936 AMLJ 104. The onus of proof on the transferee is satisfied if the transferee shows the passing of consideration. He need not go further and show absence of fraudulent intent. If there is no consideration or if it is inadequate, it would raise a presumption of fraudulent intent. 50 IC 463. If the transferee has no notice of and did not share in the fraudulent intention the transfer will not be set aside. 1923 N 133 (1). If a conveyance is duly registered, passing of consideration need not be proved by transferee unless circumstances suggest fraud. 3 R 71-1925 R 227. The burden of disproving fraudulent intent lies on the transferee. 2 IC 813; 50 IC 463.

### 13. Protection of *bona fide* Purchaser for Value

Section 53 protects a *bona fide* purchaser for valuable consideration, whether he purchases from the fraudulent grantor himself

or from a fraudulent transferee from him. 46 M 478-44 MLJ 527-1923 M 558. See also 1930 A 438; 1934 L 318(2), 1937 Nag 9. A transferee who fails to make any inquiry of the person who could have given the best of information as to the defects in the title is not a transferee in good faith. 46 M 478-44 MLJ 527. It is a question of fact in each case whether the transferee acted in good faith. 75 IC 1044; 1924 L 707; See also 89 IC 953 (1)-1926 L 24. Valuable consideration alone is insufficient. Good faith is also essential. 30 M 6; 23 CWN 769; 34 C 999; 24 MLJ 293; 33 M 334; 96 IC 356; 22 CWN 427; 165 IC 124-1936 A 663. *Bona fide* transferees for consideration are absolutely protected. 25 ALJ 873. Valuable consideration may indicate good faith 5 Bom LR 441. As to what is valuable consideration, see 29 B 428. Where a part of the consideration alone was real, the whole transfer cannot be set aside. 36 M 29, *contra*; 1927 M 278, see also 24 MLJ 266; 18 IC 768. On the sale being set aside, the vendee can have a charge only for encumbrances discharged and not for simple debts. 1927 M 278. But this is only where portions of the consideration are separable. 35 C 1051; 27 MLJ 266. For application of the sub-section, see 35 C 999; 24 C 825; 2 PLJ 546; 25 B 202; 71 IC 20. A mortgage executed by a judgment debtor against whom a money decree has been passed, before service of notice upon him under Order XXI, rule 54, CPC, for valuable consideration in favour of a mortgagee who had no notice of the execution proceedings, is valid. 94 IC 420 (2)-1926 C 469. A transferee for value knowing of impending execution against his vendor, but not of his intention to defeat or delay creditors, does not come under section 53. 95 IC 487. As to the form of decree to be passed see 1941 Bom 65.

⊗<sup>1</sup>[53A. Part performance—Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

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

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

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

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

### *Case Law*

**Section 53A**—Agreement of purchase performance of the contract for sale does not accompanied by possession. Agreement of make the person in possession of such purchase followed by possession in part property as one in unlawful possession and

1. Section 53A inserted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 16.

therefore, such person has *prima facie* right over the property, if he can clearly establish his possession over the property. *Kazalul Hussain Chowdhury vs Dy Custodian, Enemy Property* 22 DLR 345.

Protection under section 53A, Transfer of Property Act available to transferee both as plaintiff as well as defendant in suit by or against him to shield his title to property. Lessee in possession—Lease deed unregistered—Lessee, held, entitled to use unregistered lease as shield to prevent transferor from enforcing any right except those arising under such lease. *The Pakistan Employees Co-operative Housing Society Ltd (Karachi) vs Mst Anwar Sultana (1969)* 21 PLD Karachi 474.

Relief obtainable under section 53A is not only available by way of defence to a defendant but can equally be invoked by a plaintiff where circumstances entitled him to claim the same.

If the transferor, without taking recourse to law courts, becomes aggressive and tries to dispossess the transferee in possession by force, it does not seem to be in consonance with good reason that the transferee in possession should not be able to prevent the transferor from committing aggression upon the property in question and protect his own possession by invoking the principle of section 53A of the Transfer of Property Act, by himself instituting a suit as the plaintiff and obtaining the necessary restraint order against the would-be aggressor in the said suit. *Mrs June Ferguson vs Ameenur Rasheed Chowdhury* 25 DLR 1.

—Interest visualised in section 53A, Transfer of Property Act is neither a protected

interest nor an encumbrance (within the meaning of these terms in sections 160 and 161 Bengal Tenancy Act) and therefore an auction purchaser in a revenue sale gets the property free from any interests created under section 53A. *Julfu Molla vs Noab Ali* 27 DLR 441.

Doctrine of "indoor management" its meaning. The doctrine of "indoor management" is to the effect that persons contracting with a company and dealing in good faith may assume that acts within its constitution and powers have been duly performed and are not bound to enquire whether acts of internal management have been regularly done.

In the present case the lessee entered into an agreement of lease on the terms settled by the Secretary of the Society. It was subsequently contended on behalf of the Society that the Secretary was not authorised by the Managing Committee to enter into any contract and, as such, the lease was not a valid lease.

**Held:** As the Secretary was entitled under the by-laws of the Society to enter into contract on behalf of the Society the lessee was not required to enquire whether the Society actually authorised the Secretary to enter upon the contract. Such transaction with the Society is saved by the doctrine of "indoor management". *Pakistan Employees Co-operative Housing Society Ltd vs Anwar Sultana* 21 DLR (WP)345.

In a contract of sale when transferee paid the full consideration money and got possession of the disputed land, he is entitled to the protection of section 53 A of the Transfer of Property Act and Article 113 of

the Limitation Act has no application to such a claim of the transferee.

The right conferred by this section is available for a defendant to protect his possession. For the purpose of protecting his possession the section operates as a bar to the plaintiff asserting his title. In the facts of the present case the plaintiff is barred under section 53 A from asserting his title and he is not entitled to get a declaration that he has his right and title in the disputed properties. *Abdul Gani Khan vs Dino Bandu Adhikari 14 DLR 663.*

—Property means the right in the property transferred and the remedy of the transferor is barred only with respect to the right that stands transferred by the deed. The provision of section 107 is not in conflict with that of section 53A of Transfer of Property Act nor is the provision of section 17 of the Registration Act. Provision of section 53A does not create right or interest in violation of provision of section 107 and section 17, Registration Act. *Abdullah Bhai vs Ahmad Din 16 DLR (SC) 169.*

—Section 53A of the Transfer of Property Act makes an exception in favour of the transferee in possession in respect of a document which requires registration.

Section 49 of the Registration Act, no doubt, provides that if a document, which is compulsorily registerable, is not registered, then such document does not affect any rights in the property dealt with under such a document. But section 53A of the Transfer of Property Act makes an exception to this and provides that where a person obtains possession of or continues to remain in

possession of a property under a document in writing which, though compulsorily registerable, has not been registered, then neither the person transferring the property nor anyone claiming under him shall be entitled to enforce against the transferee or any person claiming under him any right in respect of that property. *Mst Ghulam Sakhina vs Umar Bakhsh 16 DLR (SC) 389.*

—Deed (unregistered) of exchange, missing—Its terms sought to be proved by witnesses who never read its contents—Secondary evidence inadmissible. *Mokim Mondal vs Ali Miah Pradhan 18 DLR 386.*

—Conditions for entitlement of the benefit of part performance.

Under section 53 A of the Transfer of Property Act a person in order to entitle himself to the benefit of the doctrine of part performance must show, *inter alia*, that the contract involved has been reduced to writing and signed by the person making the contract or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty. *Mokim Mondal vs Ali Miah Pradhan 18 DLR 386.*

—Specific performance of the contract—*bona fide* transferee.

