

NON-REGISTRATION OF COMPULSORY REGISTRABLE DOCUMENTS: AN OVERVIEW OF ITS LEGALITY AND EFFECT

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1. Introduction

The first complete enactment as to registration of documents was passed by Act XVI of 1864, consolidating and amending all the previous laws relating to the registration of assurances. It introduced for the first time a system of compulsory registration in British India as to certain classes of the documents. However, the Indian Registration Act, 1877¹ introduced a provision in order to give priority to registered documents irrespective of the fact that whether they were optionally or compulsorily registerable. But it is none other than the Registration Act, 1908 (herein after referred to as the Act) that comes into effect with the scheme of consolidating and gives notoriety to deeds by providing for their public registration. Though this Act does not lay down that, any transaction in order to be valid must be effected by a registered instrument, conversely what it provides is that when there is a written instrument evidencing transaction, it must in certain cases be registered while in other cases, it may at the option of the parties be registered in the manner laid down by the Act. But as the Act affects primarily substantive rights, a document which is registered under the Act, takes effect, as a result of registration, from the date of execution prospectively.² However, registration of a document in violation of the Act since nullifies the registration, makes them unacceptable as evidence of any transaction affecting such property or conferring such power and does not nullify the transaction which is the subject of the document; the main objects of law of registration are, to provide a conclusive proof of genuineness of documents; afford security of the title deeds, publicity of transaction in respect of properties; prevent fraud; provide facility for ascertaining whether a property has already been dealt with or not.³ Therefore, the purpose of this article is to focus on how the non-registration of compulsory registrable documents impinges on the legality of the rights and obligations arising out of a particular property and to outline up to which extent this leads to the inviolability and importance of certain classes of documents.

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1 Act III of 1877.

2 *Hemanta v Midnapur Zamindari Co.* ILR (1919) 47 Cal 485 at p. 496 (PC).

3 http://www.keralaregistration.gov.in/index.php?option=com_content&task=view&id=12&Itemid=26. last accessed on 30 June 2010.

2. Compulsory Registration

The Registration Act, 1908 is not striking at transactions and therefore, it is not necessary that a transaction affecting immoveable properties should be carried out by a registered document. It only enacts that where a document is employed to effectuate any of the transactions specified in section 17 of the Act, such document must be registered notwithstanding that the transaction is one which the law does not required to be put into writing. Therefore, the necessity of registration arises only in regard to documents set up in section 17. However, documents of which registration is compulsory *inter alia*, include: gift of immoveable property, declaration of heba,⁴ non-testamentary instruments creating rights in immoveable property, receipt of consideration, instrument of mortgage, lease, non-testamentary instruments transferring or assigning any decree or order of a court, instrument of partition,⁵ instrument of sale,⁶ authorities to adopt a son and contract for sale of any immoveable property.⁷ But these instruments are subject to certain exceptions⁸ where registration will not raise a constructive notice against the purchaser of such property.⁹ And non-registration in case of optionally registrable documents¹⁰ won't impair the effectiveness rather the registration of those amounts to the creation of independent evidence of its execution and existence. On the other hand, in deciding whether a document requires to be registered or not, consideration however, should be placed on the document as a whole and it is the immediate intention of the document and not the ultimate result that should be looked at in this type of situations.

4 Section 17 (1) Clause (aa) was inserted by the Registration (Amendment) Act, 2004 (Act No. XXV of 2004), section 3.

5 Clause (f) of section 17 was inserted by Act No. XXV of 2004, section 3 (with effect from 1st July, 2005).

6 Clause (g) of section 17 was inserted by Act No. XXV of 2004, section 3 (with effect from 1st July, 2005).

7 Section 17A was inserted after section 17 by Act No. XXV OF 2004, section 4, (with effect from 1st July, 2005). This section says in subsection (1) that notwithstanding anything to the contrary contained in this Act or any other law for the time being in force, a contract for sale of any immoveable property shall be in writing, executed by the parties thereto and registered. Sub-section (2) says "A contract for sale referred to in sub-section (1) shall be presented for registration within thirty days from the date of execution of the contract and the provisions regarding registration of instrument shall apply".