In a suit for specific performance of a contract for sale or lease a subsequent '*bona fide*' transferee for value without notice of original contract is an interested party; for a subsequent transferee for value, who has paid his money in good faith without notice of the original contract is entitled to hold his title against the plaintiff in a suit for specific performance of the contract. *5 DLR 470.*

—An unregistered document could be received in evidence in a suit for specific performance. *8 DLR 616.*

—An agreement of sale followed by possession—No transfer of interest in the property.

—In an agreement of sale followed up by possession to the purchaser apart from the provisions of section 53A Transfer of Property Act the document itself does not constitute a transfer of any interest in the property. *12 DLR 466.*

—A person who has taken possession under an unregistered lease which under section 107 of the Transfer of Property Act is required to be registered, can protect his possession on the plea of part performance under section 53A of the Act, provided he fulfils the conditions laid down therein. If a person has failed to pay the rents due it cannot be said that he has fulfilled his part of the contract. *4 DLR 623.*

—Proviso to section 49 of the Registration Act allows an unregistered deed which is required to be registered to be used as evidence of a contract in a suit for specific performance or as evidence of part performance of a contract for the purpose of section 53 A. *Ibid.*

—Applicability—Applies only when transfer was not possible for some formal defect—Not applicable where transfer is void.

The principle of part performance embodied in section 53A of the Transfer of Property Act can only be pressed into service as a shield by a defendant to protect his

possession of property which has been conveyed to him for consideration but of which the legal title has not vested in him owing to some formal defect like lack of registration of the instrument of transfer. Where the Contract of transfer was *ab initio* void the principle had no application. *Raja vs Kram Ali PLD 1951 Lahore 177; PLR 1951 Lah 307 Ref; AIR 1941 Lah 407.*

—Applicability—Section applies to leases.

Section 53A applies to leases as leases really amount to transfers of immovable property within the meaning of Chapter 11 of the Act. *Sayi vs Subbanna AIR 1946 Mad 301 Foll: AIR 1937 All 10 Dist AIR 128 Ref: AIR 1944 Pat 261.*

—Contract—Meaning of—Must be for transfer of property.

While a contract need not be in any particular form, it should be a contract within the meaning of section 53A Transfer of Property Act (IV of 1882) and not a mere admission with reference to a previous oral agreement. *Muhammad Siddik vs Jrio., PLD 1959 (WP) Karachi 400.*

—Sale of property of minor by mother and guardian on behalf of minor and for his benefit—Minor cannot challenge transfer.

A minor's agreement is void but it is different with regard to contract entered into on behalf of a minor by his guardian or by a manager of his estate. In such a case the contract can be specifically enforced by or against the minor, if the contract is one which is within the competence of the guardian to enter into on his behalf so as to bind him by



it, and, further, if it is for the benefit of the minor.

Therefore, where the mother and guardian in entering into the contract of sale into present case was an act done on behalf of the minor and the respondent, minor is the person who most aptly answers the description of "the transferor" in the sense in which these words are used in section 53 A. The minor could not challenge the transfer. *Sri Kokulam Subrahmanyam vs Kurra Subba Rao.. PLD 1948 Privy Council 52.*

—Scope—Gives protection to transferee—Does not transfer title to property in the absence of registration.

All that section 53 A, Transfer of Property Act, 1882 does is to protect the transferee against the transferor or any person claiming under him from enforcing any right in respect of the property notwithstanding the fact that the contract, though required to be registered, had not been registered or where there is an instrument of transfer the same has not been completed in the manner prescribed therefor by the law for the time being in force. This protection is given to the transferee upon the fulfilment of the condition set out in that section and upon the principle that equity looks on that as done which ought to be done. If the transferee is ready and willing to do all that he is required to do under the contract, it would not lie in the mouth of the transferor or any one claiming through him to plead absence of registration or compliance with other formalities to get out of his own obligation under the contract. This section nowhere professes to transfer the title to the purchaser. *PT Co-op Housing Society Ltd vs Manzoor*

*Ahmad PLD 1961 (WP) Karachi 53.*

Section 53A—When vendee in part performance of the contract has taken delivery of possession from the vendor following a registered agreement, he cannot be ousted from his possession as he has acquired an indefeasible right over the property and the vendor lost all right to the property, only thing that remains is the execution and registration of the deed by the vendor. *Md Abul Hossain Sarder vs Bangladesh 34 DLR 255.*

Section 53A—The defendant being in possession of the suit land in furtherance of bainapatra is protected by the provision of section 47 of the Registration Act. *Mir Abdul Ali vs Md Rafiqul Islam 40 DLR (AD)75.*

—Respondent No. 1 claimed to pre-empt the sale on the ground that he became a co-sharer by virtue of a decree which he obtained in his suit for specific performance of contract. **Held:** As he did not obtain a kabala in pursuance of a decree, his claim as a co-sharer is without any basis. *Maleka Khatun vs Abid Ali 39 DLR (AD) 234.*

—Contract by part performance, must be evidenced by writing signed by the person who contracted to transfer. *Mehar Khatun vs Sarat Kumar Kanungoe. 36 DLR (AD) 217.*

—Section 53A of Transfer of Property Act affords protection to a transferee in possession of immovable property as against the transferor or any person claiming under him when under a written contract the transferee in part performance of the contract takes possession of the property or any part thereof although the contract though required to be registered has not been registered or

where there is an instrument of transfer, the transfer has not been completed in the manner prescribed thereof by the law for the time being in force. *Joyanta Bijoy Chakraborty vs Gopesh Chandra Chakraborty*. 35 DLR 319.

—Applicability of section 53A—  
Whether right under section 53A is a legal right or an equitable or a contractual right.

Under article 4 of President's Order 16 of 1972 the industrial unit concerned vested in the Government which acquired the right to administer, control, manage and dispose of by transfer or otherwise the said properties in accordance with the provisions of the said Order.

Allotment, agreement, or lease granted or entered into after the 25th March, 1971 may be cancelled, terminated or amended by the Government, if it chooses to do so and if a person is in possession of an abandoned property by virtue of such allotment, lease or agreement can be asked to surrender possession of such property only if the Government cancels or terminates such an allotment, lease or agreement under clause (2) of the article and, as is provided in clause (3) the Government may eject such a person only when he fails to surrender possession under clause (2) of the article.

It is up to the Government whether it will accept the agreement and submit to it or terminate the same and take over possession of the abandoned property ousting the occupant in possession on the basis of the said agreement, but until and unless the Government chooses to take appropriate action under clause (1) of the article the

agreement is valid and binding upon the Government. The provisions of President's Order No. 16 of 1972 do not confer any power upon the Government, apart from article 10, to ignore such an agreement and eject the occupant lawfully in possession of the abandoned property.

Under the general law the Government which has stepped into the shoes of the Pakistani Company, the original owner of the industrial unit, cannot exercise its right of possession as against the Bangladeshi company by virtue of section 53A of the Transfer of Property Act which creates a positive bar to the exercise of any right including that of taking possession in view of the agreement for sale of the industrial unit between the Pakistani Company and the East Pakistan Company, in part performance of which the East Pakistan Company was inducted into possession and, as such, the Government is not entitled to interfere with the possession of the appellant Company in respect of the industrial unit in its possession.

In Bangladesh when such right arising from part performance of a contract has been given a positive statutory shape in section 53A of the Transfer of Property Act, such right issues from a positive legislative enactment and is not founded merely on equity or a contract. So long as the agreement remains in force and the party in possession is agreeable to perform his part of the contract, his possession cannot be interfered with by a party to the said contract or any person claiming under the said party. *Buxly Paints Ltd vs Bangladesh* 31 DLR (AD) 266.