8 For details see section 17(2), the Registration Act, 1908.

9 *Hiralal v Bhagirathi* AIR 1975 Cal 445.

10 Section 18, the Registration Act, 1908.

3. Non-registration: Its Legality and Effects

Providing a method of public registration of documents in order to give information to people about their legal rights and obligations arising or affecting a particular property, is, amongst other things, the very idea of registration that lends inviolability and importance to certain classes of documents.¹¹ Section 17 of the Act, being a disabling section, must be construed strictly as because unless a document is clearly brought within the purview of section 17, its non registration is no bar to its being admitted in evidence. And if there is any doubt on the subject, the benefit of the doubt must be given to the person who wants the court to receive the document in evidence.

However, section 49 of the Act reveals the effect of non-registration of documents which are required to be registered and it says that no document required to be registered under this Act or under any earlier law providing for or relating to registration of documents shall operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest whether vested or contingent, to or in immovable property, or confer any power to adopt, unless it has been registered.¹² And a document which does not require to be registered cannot be affected by procedure of inadmissibility. However, apart from cases where a registered instrument is specifically required by the Transfer of Property Act, 1882; there are many transactions relating to immoveable property which can be validly effected orally. In cases of this type, if there is in fact a writing relating to such transaction, it becomes relevant to consider whether, on its true interpretation, the document itself was intended by the parties to be the formal instrument of the transaction, superseding and embodying the oral bargain, and would be compulsorily registrable.¹³ Conversely, this Act also provides for the prohibitory and penal sanctions which impose serious disqualifications for non-observance of registration.

3.1 Negation in Affirming Title

It can not be laid down as a general principle that mere registration of an instrument without reference to other circumstances operates to transfer the property or pass title to it¹⁴ where there is neither possession of the property

11 *Jogi Das v Fakir Panda* AIR. 1970 Orissa. 22.

12 *Mobinul Haq Siddiqi and another v Mrs. Hajra Farooqi and 3 others* PLD 1986 Kar 358.

13 *Subba Rao v Mahalakshamma* ILR (1930) 54 Mad 27.

14 *Ibrahim v Sardar Ahmed* (1955) 7 DLR (WPC) 62; *Aminuddin Ahmed v Samaddi Hajari* (1955) 7 DLR 443; *Subrahmanya Sastry v Lakshminarasamma* AIR 1958 AP 22; *Mina Ghosh v Daulatram Arora* AIR 1967 Cal 633.

alleged to have been sold nor any proof of the payment of consideration. Prior to the Transfer of Property (Amendment) Act, 2004, in case of a sale of immovable property of the value of more than taka 99, registration was obligatory and in absence of registration, it could neither extinguish the title of the executant's nor confer that on the vendee; explicitly, vendee could not derive any benefit from the production of such document in support of his claim of ownership on the basis of title.¹⁵ However, it is the said Amendment that makes every instrument of sale of tangible immovable property compulsorily registrable irrespective of the value, and now where compulsory registrable document is not registered, it can be received in evidence; but it, by itself, will not operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent to or in the immovable property. In *Ashutosh v Md. Yusuf Ali*¹⁶ it has been held that an unregistered document agreeing to exchange immovable property which otherwise requires compulsory registration would not vest any title or affect the same in the said property. As section 17 does not purport to create a new title¹⁷ but only affirms it which was created by the deed, the title is complete when the deed is executed and the effect of registration is only to make it absolute and unquestionable¹⁸ meaning when an unregistered deed is executed, transfer of title remains in abeyance till the deed is registered, and as soon as it is registered, the transfer operates in the words of section 47 of the Act not from the date of the registration but from the date on which it would, if no registration was needed, have taken effect.¹⁹ Therefore, title of a person under a registered document may be said to relate back to the time from which it would have operated if no registration thereof had been required or made.²⁰

3.2 Issues Regarding Admissibility

The general rule of compulsorily registrable documents as specified in section 17 of the Act is that non-registration of those documents does not affect transactions but only nullifies the instrument to the extent of its

15 *Muhammad Saeed v Mst. Nahid Shagufta & 3 others* PLD 1990 Lah 467 (DB).

16 *Ashutosh Saha and another v Mohammad Yusuf Ali and others* AIR 1987 Pat 102 (FB).

17 *Khan Md. Biswas v Chittaranjan Sen* (1955) 7 DLR 60; *Girindra Chandra Datta Chowdhury v Kumud Behari Roy* (1952) 4 DLR 623.

18 *Chander Singh and others v Jamuna Prasad Singh and others* AIR 1958 Pat 193.

19 *Ata Ullah Malik v The Custodian of Evacuee Property, West Pakistan and Karachi and others* 16 DLR SC 298.

20 *Ibid.*

admissibility in evidence in a civil proceeding.²¹ In other words, where on its proper interpretation, the document is in itself the instrument of the transaction in question, it must be registered although the transaction is one which the law does not require to be effected by a registered instrument, and in the absence of registration, the document cannot be received as evidence of the said transaction.²²

However, the former effect of non-registration that it could not be received as evidence of any transaction affecting such property is no longer the law of the country²³ as under section 49, the only penalty provided is that no document required to be registered shall operate to create, declare, transfer, limit or extinguish whether in present or in future any right, title or interest to or in any immoveable property. Thus, though an agreement which is not registered in terms of section 17 could not be made a basis for an assertion of title in the suit property, yet it could certainly be admitted in evidence²⁴ and used for a collateral purpose²⁵ such as of showing its nature and character as well as position of person holding under the same.²⁶ Though the character and nature of the possession cannot be separated from the main transaction evidenced by the document, a distinction has, however, to be drawn between the character and nature of the possession and character and nature of the transaction as because the document is admissible to prove the character and nature of the former and it is not admissible to prove the character and nature of the latter. For instance, the fact that whether a lease of immoveable property is made for a certain term express or implied or in

21 *Abdullah v Rahmatulla* AIR 1960 Mad 274; *Iswar Dutt v Sunder Singh* AIR 1960 J & K 63; *Katai Mia v Sukhamoyee Chaudhurani* AIR 1959 Assam 60;

22 Vide sec.49 of the Registration Act and sec.91, of the Evidence Act. See, observations in *Maung Tun Pe v Maung Sein Myi* ILR (1929) 7 Rang 414, in so far as they conflict with the above view, must be read with caution. As regards the Mahomedan Law of gifts, the decision in *Nasib Ali v Wajed Ali* (1926) 100 IC 296 (Cal) and *Kulsum Bibi v Shiam Sunder Lal* (1936) 164 IC 515 (All) (where the deed of gift being unregistered, the gift was proved by oral evidence), seem at first sight to be at variance with the rule in the text above.

23 *Sh. Jamilur Rahman v Akbar Hasan* 1985 CLC 922 (Karachi); *Hakim Din v Muhammad Irshad* PLD 1978 Lah 333 (DB); *Abdul Karim v Mirza Basir Ahmad* PLD 1974 SC 61

24 *Muhammad Akram v Syed Imrao Ali Shah* 1988 CLC 2228 (Lahore).

25 *Khalilur Rahman v Province of E Pak* 29 DLR 239; *Shahadat Hossain and others v Md Jabed Ali*, 1984 BLD 215

26 *Khalilur Rahman v Province of E Pak* 29 DLR239; *Dwijendra nath Pathak v Abdullah Al- Mahmud* (1973) 25 DLR 480; *Pak Employees Co-operative Housing Society v Anwar Sultana* (1969) 21 DLR (WP) 345; *Babu Ram Mandol v Revuka Bala Roy Chowdhury* (1960) 12 DLR 517; *Ahmed Shah Khan v Abdul Barkat* (1959) 11 DLR 427; *Khan Md. Biswas v Chittaranjan Sen* (1955) 7 DLR 60.

perpetuity or for a certain consideration is not covered by the term 'collateral purpose' under the concerned section. They are the essential terms of the lease and cannot be proved by a document which is not by the law governing such document admissible in evidence but endorsement, requiring registration and not registered in a lease is admissible for collateral purposes.²⁷ An unregistered lease thus, does not prove the relationship of landlord and tenant to create rent, the area of the leasehold property, the period of lease and other terms. It only shows the nature of possession and of finding out if parties agreed to refer the dispute to arbitration.²⁸