Interest visualised in section 53A Transfer of Property Act is neither a protected

interest nor an encumbrance (within the meaning of these terms in sections 160 and 161 Bengal Tenancy Act) and therefore an auction purchaser in a revenue sale gets the property free from any interests created under section 53A. *Julfu Molla vs Noab Ali Sarkar.* 27 DLR 441

**Section 53A**—Part-performance—When a transferor has delivered possession of his property to the transferee in part-performance of a written contract neither the transferor nor any one claiming under him will be permitted to assert his title to the property in question or to recover possession of the same so long the transferee or the person claiming under him has done some act in furtherance of the contract and has performed or is ready to perform his part of the contract. *Progati Industries Ltd. vs Shahida Khatun* 43 DLR 429.

**Section 53A**—Temporary Mandatory Injunction—Possession claimed even on the basis of imperfect document can be restored to the plaintiff dispossessed without notice—the plaintiff was in possession on the basis of some documents however imperfect that document might be and he could certainly have his possession protected under section 53A of the Act or under provisions of the Specific Relief Act and if dispossessed he could be put back to possession. *Bangladesh Mukti Judda Kallyan Trust vs Nurul Hossain* 44 DLR 22.

**Section 53A**—Once the defendant obtained a sale-deed and continued in possession not on the strength of his bainapatra but on the strength of his sale-deed section 53A ran its full course and exhausted itself. *Rafiqul Islam (Md) vs Mir Abdul Ali* 44 DLR (AD) 176.

**Section 53A**—Tenancy right—Whether it is protectable by the Doctrine of Part-performance—The contention that a tenancy being merely a transfer of a "partial right in property" it could not be said to be a transfer of property within the meaning of section 53A Transfer of Property Act was rejected. Though the right is only to enjoy the property, still it is a right and the tenancy is a transfer of immovable property within the meaning of the said doctrine. *Pradhip Das alias Shambhu & others vs Kazal Das Sarma & others* 44 DLR (AD) 1.

**Section 53A**—The petitioners though third parties in the suit can seek protection under this provision of law if it is true that they had been put into possession of a portion of the suit property. *Talukder Sarwar Hossain and another vs Shakhawat Hossain and ors* 1 BLC 1

**Section 53A**—The deceased plaintiff having delivered possession of the suit property in part performance of written contract for sale was not entitled to recover Khas possession by ejecting the defendants who are in lawful possession of the suit property and in such a case section 53A of the Transfer of the Property Act will be attracted. *Shahida Khatun & others vs Progati Industries Ltd and another* 3 BLC 73

**Section 53A**—Landlord sold the possession of the godown giving the right to sell its possession—Not evictable under the Premises Rent Control Ordinance—The plaintiff by accepting the terms and conditions of the contract entered into between the defendant and the original owner Agarwala giving the defendant the right to sell the possession of the premises is

estopped from evicting the defendant from the premises as the defendant cannot be treated as a tenant under Premises Rent Control Ordinance as tenant at will but he is liable to pay rent and arrear of rent is recoverable by suit when no eviction is applicable to the provision of Transfer of Property Act. It is a kind of estoppel which may be called waiver or forbearance on the part of the plaintiff or an agreed variation or substituted performance. *Moksed Ali (Md) vs Hajee Mohammad Ali* 4 BLC 612

**Section 53A—Scope**—This section is a defensive provision and it does not confer any title in favour of the person in possession of immovable property in part performance of a written agreement. *The Assistant Custodian, Enemy Property (L & B) Dacca, vs Abdul Karim & another; Abul Jalil & another vs Abdul Karim & others* 3 BSCR 287.

**Section 53A—Essential elements of the Doctrine of Part-The performance of Contract** discussed—*The Assistant Custodian, Enemy Property (L& B) Dhaka, vs Abdul Karim & another* 3 BSCR 287.

**Section 53A—Doctrine of Part-performance and the Characteristics of this Section.**

**Held :** The doctrine is based on prevention of fraud. When one party has performed his part of the contract in the confidence that the other party would do the same on the refusal of the latter to perform his part of the contract, it would amount to be a fraud upon the former the section comes in aid to protect the interest of the former. The section has been characterised as essentially a

defensive provision. *The Assistant Custodian, Enemy Property (L& B) Dhaka, vs Abdul Karim & another* 3 BSCR 287.

**Section 53A**—This section partially imports the English Doctrine of Part-performance and provides a passive equity to the transferee, and does not give the transferor an active equity, which could be passed for maintaining a suit for title—by no means the section can be construed to confer title upon the transferee in possession of the property.—It confers a limited right which is available to him as a shield to protect his possession. *The Assistant Custodian, Enemy Property (L& B) Dhaka, vs Abdul Karim & another* 3 BSCR 287.

**Section 53A**—Part-performance under this section does not give rise to an equity but to a statutory right to protect possession, against any action by the transferor but this right has no operation against the persons not claiming under the transferor. *The Assistant Custodian, Enemy Property (L& B) Dhaka, vs Abdul Karim & another* 3 BSCR 287.

**Section 53A**—The section does not operate to create a form of transfer of property which is exempt from registration—the Doctrine of Part-performance cannot be applied to override the mandatory provisions of the Act itself, so as to nullify the requirement of a registered document. *The Assistant Custodian, Enemy Property (L& B) Dhaka, vs Abdul Karim & another* 3 BSCR 287.

**Section 53A**—Transfer under this section includes sale and lease. *The Assistant Custodian, Enemy Property (L& B) Dhaka, vs Abdul Karim & another* 3 BSCR 287.

**Section 53A**—Right conferred under this section cannot be made the basis of a suit by the transferee for a declaration that the transferor or other person claiming under him has not the title to the property—this section cannot be extended to provide sanction to such a suit. *The Assistant Custodian, Enemy Property (L& B) Dhaka, vs Abdul Karim & another 3 BSCR 287.*

**Section 53A**—Statutory restrictions in this section—wordings of the section in the matter of equity of Part-performance explained—Equity regards as done what ought to have been done.

**Held:** Two of the restrictions are (i) there must be a written contract; and (ii) it is only available as a defence. Equity under this section depends not so much on part performance as on the fact that there is a valid contract between the parties still capable of specific performance, because, equity regards as done what ought to have been done, Of course, the words of the section do not warrant a conclusion that a transferee in possession in part-performance of the contract for sale is necessarily debarred from the benefit of the section in an action brought to maintain his possession as a plaintiff. *The Assistant Custodian, Enemy Property (L& B) Dhaka, vs Abdul Karim & another 3 BSCR 287.*

**Section 53A**—Scope and Application of these sections of the two statutes compared and contracted with reference to the Doctrine of Part-performance.