3.3 Consideration of Registered and Unregistered Instruments

In cases where a transaction is ineffective so long as it is not registered, the fact that it has not been registered, would make it inoperative. Therefore, where a transfer of the property to the respondent is exhibited by a registered document which upon its terms is an absolute sale and the appellant seeks to utilize the unregistered one to show that the transaction covered by the registered document though ostensibly a sale, is, in reality a mortgage by conditional sale and it was held that an unregistered document cannot be allowed to affect the terms of a registered one which creates rights in the property of the value of more than Taka 100. Once by a registered deed title has passed to the vendee, the subsequent deed of cancellation by the vendor does not nullify the effect of the already completed deed.²⁹ And when a document requires registration, but is not registered, the defect of registration may be cured by the conduct of the parties in continuously acting upon it for a long period. Upon these facts the Privy Council held that though the document was not registered, effect should be given to it, as if it was registered.³⁰

However, an unregistered document is not rendered the document invalid or the rights there under is not extinguished by a subsequent registered document although, the ownership, it is submitted, will commence only from the date of the second document. Thus, where the appellant claimed that disputed piece of land had been gifted to him with possession but the same had also been sold by registered sale deed, it was held that the registered

27 *Khan Muhammad Biswas v Chittaranjan Sen* (1955) 7 DLR (HCD) 60.

28 *Cotton Trading Corporation of Pakistan Ltd. v Sheikh Sultan Trust, Karachi* 1981 CLC 623; *Mahendra Singh v State* AIR 1976 All 59.

29 *Michhu Kumar and others v Raghu Jena and others* AIR 1961 Orissa 19.

30 *Muhammad Khan v Muhammad Zaman Khan* PLD 1956 (WP) Pesh 12.

deed had precedence over the earlier unregistered gift-deed.³¹ In cases under section 50 of the Registration Act, 1908 an unregistered mortgage won't invalidate or extinguish the rights of such a mortgagee. Therefore, purchase under a subsequent registered mortgage does not extinguish an earlier unregistered mortgage and the debt could be recovered from the money, if any, after satisfying the registered one. Similarly, a person who claims under a deed which under the law does not require registration and is perfectly valid though unregistered cannot escape the provisions of section 50.³² Also, where persons in possession claimed title on the basis of unregistered sale deed, it could not be held to transfer title to such persons but could be made use of to examine the nature of transaction it evidences. However, without creating any legal title in the plaintiffs, the unregistered document changed the nature of their possession of the suit land and if they did not acquire the status of lawful owners they, at least, feigned ownership, under the terms of the said document to the knowledge of the defendants since its execution; their possession of the suit land as such, stretched long after the statutory period of 12 years to create title in them.³³

3.4 Execution Aspects

Generally, a registered document should be presumed to be written on the date it bears and for the purpose of execution, registration of a document raises no presumption in its favor. And person claiming the execution is required to prove it by producing evidence that it was in fact executed.³⁴ In all such cases, lapse of time does strengthen the onus cast. However, where a document has been duly executed, in the absence of any circumstances to the contrary, the presumption will be that the parties intended, the title to pass forthwith. On the other hand, in relation to section 47 of the Registration Act, 1908, the provisions herewith operate not only as between the parties to the deed but also affect the rights of third parties.³⁵ For instance, where there is transferor and the transferee, the registered document takes effect as between them from the date of execution; and if there is a competition between two documents relating to the same property the one executed earlier in point of time will have priority over the other. But as regards a third party, the point of time at which the deed is to be effective is, when it is

31 *Jainullah and another v Ann Mia and others* (1963) 15 DLR (HCD) 77; *Mir Abdul Ali v Md. Rafiqul Islam* 8 BLD (AD) 73 and 149.

32 *Ashraf Ali v Chandrapal Singh and another* AIR 1925 Oudh 506.

33 Chowdhury, Obaidul Huq. 1985. *The Registration Act*, 2nd edn. Malibagh: Dhaka, at p. 141.

34 *Sh. Muhammad Sharif Uppal v Sh. Akbar Hussain and others* PLD 1990 Lah 229.