**Sec: Specific Relief Act, Section 27A.**  
*The Assistant Custodian, Enemy Property (L& B) Dhaka, vs Abdul Karim & another 3 BSCR 287.*

**Section 53A**—Statutory Right for Protection of Possession will depend upon the Nature of the Claim.

**Held:** The plaintiff in a suit under Order XXI, rule 103, CPC comes to the Court to protect his possession, and the capacity in which the plaintiff comes to the Court is in reality of defendant. In such a case to the transferee instituting the suit statutory right under section 53A, Transfer of Property Act, may be available, but it will depend on the nature of the claim made in the suit. *The Assistant Custodian, Enemy Property (L& B) Dhaka, vs Abdul Karim & another 3 BSCR 287.*

**Section 53A**—Suit for specific performance of contract—prayer in the plaint seeking the relief read "whichever defendants in law and equity" are found liable entire suit was directed against both the groups of defendants—Plaintiff entitled to relief in full against all the defendants. *Abdul Kashim vs Abul Hakim 1 BCR 1981 (AD) 228.*

**Section 53A**—Agreement for sale of land—agreement contemplating that in the event of non-payment of balance of consideration money the vendor will have the right of re-entry into the land and the earnest money will be forfeited—vendees defendant on payment of earnest money took possession in part-performance—On vendee's failure to pay the balance of consideration money or to get the kabala executed nothing inhered in him to confer any right under this section vendee-defendant cannot claim any right under this section and he is obliged to restore possession to the vendor—Vendor will have right to re-enter into the land and the earnest money will stand forfeited. *Ataaddin Khan &*

*another vs Md Hafizullah Bhuiyan 1 BCR 1981 (AD) 207.*

**Section 53A**—Reliance on the Doctrine of Part-performance succeeds only when contract is proved to be genuine. *Abdul Kader vs AK Noor Mohammad BCR 1984 (AD) 35; 1985 BLD (AD) 33 : 1985 14 BLR (AD) 1.*

**Section 53A**—Oral contract does not attract the Doctrine of Part performance as embodied in this section.

The respondent instituted suit for ejectment of predecessor of the appellant from the suit premises claiming that the defendant was his licensee. The defendant resisted the claim contending that he was in possession of the premises on a contract for sale. The trial Court dismissed the suit and on appeal the lower appellate Court upheld the decision of the trial Court. The High Court Division in second appeal set aside the judgments and decrees of both the courts below on finding that the defendant was not in possession under any written agreement for sale.

**Held :** To attract the application of section 53A of the Act, the first requisite is that the contract is in writing and signed by the transferor. The transferee is entitled to retain possession in spite of absence of a registered deed of transfer by virtue of the Doctrine of Part-performance only when he proves that there was a written and signed contract in his favour and he had taken possession in accordance with terms of the contract. Where the condition precedent for attracting the section viz, the written agreement, is not found, the plea of Part-performance is not available. *Mehar Khatun*

*& others vs Sarat Kumar Kanungoe 1985 14 BLR (AD) 33 BCR 1984 (AD) 172.*

**Section 53A**—This section has no manner of application in a case under Succession Act. The respondent is not without any remedy for the execution of the decree. This section creates no real right. It is estoppel between the proposed transfer and transferor which shall have no operation against third person. (46 CWN 374 PC). *Subhra Nandi Majumder vs Mrs Begum Mahmuda Khatun BCR 1990 (AD) 96; 1990 10 BLD (AD) 85; 1990 42 DLR (AD) 133.*

**Section 53A**—Read with The Succession Act (XXXIX of 1925), Section 281 : Suit for specific performance of contract was filed only when the probate proceeding was filed—Whether she is entitled to citation within the meaning of section 283 at all—She is entitled to bring action for breach of contract and she has already filed the suit for specific performance of contract. If she succeeds then the suit will be decreed and it could be executed against the executor of the will. *Subhra Nandi Majumder vs Mrs Begum Mahmuda Khatun BCR 1990 (AD) 96; 1990 10 BLD (AD) 85; 1990 42 DLR (AD) 133.*

**Section 53A**—Agreement to sell—No cogent evidence was produced by plaintiff to inspire confidence—Evidence produced by plaintiff was falsified by documents produced by defendant—Courts below, thus, had rightly exercised jurisdiction vested in them under law and had acted in exercise of their jurisdiction legally with no material irregularity—Interference by High Court in setting aside judgments and decrees passed by Courts below was uncalled for in circumstances. *Abdul Hameed vs Suhrab PLD 1997 Kar 589.*

**Section 53A**—Agreement to sell would not create any right, interest or title or purchaser in property; it would, however, give right to purchaser to sue seller for performing his contractual obligations. *Holomal vs Ghulam Ali PLD 1997 Kar 509.*

**Section 53A**—Agreement to sell and general power of attorney of specified dates were executed when petitioner was admittedly outside the country—Such documents were, thus, forged documents and all subsequent documents based on such forged documents were equally void. *John Paul vs Irshad Ali PLD 1997 Kar 267.*

**Section 53A**—Entitlement to protection of section 53A, Transfer of Property Act, 1882, would be available to person who had purchased property by way of unregistered document; was in possession of same and had secured its allotment from Competent Authority. *Muhammad Bashir vs Muhammad Siddique 1997 CLC 466.*

**Section 53A**—Suit filed by plaintiff on basis of agreement to sell was dismissed by trial Court on the ground that execution of document in question was not proved—Suit filed by owner (defendant) against plaintiff for possession was defended by plaintiff on the plea that he was in possession of property under agreement of sale—Trial Court had decreed suit for possession against plaintiff (in parallel suit) in view to findings in other suit that agreement to sell was fabricated and had not been executed by defendant—Finding recorded by trial Court was maintained by High Court in circumstances. *Muhammad Sultan vs Kabir-ud-Din 1997 CLC 1580.*

**Section 53A**—Protection to person in possession of property under unregistered document—Extent—Where any document requiring registration under section 17, Registration Act, 1908, was not registered it could not bar or deprive any purchaser from claiming benefit under section 53A, Transfer of Property Act, 1882, provided he had satisfied requirement of that section—First proviso to section 50(1), Registration Act, 1908 would give protection to person in possession of property under unregistered document, be it agreement for sale or contract of sale—Only condition was that deed in question, should be unregistered document by person in possession of property under it and he fulfilled conditions laid down in section 53A, Transfer of Property Act, 1882—Document in question, was, thus, document of sale of disputed property which was unregistered—Plaintiff was, therefore, entitled to the protection and rights under section 53A, Transfer of Property Act, 1882. *Fazla vs Mehr Din 1997 SCMR 837.*

**Section 53A**—Applicability of section 53A, Transfer of Property Act, 1882—Essentials—Agreement between parties should be in writing signed by that party or his agent whom it sought to bind—Transfer in part performance of contract would take possession of property or, if already in possession, would continue in possession coupled with performance of some act in furtherance of contract—Transferee seeking to avail himself of doctrine contained in section 53A, Transfer of Property Act, 1882 should perform or be willing to perform his part of the bargain as per terms of contract—Where contract had been partly performed all rights and liabilities under the same should

arise and be enforceable as between parties to the contract, notwithstanding that transaction had not been completed according to law—Application of doctrine contained in section 53A, of the Act, however, should not affect rights of any transferee for consideration who had no notice of contract or of the part performance thereof. *Muhammad Yusuf vs Talia* 1998 CLC 1104.

**Section 53A**—Plaintiff's suit for possession dismissed by trial Court was decreed by Appellate Court on basis of title—Validity—Property in question, was admittedly allotted to predecessor-in-interest of plaintiffs and after his death mutation was sanctioned in favour of his heirs i.e. plaintiffs—Defendant claimed to have purchased property in question not through sale-deed but through agreement to sell—Defendant could not prove title of his vendor—Defendant, thus, failed to prove that he had any right in such property nor could he show that he was bona fide purchaser and that as a man of ordinary prudence he had made efforts to satisfy himself about title of his vendor—Finding of fact based on evidence produced by parties did not suffer from material irregularity/illegality so as to justify interference by High Court in its revisional jurisdiction. *Ghulam Hussain vs Muhammad Bashir* 1998 CLC 701.

**Section 53A**—Agreement to sell land in question—Non-payment of balance amount—Defendant in possession of land not under agreement to sell but as tenant—Trial Court through interim order directed defendant to pay share of produce to plaintiffs and till same was paid, he could not lift any produce from land in question—Validity—Defendant at the most had status of

tenant and never got possession of land under agreement to sell—Defendant was also entered as tenant in Khasra Girdawari, therefore, he was bound to pay share of produce to plaintiffs before lifting produce from the field—Judgment of trial Court as affirmed by appellate Court that defendant must pay share of produce to plaintiffs and till same was paid should not lift the same from the field, did not suffer from any infirmity justifying interference in such findings. *Bahadur Khan vs Muhammad Siddique* 1998 CLC 724.

**Section 53A**—Agreement to sell incorporating specific terms—Plaintiff's evidence relating to terms of such agreement not rebutted by defendant in his evidence—Agreement to sell would be deemed to have been proved including the terms included therein—Basic requirements of such agreement in terms of section 2, Contract Act, 1872 had been duly fulfilled—Elements of offer of sale, acceptance of such offer and consideration were fully established by evidence on record and same was thus specifically enforceable in circumstances. *Inamullah Khan vs Zakia Qutab* PLD 1998 Pesh 52.

**Section 53A**—Protection of section 53A would not be available where possession has been delivered in pursuance of an oral agreement as section 53A applies only when possession has been delivered in pursuance of written agreement. *Abdul Wahid vs Respondent* 1998 AC 375.

**Section 53A**—Application of section 53A, Transfer of Property Act, 1882—Necessary ingredients enumerated. *Abdul Ghani vs Abrar Hussain* 1999 SCMR 348(i).



**Section 53A**—Civil Procedure Code (V of 1908), Section 115—Revision—Suit for declaration to be owners of the land in dispute against "Pardahnashin" and illiterate lady on the basis of agreement to sell—Duty of Court—Plaintiffs were tenants on the suit land—Trial Court as well as the lower Appellate Court had dismissed the suit filed by plaintiffs—Revision against concurrent findings of fact by two Courts below—Validity—Held much care and caution had to be taken by the Courts in the matter of agreements or transactions of sale with illiterate "Pardahnashin" ladies, as they deserved special protection—Where the plaintiffs were already tenants over the disputed land, they could not claim any protection of section 53A of Transfer of Property Act, 1882, particularly when they had failed to prove the possession of the land pursuant to the agreement to sell—No illegality or material irregularity was committed by the Courts below in the exercise of their jurisdiction—Judgments and decrees did not result in any miscarriage of justice and were not called for any interference—Revisions were dismissed in circumstances. *Karim Baksh vs Qadrat Ali* 1999 CLC 967.

**Section 53A**—Transfer of property—Part performance—Big mansion which had not been partitioned—Transferees of such big mansion—Status—None out of 59 transferees of such big mansion could claim that he owned any specific part of the big mansion as all the joint transferees/joint owners had interest in each inch of the property—None of such transferees, therefore, could transfer a particular part or portion of the big mansion in favour of a third

person—Joint transferee of an unpartitioned property, at the most, could assign his interest in such property according to law if permissible. *Abdul Ghani vs Abrar Hussain* 1999 SCMR 348.

**Section 53A**—Transferees of big mansion which had not been partitioned—Status—Transfer of property by such transferees—Without expressing final opinion Supreme Court considered it a debatable point as to whether section 53A, Transfer of Property Act, 1882 could be invoked in the present case. *Abdul Ghani vs Abrar Hussain* 1999 SCMR 348.

**Section 53A**—Agreement of sale—Validity—Entitlement of plaintiff to specific performance—Alleged power of attorney executed by vendor in favour of vendee was got registered at a place where neither land in question was situated nor party resided or worked for gain—Scribe of document had stated in court that he did not know vendor and he was unable to give even most rudimentary description of vendor—Provisions of section 22, Specific Relief Act, 1877, stipulates that jurisdiction to decree specific performance of contract was discretionary—Court was not expected to decree specific performance where circumstances in which contract was made were such as to give plaintiff unfair advantage over vendor, even through there was no fraud or misrepresentation on plaintiff's part—Plaintiff was, thus, not entitled to relief of specific performance—Judgment and decree passed by trial Court was set aside and plaintiff's suit was dismissed in circumstances. *Dosa vs Shahamad* PLJ 1999 Lah 1770(iv) = 1999 Law Notes (Lah). 1096.

**Section 53A**—Doctrine of part performance of the contract could not be made as a weapon of offence, but it was merely a shield which could be used as defence—Irrespective of fact that doctrine of part performance was not pleaded in suit by plaintiff, that could not be made basis for a declaratory decree in favour of plaintiff. *Azad Government of the State of Jammu and Kashmir, Muzaffarabad vs Abdur Rashid* 1999 YLR 1001.

**Section 53A**—Execution of agreement to sell—Effect—Mere execution of agreement to sell would not bestow any title until and unless further steps were taken in pursuance of said agreement. *Liaqat Ali vs Abdul Aziz* 2001 CLC 1502.

**Section 53A**—Part performance—Protection of section 53A of Transfer of Property Act, 1882—Pre-conditions enumerated. *Latifan Begum vs Nisar Ahmad* 2001 YLR 701.

**Section 53A**—Agreement to sell the property—Part performance of contract—Provision of section 53A, Transfer of Property Act, 1882, was merely a shield which could be used in defence and not as a weapon to assert title over the property—Section 53A could only be used as a defence in answer of claim of possession by the vendor or any other person claiming through or under him—Right conferred by section 53A was only available to defendant to protect his possession, but did not create a title on the defendant and would merely operate as a bar to the plaintiff asserting his title—Section 53A was limited to the cases where the transferee had taken the possession and the transferor was debarred from

enforcing any right against him other than that expressly provided by the contract. *Mumtaz Hussain Khan vs Muhammad Hussain* 2001 CLC 946.

**Section 53A**—Suit for specific performance of agreement—Plaintiff had proved that defendant who was his brother had agreed to sell half of his share in the suit property to him and after receiving consideration had delivered possession of the house to him—Trial Court decreed suit, but appellate Court reversed finding of trial Court holding that agreement which was a sale-deed being not a registered document was not admissible in evidence—Plaintiff, in performance of his part of agreement, had paid settled consideration to defendant and plaintiff was in possession of suit property—Effect—On equitable principle underlying in section 53A of Transfer of Property Act, 1882, plaintiff even in absence of registration of agreement would be fully entitled to protect his possession against defendant—Execution of document of sale and payment thereunder having stood proved, Appellate Court could not non-suit the plaintiff on a mere technicality—Finding of appellate Court was reversed and that of trial Court was restored by High Court. *Muhammad Ramzan vs Jan Muhammad* 2001 MLD 553.