35 *Sadei Sahu v Chandramani Dei and another* AIR 1948 Pat. 60 (DB)

registered.³⁶ Also where there being two different *Kabalas* one later than the other in favor of two different persons in respect of the same property, title under the first has priority over title under the second though, the second is registered prior to the first and possession is delivered under it. And where a deed of transfer of immovable properties is executed, but before it can be registered the properties covered by it are attached, the attachment cannot prevail against the deed when it is registered or it cannot prevent the registration thereof and when registered, the deed operates only from the date of its execution.³⁷

3.5 Ultra vires Transactions

As the law of registration is intended to prevent and not to aid fraud,³⁸ registration cannot confer validity upon an instrument which is *ultra vires*, illegal or fraudulent. Since a transaction, before it becomes effective, must be a legally proper transaction; so as to be a proper one, registration must be valid according to the law for the time being in force and if it is not, mere registration does not make it effective. For instance, non-compliance with the rules of registration as laid down in the Act makes it invalid whether effected by fraud, negligence or inadvertence.³⁹ Thus, the Registration Act, 1908 has no application in cases where the registered deed is obtained by fraud and the party holding the same has no claim to priority by virtue of the Act; the object of which is to put an end to fraud. In cases where there is a fraud on the law of registration like relevant property's description was different from that described in the registered document, document is not presented before the Registrar by the executant or the proper person, the registration of those documents will be invalid⁴⁰ since the transactions are *ultra vires*, illegal or fraudulent. However, to see whether the registration of a document has the effect of transferring any right of property or not, the

36 *Muhammad Meherali Mondal v Muhammad Karam Ali Sarkar* (1965) 17 DLR 365.

37 *Bhagavathula Kemeswara Rao v Doddaku Veera* AIR 1960 Andh Pra 616.

38 *Abdul Motalib v Imam Ali Mollah and ors* (1990) 42 DLR (AD) 123; *Mir Abdul Ali v Md. Raftiqul Islam Khan* (1988) 40 DLR (AD) 75; *Abdur Rahman v Baser Ali and others* (1969) 21 DLR (HCD) 599; *M/S Green & White v Registrar J. S. Companies* (1963) 15 DLR 4924 Bom. 126, 148; *Abdul Motalib v Imam Ali Mollah and others* 10 BLD (AD) 160.

39 *Chindu v Rameshwarnath* AIR 1927 Nag 30 (DB).

40 *Harendra v Hari* ILR (1914) 41 Cal 972; *Bishwanath v Chandra* ILR (1921) 48 Cal 509; *Akshayalingam v Ramayya* (1929) 120 IC 876; *Jogine Mohan v Bhoot Nath* ILR (1902) 29 Cal 654.

40 *Mujibannissa v Abdul* ILR (1901) 23 All 233; *Halima v Khairunnisha* ILR (1925) 8 Rang 898; *Dottic v Lochmi* ILR (1931) 10 Pat 481.

court has to see the intention of the parties in each particular case, as mere registration of a document does not necessarily operate to transfer or affect the property dealt with it without regard to the intention of the parties to the document.

3.6 Priority Cases

The dispute as to the precedence of one document over the other in the case of successive transfers of the self-same property in favor of different person has to be determined in accordance with the principles laid down in section 47 of the Act.⁴¹ It gives priority to a registered instrument over an unregistered one on the principle that it is execution and not registration that determines the precedence of one document over another.⁴² It follows that if a deed is presented for registration within the time prescribed by the Act, and registered, it is immaterial that another deed executed subsequently has obtained priority of registration. But where the registration of a deed is delayed by the fraud and misrepresentation of the other party, the latter cannot be allowed to benefit from his own fraud. Therefore, where a transfer was made in favor of P after the transfer in favor of D but it was registered earlier than the transfer in favor of P, it was held that though the effect of registration is to confer validity on the document from the date of its execution, D should not be allowed to rely upon his own fraudulent conduct to give his conveyance preference over the sale-deed in P's favor executed later but registered earlier.⁴³

However, the principle of priority conferred to one document over another is not in any way affected by decrees being obtained on them.⁴⁴ Therefore, where X sold property to A by unregistered deed who leased it to X and obtained the decree for rent on lease, and subsequently, X sold the same property to B by a registered deed, B is entitled to priority and the decree does not have preference over the other. And also where a decree is obtained on an unregistered mortgage and a registered sale-deed is executed pending

41 *Mir Abdul Ali v Md Rafiqul Islam* 40 DLR (AD) 75; *Jainullah and another v Anu Mia and others* (1963) 15 DLR (HCD) 77.