**Sections 53A & 54**—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, through 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 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

defect—Supreme Court declined interference in circumstances. *Ghulam Rasul vs Muhammad Hussain 1999 SCMR 2004.*

**Sections 53A & 54**—Agreement to sell coupled with possession—Effect—Mere contract of sale would not convey any right—Where, however, such contract was coupled with possession then under section 53A, Transfer of Property Act, proposed vendee could defend his title and possession. *Akbar Ali vs Lal PLD 1997 Lah 709.*

**Sections 53A, 118 & 119**—When in pursuance of a deed of agreement of exchange dated 3-2-61 between the petitioner Hafizur Rahman and Parimal followed by a deed of exchange executed and registered in India the former got the possession of the disputed property and the latter got the possession of the property in India, though requisite legal document of the petitioner regularising exchange by the Board of Revenue has not been executed, the position is the same as if the document had been executed against all who want to threaten or disturb the possession of such property and the plaintiff-petitioner has acquired title to the suit property sufficient to defend his possession therein and to get khas possession thereof, if ousted therefrom. *Hafizur Rahman vs Government of Bangladesh and others 1 BLC 255.*

#### Abstract

1. Plea in defence
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### 1. Plea in Defence

A person who procured a legal flaw cannot take advantage of it in defence. *20 ALJ 392-44 A 642-1922 A 233 (2)*. An attaching decree-holder can plead as defence to a suit by the alienee whose claim has been disallowed that the transfer was fraudulent and intended to defeat or delay the transferor's creditors. *39 MLJ 350-43 M 760 (FB)*. See also *60 IC 896-19 ALJ 299; ILR 1936 N 69-1936 N 166*. Where the plaintiff seeks to recover possession of property on the basis of a trust deed, it is open to the defendant to plead by way of defence that the plaintiff should not be allowed to recover on the basis of the said document as it was a fraudulent one intended to defeat the rights of creditors among whom the defendant is one. *72 CLJ 420-1941 Cal 233*. See also *1938 Lah 136; (1940)2 MLJ 491*. It is also open to a creditor who has been defeated or delayed to raise the plea in defence. *1936 ALJ 692-1936 A 663*.

### 2. Parties to Suit

In a suit by a creditor impeaching a transfer by his debtor as being fraudulent under section 53 or in an appeal passed from a decree passed in such suit, the receiver, where the debtor has been subsequently

adjudged insolvent, is a necessary party and such a suit or appeal is incompetent when the receiver, who is a necessary party, is not impleaded. *181 IC 655-1938 Lah 856*.

### 3. Limitation

It is true that the creditor has to challenge the transfer only within six years, but where the creditor has occupied the position of a defendant, no time limit affects his defence and he can consequently challenge the transfer even though six years had expired. *1940 Lah 198*.

### 4. Frame of Suit

Objection in Appeal—Where plaintiff filed a suit under section 53, but failed to sue on behalf of or for the benefit of the creditors of judgment-debtor, but no objection was taken in the trial Court and the suit was decreed.

**Held:** that the defendant was not entitled in the appellate Court to claim that the suit as framed was not maintainable. *1935 R 275; 1936 AMLJ 104*. See also *1937 OWN 1069*. As to court-fee, see *1939 MWN 778*.

### 5. Issue under section 53

If can be raised by way of defence—Where at the time of a sale of the judgment-debtor's property in execution of a decree an objection to the sale is made by a party under section 47, CPC, on the ground that he is owner of the property by virtue of a transfer of the property in his favour by the judgment-debtor, the decree-holder is entitled to contest the objector's claim on the ground that the property was transferred fraudulently and he need not file a separate suit to have that

transfer declared fraudulent. To such a defence by the creditor, the rule contained in section 53, Transfer of Property Act, as to the form in which the suit is to be brought does not apply. Moreover, the defence of the creditor in such a case can be described to be made in a representative capacity to apply for a rateable share in the sale proceeds if the property is sold. *180 IC 830-1938 Lah 136*. See also *(1942)2 MLJ 491*.

**English and Indian Law, Distinguished**—The right conferred by section 53A is limited to cases where the transferee has taken possession and against whom the transferor or anyone claiming through him is debarred from enforcing any right other than that which is expressly provided in the contract. *Under the English law* the equity of part performance is an active equity and the person in possession can enforce in an independent suit further proceedings. Under section 53A, the right is available only to the defendant to protect his possession. It is only in the case of specific performance that part performance assists a plaintiff; and section 27A of the Specific Relief Act is the only case recognised by the Indian Legislature where the equity of part performance is an active equity as in English Law, sufficient to support an independent action by the transferee in possession; and though he may maintain a suit for injunction, as being in possession, as against a trespasser, he cannot maintain an injunction suit against a person claiming under colour of a title from the transferor. The proper procedure for him is to sue for specific performance. *41 CWN 54; 164 IC 557-1936 N 174*. See also *42 CWN 630-1939 Cal 163; 1937 Nag 74*. The English doctrine of part performance is not

available in India by way of defence to a suit for ejectment except under the provisions of section 53A of the Act and in cases to which that section is applicable. *71 CLJ 144-44 CWN 357-1940 Cal 254; 41 CWN 54*. Whether section 53A applies at all to an agreement to transfer a partial interest in property, such as a right to mine minerals or cut timber or the like. It is at least possible that it only applies to an agreement to sell or otherwise dispose of the entirety of a piece of real property. *46 CWN 374-(1942)1 MLJ 1-1941 PC 128 (PC)*.

#### 6. Scope—If retrospective

Section 53A does not affect any proceeding commenced before the amending Act of 1929. It is not retrospective. *14 P 672-1935 P 291 (FB); 1936 N 115; 1936 N 282-165 IC 934; 1936 O 306-162 IC 712*.

Section 53A applies to all cases instituted on or after the 1st April, 1930, though the transfer took place before 1930. *1936 ALJ 1323-1936 AWR 1038; 64 CLJ 558*. The question of the retrospective nature of section 53A arises not with respect to the particular contract in question but with respect to *the enforcement of the right against the transferee*. *15 Pat 786-1937 P 36*. Doctrine applicable to Punjab. *162 IC 314-1936 L 366; 43 PLR 656-1941 Lah 407*. Section 53A gives a party relying upon it such right which but for the lack of some formality, he would have under the written agreement; but it gives no more and does not give any right which the informal agreement would not give. *182 IC 618-1939 Pat 296*. The amendment of the law effected by the enactment of section 53A confers no right of action on a transferee in possession under an unregistered contract of

sale. "The right conferred by section 53A is a right available only to the defendant to protect his possession." The section is so framed as to impose a statutory bar on the transferor, it confers no active title on the transferee. Any other reading of it would make a serious inroad in the whole scheme of the Transfer of Property Act. *66 IA 293-ILR (1940) 1 Cal 250, 1940 PC 1—(1940) 1 MLJ 75 (PC)*. Section 53-A applies to a contract to transfer occupancy holding which has not been completed in the manner prescribed by section 26-C of the Bengal Tenancy Act.

There is no provision in the latter Act which in any way takes away the right conferred by section 53-A upon a purchaser to retain possession as against his vendor in the circumstance mentioned in that section. *ILR (1938) 2 Cal 328-42 CWN 630-1939 Cal 163*. Section 53A is restricted in its application and cannot be extended further than its terms warrant. It places the transferee and those claiming under him in possession of a shield which they can wield against 'the transferor or any person claiming under him' but which is imperative against third parties with independent rights. *1938 NLJ 123*. Though the right conferred by section 53-A is a right available only by way of a defence, where a suit is brought by a vendee under Order XXI, rule 103, CPC, he is merely seeking to protect his rights to which he is entitled and, as such, the suit is only one by way of a defence and section 53A of the Transfer of Property Act would be available to such a plaintiff. *15 Luck 43-1940 Oudh 1*. In order to satisfy the requirement of section 53A it is enough to show that the transferee has taken possession or continued in possession in part performance of the

contract and has done some act in furtherance of it. The section does not require any concurrent act or any specific consent apart from the contract on the part of the vendor. *15 Luck 43-1939 OWN 876-1940 Oudh 1*. A plaintiff cannot claim the benefit of section 53A, but it is available only as defence. *1939 ALJ 384-1939 All 504*.