42 *Azizuddin Alias Aniuddin v Abu Taleb Sarder* (1983) 35 DLR (HCD) 360; *Ata Ullah v Custodian of Evacuee Property* (1964) 16 DLR (SC) 299; *M/S Green & White v Registrar J.S. Companies* (1963) 15 DLR 492; *Jainullah and another v Anu Mia and others* (1963) 15 DLR (HCD) 77; *Fazar Ali & ors. v Afzal Mia & ors.* (1957) 9 DLR 258.

43 *M.k. Muhammad Batcha Sahib v Arunachalam Chettiar* AIR 1926 Mad. 39.

44 Mahmood, Sh. Shaukat and Shaukat, Sh. Nadeem 1985. *The Registration Act*. 4th edn.. Lahore: Pakistan, at p. 188.

execution of the decree; the sale is governed by the doctrine of *lis pendens* and cannot take precedence over the decree. Similarly, section 50 of the Act reveals that every document of the kinds mentioned in clauses (a), (b), (c) and (d) of section 17(1), and every document registrable under section 18, in so far as such document affects immovable property or acknowledges the receipt or payment of any consideration in respect of any transaction relating to immovable property⁴⁵ shall, if duly registered; take effect as regards the property comprised therein, against every unregistered document relating to the same unregistered one be of the same nature as the registered document or not.⁴⁶ Proviso of this section explains that the person in possession of the property under an unregistered document prior in date would be entitled to the rights under section 53-A of the Transfer of Property Act, 1882 (IV of 1882) if the conditions of that section are fulfilled and the person in whose favor an unregistered document is executed shall be entitled to enforce the contract under the unregistered document in a suit for specific performance against a person claiming under a subsequent registered document.⁴⁷ The explanation to the section has the effect of making even a compulsorily registrable document which is registered under the earlier Acts prevail over an unregistered optionally registrable document executed under the prior Acts. Here consideration should be placed on the point that this principle has no application to cases where under the prior unregistered deed of transfer, there has been a valid and effectuated transfer of property; it refers only to cases where the previous document, though valid, was only optionally registrable, that is to say, if in respect of a document relating to a transaction a person had the option to register the document, and if for some reason the transaction is not completed or does not completely take effect and subsequently another person comes to purchase the same property under a registered document without any knowledge or notice of the previous transaction, then in the conflict between these two provisions of the Act, it was decided that effect shall be given to the latter registered document.⁴⁸ Therefore in a competition between a document which is compulsorily registrable and registered and one which is optionally registrable and

45 Substituted by Registration (Amendment) Ord., 1962 (45 of 1962), s. 13 (with effect from the 7th June, 1962), for "and clauses (a) and (b) of section 18".

46 Subs. by Registration (Amendment) Ord., 1962 (45 of 1962), s. 13 (with effect from the 7th June, 1962), for the full-stop.

47 Provisions added By Registration (Amendment) Ord., 1962 (45 of 1962), s. 13 (with effect from the 7th June, 1962), for the full-stop.

48 *Kuppuswami Goundan v Chinmaswami Goundan and others* AIR 1928 Mad. 546.

registered, the former will prevail, whether the unregistered document be of the same nature as the registered one or not.

3.7 Issues of Notice and Onus Thereof

As question of notice arises only when there is conflict between registered deed and unregistered one or oral transaction or where transferor is not entitled to dispose of property, the question of priority in operation of document is not affected by want of notice, on the part of the person claiming under the subsequent document of the execution of earlier one.⁴⁹ Also, a registered transferee will have no priority over unregistered transfer if he receives notice thereof prior to the registration of the document even though he had no such notice at the time of execution of the document.⁵⁰ Therefore, in view of the provisions of the specified Act, the right of pre-emption as to various parties must be determined as on the date of registration and not on the date of execution of the transfer deed on which pre-emption is claimed.⁵¹ But as regards the right of the transferees, where a deed of gift in favor of a vendee is executed before but registered after the date of suit for pre-emption, the deed of gift having become operative prior to the institution of the suit, there is no improvement of status by the vendee after the institution of the suit. And in a pre-emption suit the limitation runs from the date of registration and not from the date of execution of the deed where Article 120 of the Limitation Act is applicable and not section 47 of the Registration Act, 1908.⁵² A registered deed though operates as notice in *rem* yet while making statement before Registrar, transferor must produce before him very cogent proof in support of his claim to be owner of property under transfer or sale and must also accept responsibility to meet claim of any body as may assert his ownership to property.⁵³