### 7. Indian Law of the Doctrine of Part-Performance

Under the Transfer of Property Act, as it stood before the amendment, the Doctrine of Part-performance had no place whatever; and even if at the date of the suit by the legal owner the defendant had an enforceable contract of sale in his favour, he cannot rely on that fact as a defence to the claim in ejectment. At best he would only apply for stay of the ejectment until he obtained specific performance of his contract by suitable proceedings. Section 53A of the amended Act is not retrospective and does not apply to pending proceedings. Section 16 of the Amending Act of 1929 clearly excluded such operation in respect of suits pending on the date of the coming into force of the Act, i.e. 1st April, 1930. *1935 MWN 267-41 LW 364*. See also *37 Bom LR 82; Bom LR 1245-1935 B 91; 39 CWN 416; 151 IC 388-1934 A 701; 1934 A 768; 152 IC 499-1934 P 546*. The right conferred by section 53A of the Transfer of Property Act is limited to cases where the transferee has taken possession and against whom the transferor or any one claiming through him is debarred from enforcing any right other than that which is expressly provided in the contract. *41 CWN 54*. See also *44 CWN 357-1940 Cal 254*. Although the provisions of the Transfer of

Property Act are not in force in NWFP still its principles are applied as being principle of justice, equity and good conscience. 1937 Pesh 58-43 PLR 658.

The section can apply only if the agreement is in writing and the terms have been set out with reasonable certainty. 35 Bom LR 722-1933 B 381-145 IC 557; 151 IC 227-1934 R 127. The first requirement mentioned in section 53A as a condition for the applicability of the section is that there should be a writing signed by the transferor on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty. The words "signed on his behalf" in the section mean signed by a person who has authority to bind or represent the transferor. 43 Bom LR 603. ILR (1941) Bom 529-1941 Bom 346. The doctrine of Part-performance can have no relation under any circumstances to movable property. 152 IC 431-1934 R 303. The earlier decisions which allowed the doctrine of Part-performance to prevail even in cases where there was no writing, are no longer good law. 144 IC 788-1933 P 458; 165 IC 934-1936 N 282. Section 53A clearly contemplates that the contract itself shall be in writing, and not that there shall be a writing referring to some part or parts of a contract which may previously have been oral. A distinction must be drawn between a writing which is a reduction into writing of a previous oral agreement which would fall within the provisions of section 53-A and a writing in which there is a mere reference to a previous oral agreement. 1938 Rang IR 692-1938 Rang 356.

A contract or an agreement in writing or a written agreement is a *sine qua non* under

section 53A. Such written agreement may of course be the embodiment of what has already been orally agreed upon and may also refer to payment by the purchaser and receipt by the vendor of part of the purchase-money, but it must essentially be a written agreement. 174 IC 169-1938 Rang 49. Section cannot be applied to any case in which there is no contract in writing, 1933 R 136; 144 IC 825. Section 53A cannot be applied to a family settlement which is neither a transfer of property nor a contract to transfer property, but which merely acknowledges the right of the other party. Such a settlement if in writing has to be registered; and if unregistered the defect is fatal and cannot be cured by section 53A. ILR (1937) All. 817-1937 All. 578-1937 ALJ 627(FB); 165 IC 934-1936 N 282 (Oral sale). See also 1939 ALJ 433-1939 All 529.

The decision of the question whether the Doctrine of Part-performance could be pleaded by a purchaser from a Hindu widow, as against the reversioner, would depend upon the answer to the question whether the reversioner was a 'person claiming under him' (i.e. transferor, widow). The test to be applied is to see whether the acts of the deceased widow affecting the property bind the reversioner or not. 1940 Nag 396-1940 NLJ 499. To establish the application of the principle of part-performance it must be shown that the respective parties have so changed their respective positions that the change can only be referable to the contract alleged. A mere payment of the purchase-money, for instance, is insufficient. 47 B 621-25 Bom LR 381-1923 B 473. See also 45 MLJ 528-. 46 M 919-1924 M 271. (SB); 40 CWN 1176. To constitute part-performance

the act must be an act, unequivocally referring to and resulting from the agreement and such that the party would suffer an injury amounting to fraud, by the refusal to execute that agreement. *1924 P 433*. Where the purchaser was already in possession of the property as mortgagee and then continued in possession after the agreement to sell had been concluded and a portion of price was paid in addition to the amount already due on the mortgage, in respect of which the purchaser was already in possession.

**Held:** that such payment was an unequivocal act which could not be referred to any other matter than the agreement for sale, and, as such, it was sufficient to satisfy the requirement of section 53 A, viz, that some act must be done in furtherance of the contract. *1934 R 303*.

When the agreement or contract is dependent upon the promisor obtaining the assent of another to the agreement proposed, the promisee is not entitled to sue for specific performance of the agreement as long as the assent is not obtained. Section 53 A would not apply to such an agreement. *15 P 460-1936 P 372*. See also *45 CWN 489*. The contract contemplated by section 53A is a completed contract and a valid contract *45 CWN 489*. See also *1940 AWR (HC) 243*. The object of this section is to protect persons in cases where there is a contract which cannot be proved in evidence or the specific performance of which is barred. *45 CWN 489*. See also *1936 Pat 372*. Section 53A contemplates reliance upon the entire contract.

It does not contemplate the splitting up of a contract into different parts. *45 CWN 489*.

Section 53A only enunciates the doctrine of part-performance and does not in any way invest the transferee with any title to the property of which the transferee might have taken possession. *1941 ITR 358*. Section 53A, according to its terms, debars a transferor from exercising rights which he would have apart from the agreement. Although there is an exception to this disablement in the words "other than a right expressly provided by the terms of the contract." it is clear that the transferor cannot in any case derive any rights from the section which are inconsistent with the conditions subject to which the section comes into operation. Since it is a condition precedent that the transferee shall have performed his part of the contract or should be willing to perform his part of the contract at the time when the section is sought to be made use of, which is the material time, it necessarily follows that suit by the transferor for damages for breach of contract can never be founded upon section 53A. *43 Bom LR 603—ILR (1941) Bom 529-1941 Bom 346*. See also *45 CWN 132*. In order to avail oneself of the benefit of the provisions of section 53A it must be shown that the possession relates unequivocally to the contract.

He must show either from the contract itself or from some other evidence that the continuance of his possession was in reference to or pursuant to the contract for sale. *45 CWN 489*. Section 53A gives the right to the transferee-defendant to resist the transferor. Plaintiff's claim for possession only when he has himself performed his part of the contract or where performance on his part was still due, he has offered to perform what remained to be performed by him. *45*



*CWN 132*. See also *1941 Bom 346*. Lease pending suit on mortgage—Lessee obtaining possession through lease not signed by both parties—Private sale of mortgaged property—Suit by lessee against purchaser availing benefit of section 53A—If maintainable. *1939 ALJ 692*. See also *17 Pat 460-1938 PWN 951-1938 Pat 337*. Where a party secures an advantage for himself in pursuance of an award relating to immovable property, he cannot be allowed to repudiate the award. The principles embodied in section 53 A are applicable to such cases and even if the document requires registration, the defect is cured as soon as it is acted upon by the parties. *37 PLR 459*. Non-registration of sale-deed does not render the sale ineffectual if the vendee has paid the price and obtained possession; for, thereby the vendee obtains an equitable right that the vendor should complete the title by a formal registered conveyance. *9 IC 770; 46 A 759-1924 A 772*. See also (*1937*): *1 MLJ 676; 1937 Pesh 58-169 IC 958*. But the English equitable Doctrine of Part-performance could not be applied so as to modify or override the mandatory provisions of the Act, so as to nullify the statutory requirements of a registered instrument. [*42 C 801 (PC) and 39 M 509, Expl] 58 IA 91-58 C 1235-1931 PC 79-60 MLJ 538 (PC)*].

A transferee, put in possession of the land, even if the title deed is not executed and registered, stands in the same position as if the document has been executed, provided specific performance can be obtained by the parties. *61 IC 687-33 CLJ 437; 27 CWN 159-1923 C 130*. See also *1934 L 751; 1934 R 284*. A person invoking the aid of this section is not entitled to a declaration of his title to

the property, but only to a declaration of *his right to the possession* thereof. *1934 R 284*. See also *1933 P 428*. Where a person obtained certain property from the Collector under a grant made by him after he had wrongfully terminated the grant in favour of another and there was neither consent nor acquiescence on the part of the former grantee to possession being taken or retained by the latter.

**Held:** that the doctrine of part-performance did not apply to the case. *139 IC 388-1932 S. 42*. A person seeking specific performance of an agreement could not get round the plea of limitation by obtaining wrongful possession of the land and then pleading the agreement as a defence when his suit is barred by limitation. *1932 Sind 42*. Where a purchase of land was made by the plaintiff with notice of a prior contract for sale by the plaintiff's vendor in favour of the defendant,

**Held:** that the plaintiff's vendor cannot prevail as against the rights of the defendants. *18 CWN 445-20 IC 803*. (Facts from which notice can be inferred). It is for the person claiming the benefit of the Doctrine of Part-performance to show that the transferee, who otherwise has a legal title, had notice of the contract or of the part-performance thereof. *154 IC 474-1935 R 12*.

Where a person enters into possession of immovable property belonging to another under an agreement that he was to appropriate the rent, and profits of the property in lieu of interest on money advanced by him, such an agreement does not create any interest in immovable property in favour of the person so entering into

possession and he could not resist a claim for possession by the owner or his transferee. *11 LBR 319-1922 LB 25*. See *1933 C 393-144 IC 598*, where the Doctrine of Part-performance was held to apply to a claim for rent by the landlord under a registered kabuliyat. Where the agreement of transfer is void the Doctrine of Part-performance is inapplicable. *14 Pat LT 27-1932 P 165*. The Doctrine of Part-performance was held not to apply where there was no promise to convey the lands outright, but only to lease them. *36 Bom LA 1245-1935 B 91; 1936 ALJ 1323-1936 AWR 1038*. Though section 53A on the face of it applies primarily to contracts of transfer only, the words 'where there is an instrument to transfer' in the section show that it applies to transfers also.

Where a permanent lease is unregistered and is defective in not complying with the requirements of section 107 of the Transfer of Property Act, the defect will be cured by the provision in section 53A that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force. *1939 OWN 102-1939 Oudh 85*. An agreement contained in a lease which ought to have been, but which is not, registered, is inadmissible in evidence. *18 RD 572*. Neither under section 53A of the Transfer of Property Act, nor under section 49 of the Registration Act as amended in 1929, can a landlord recover rent under an unregistered lease, if the lease is one requiring registrations. *62 C 394*. Section 53A does not operate to create a form of transfer of property which is exempt from registration. It creates no real right: It merely creates rights of estoppel between the proposed transferee and transferor, which have no

operation against third persons not claiming under those persons. *46 CWN 374-55 LW 79-(1942) 1 MLJ 1 (PC)*.—*1941 PC 128 (PC)*. Co-sharers—Deed effecting partition of properties—Inadmissibility due to non-registration—Co-sharer disturbed in possession by another co-sharer—Right to sue in ejectment on basis of deed. See *(1941) 2 MLJ 707*. See also *1941 OA 1050*. Decree in money suit on compromise—Provision for charge on immovable property not comprised in suit—Non-registration—Subsequent appointment of receiver in execution at the instance of decree-holder—Possession by receiver—If in part-performance and if cures non-registration. *40 CWN 974*.

### 8. Receipt

A document which is primarily a receipt, cannot be said to be always insufficient for the purpose of section 53A. It would be sufficient if all the essential terms of the contract could with reasonable certainty be ascertained from it. Where a document recited the receipt of a sum of money from another as earnest money for the sale of a house for a particular price and that a portion of the consideration was to be reserved with the vendee for payment to a mortgagee, and the boundaries of the house were also given it was held that the receipt was sufficient for the purpose of section 53A as all the essential terms of the contract could with reasonable certainty be ascertained from it. *15 Luck 43-1939 OWN 876-1940 Oudh 1*. Document contemplated by section 53A need not be a formal agreement or contract, nor need it purport to be in its entirety an agreement, but part of the document at least must be in essence an agreement or contract. It is not

sufficient to say that the terms of an agreement can be ascertained from a document which purports to be on the face of it merely a receipt. Where therefore a document recited that a certain sum of money was received as an advance against the sale of a piece of land for a certain sum and the balance to be paid within a certain period.

**Held:** that by merely mentioning the period within which the balance of the purchase-money was to be paid, the document could not be construed as an

### 9. Limitation

Section 53A confers only a passive right and is available to a defendant to protect his possession. Article 113 of the Limitation Act certainly cannot apply to such a right. Consequently, the right of defence under section 53A is available to a defendant although his right to sue for specific performance of the contract made in his favour is barred by limitation. *ILR (1938) 2 Cal 328-42 CWN 630-1939 Cal 163.*

### 10. Pleadings

A defence under section 53A ought to be raised in specific terms, as it involves questions of fact. *45 CWN 240-1941 Cal 33.*

**Sections 53A and 27A, Specific Relief Act—Distinction—**What section 53A, Transfer of Property Act, creates is a defence by prohibiting the enforcement of a right by the transferor. The difference between the protection given by that section and the right conferred by section 27A, Specific Relief Act, is that while the former creates a defence, the latter creates a ground of claim.

Section 53A strikes at and prohibits the action based on the contract and not the contract itself. *ILR 1936 N 115.* See also *41 CWN 54: 1937 Nag 74.*

### 11. Oral-Usufructuary Mortgage—Suit for Redemption

Both in India and in Burma cultivators, in the teeth of the express terms of section 59 are still wont to obtain loans by delivering their lands to the lenders upon the terms that the lenders may remain in possession until the loan is repaid, and appropriate the fruits of the land towards the repayment of the principal or of the interest due under the loan. Such transactions are usufructuary mortgages within section 58(d) and unless the instrument of mortgage in such a case is in writing, and the transaction also falls within section 53A, the terms of the mortgage cannot be relied on as a ground of attack or of defence by either the plaintiff or the defendant in a mortgage suit, except in cases in which they are embodied in a duly registered written instrument. Accordingly, a suit framed as a suit for redemption of lands which are the subject of an oral usufructuary mortgage cannot be sustained, inasmuch as the plaintiff pleads and relies on the oral mortgage which is required by law to be effected by a registered instrument. The proper course of the mortgagor to take in such a case would be to sue for possession relying on his title. In such a suit, it is not permissible for the defendant to rest his claim to remain in possession on the oral mortgage which could not be proved. *13 R 274 (FB).* But see *14 LR 157 (Rev) 17 RD 201.*

**Sections 53A & 107—**Section 53A, Transfer of Property Act, cannot be invoked

by a lessor under an instrument not complying with the provisions of section 107 of the Act, to establish that he possesses any right of action under the instrument, considered purely as a lease. The main provisions of section 53A would protect the defendant lessee in his possession of the property if he proved that the necessary conditions had been satisfied. The lessor is debarred from enforcing against the lessee any right in respect of the property, 'other than a right expressly provided by the terms

of the contract. The implication is that while the instrument *qua* lease is invalid *qua* contract it can be enforced. Hence, where one party has been in possession under an instrument which is defective in form, the contract can be looked into for the purpose of determining the rights and liabilities of the parties arising out of such possession. It is permissible to admit the defective instrument in evidence for that purpose. 1941 OA 1050.