49 Mahmood, Sh. Shaukat and Shaukat, Sh. Nadeem 1985. *The Registration Act*, 4th edn., Lahore: Pakistan, at p. 174.

50 30 All 238; AIR 1933 Lah. 609; AIR 1929 Lah. 500.

51 *Abdul Motalib v Imam Ali Mollah and others* 10 BLD (AD) 160; *Ayesha Khatun v Jahanara Begum* 43 DLR (AD) 9; *Abdul Motalib v Imam Ali Mollah and ors* (1990) 42 DLR (AD) 123; *Lebu Mia v Ganesh Chandra Nath and ors* (1982) 34 DLR (AD) 220; *Abdur Rahman @ Abdur Rahman v Maklis Ali and anor* (1979) 31 DLR (AD) 118; *Abdur Rahman v Baser Ali and others* (1969) 21 DLR (HCD) 599; *Azimuddin Bhuiyan v District Registrar, Dacca, Mr. A.B.M.F. Rashid, Sub, Registrar, and others* (1968) 20 DLR (HCD) 355; *Ajimuddin Paramanik & others v Najemuddin Mondal and others* (1965) 17 DLR (HCD) 231; *Muhammad Meherali Mondal v Muhammad Karam Ali Sarkar* (1965) 17 DLR 365; *Noab Mian Bhuiyan v Golam Hosain (minor)* (1961) 13 DLR (HCD) 889.

52 *Ragho v Sakharam* AIR 1922 Nag 200.

53 *Jamal Khan and 5 others v Mst. Mubarik Bano and 7 others* PLD 1982 Pesh 16.

3.8 Specific Performance or Rescission of Contract

The Registration Act also provides for instituting a suit of specific performance or rescission of contract where a contract for sale of immovable property is executed but not registered prior to coming into force of section 17A⁵⁴ and where either of the parties to the contract shall if aggrieved for non-compliance with any of the provisions mentioned in section 17B⁵⁵ (1) (a); notwithstanding anything contained to the contrary in any law for the time being in force as to the law of Limitation. However, there is a condition precedent for instituting the specified suit which reveals that it has to be instituted within six months next after the expiry of the period mentioned in section 17B(1)(a).

3.9 Oral Agreement and Possession

It is clear by section 48 of the Act that a registered document shall take effect against an oral agreement or declaration relating to any property only when the said agreement or declaration has not been accompanied or followed by delivery of possession. But an oral agreement or an unregistered written agreement as to sale of immovable property followed by delivery of possession without any registered document with respect thereto, shall affect the validity of the subsequent sale of the same property.⁵⁶ Therefore, where a purchaser of immovable property under an unregistered *kabala* has paid the agreed price to the vendor, and is placed in possession, in the absence of circumstances showing that such purchaser was not entitled to sue his

54 This is provided in section 17B which was inserted after section 17 by Act No. XXV of 2004, section 4, (with effect from 1st July, 2005).

55 -(1) where a contract for sale of immovable property is executed but not registered prior to coming into force of section 17A-

(a) the parties to the contract shall, within six months from the date of coming into force of that section, -

(i) present the instrument of sale of immovable property under the contract for registration, or

(ii) present the contract for sale itself for registration, or

(b) either of the parties, if aggrieved for non-compliance with any of the provisions mentioned in clause (a), shall, notwithstanding anything contained to the contrary in any law for the time being in force as to the law of Limitation, institute a suit for specific performance or rescission of the contract within six months next after the expiry of the period mentioned in clause (a),

(2) the provision of sub-section (1) shall not apply to any contract for sale of immovable property on the basis of which a suit has been instituted in a civil court before coming into force of section 17A.

56 Mahmood, Sh. Shaukat and Shaukat, Sh. Nadeem 1985. *The Registration Act*, 4th edn., Lahore: Pakistan, at p. 178.

vendor for specific performance, a subsequent purchaser of the property under a registered conveyance cannot succeed in a suit to recover possession of the property from such purchaser. And where a transferee under a verbal contract is already in possession in some other character, the case would be one of “oral agreement accompanied by possession” within the meaning of this section and such transfer would prevail against any subsequent registered transfer.

However, it is already settled that no equitable doctrine could override specific provisions of section 49 of the Act so as to make an unregistered document create title, if the same required registration under section 49.⁵⁷ And where, a purchaser was let into possession by vendor under an unregistered document pursuant to an oral agreement to sell under a mistaken belief that the transaction was complete, whereas, in fact it was incomplete, for want of registration of instrument purporting to effect transfer, such purchaser must be regarded to be a purchaser under a contract for sale which was yet to be an equitable owner, yet would have a charge on property for the amount paid by him towards purchase of property in question.⁵⁸

But a subsequent registered document cannot be pleaded in bar of a prior unregistered document or a prior oral agreement to sell if the registered document has been taken with notice of the latter.⁵⁹ And the provision as to delivery in section 48 of the Act does not preclude the party to the oral agreement from relying on the doctrine of notice when there has been no delivery of possession.⁶⁰ However, the onus of proof that the registered transferee, had notice of the prior oral agreement is on the person claiming under the oral transfer,⁶¹ and if the property to be sold is not in the possession of the vendor, but of another person it is the duty of the purchaser to make enquiries from that person, and he is bound by all the equities which the party in possession is tantamount to notice of the interest or claim in the property of the person in possession and whoever deals with such property is put on enquiry as to the title of the person in possession. And if, therefore, the *factum* of possession is proved, notice to the transferee of the claim or interest of the person in possession must be assumed. That being so, he is put

57 *Habibur Rahman and another v Mst. Wahdania and others* PLD 1984 SC 424.

58 *Ibid.*

59 *Hemeswar Barua v Poal Chandra Bora and another* AIR 1928 Cal 754.

60 (1907) 17 M.L.J. 319 (DB).

61 *Rasila and another v Haveli Ram and others* AIR 1929 Lah. 500.

on the enquiry as to the claim the property and when no such enquiry is made; there will be a postponement of the claim.⁶²

4. Concluding Observations

As the Registration Act, 1908 came into force on the first day of January 1909, provisions of this Act therefore, apply to all documents which are produced in courts in evidence on or after 1 January 1909 provided the document is one which was compulsorily registrable under the Act in force at the time when it was executed. The question of admissibility of a document in evidence is a matter of procedure and so it is governed by the registration law present at the date of the institution of the suit, and not by an Amending Act which may be in force when the suit comes on for hearing. Thus after the Transfer of Property (Amendment) Act, 2004 (Act No. XXVI of 2004) there is no scope for the courts of law to take into consideration any unregistered instrument of sale of tangible immovable property executed thereafter as well as there is no scope to enforce any unregistered contract of sale by a suit for specific performance of contract. That by the said Act of 2004 compulsory provision of registration has been made for every instrument of mortgage where the principal money secured is one hundred taka or upwards with the only exception that where the bank or financial institution wishes to finance to the purchase of a flat or floor space or plot to be constructed or developed, the same may be effected through a mortgage by deposit of title deeds and no immovable property under registered mortgage shall be re-mortgaged or sold without the written consent of the mortgagee and any transfer in violation of this shall be void. It is submitted, however that, where on its true construction, a document is admittedly within the four corners of the provisions of the Act as to compulsory registration, the courts cannot countenance any evasion of the statute, but must give effect to the terms of the Act which are imperative, and no plea of hardship and so forth can be of any avail. Where a document would be invalid because of non-registration if one construction is placed on it, and be valid if another construction is placed on it, then the law should favor the construction which would make it valid. Therefore, the effect of non-registration of documents which are required to be registered is a settled question of law and must be considered carefully when the question of admissibility of evidence arises of such documents.

⁶² *Balchand Mahton v Bidaki Singh* AIR 1929 Pat. 284.