

# Rudiments and Demurrals of Doctrine of Priority: Bangladesh Chapter

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**Abstract:** *In Bangladesh, the ownership, occupancy, and transfer of property are complicated because individuals in the country repeatedly purchase and sell the same property, despite the existence of laws. This may occur if the transfer is not adequately documented and possession is not delivered accordingly. Such a chaotic situation leads to suits paving the way for the superior courts making precedents, and the government departments framing guidelines, notifications, and statutory rules and orders (SROs), and the legislature making amendments to the existing laws or re-enactments. This article enlightens the doctrine of priority under the Transfer of Property Act, 1882, in conjunction with its essentials and exceptions. In order to have a better understanding, this particular concern has also been discussed through relevant case laws.*

**Key-words:** *Immoveable property, transfer of property, priority right, property right, negligence, mortgage*

## 1. Introduction

Inferred from the principles of natural justice, the doctrine of priority is incorporated in section 48 of the Transfer of Property Act, 1882. This avowal is articulated in the maxim ‘*qui prior est tempore potior est jure*’, which connotes that the person who is earlier in time has priority or better advantage in law.<sup>1</sup> When interests are created at variance by parties over a particular immoveable property, it can be determined through the courts by dint of this canon to a large extent. This is also related to the norm known as ‘*nemo dat quod non habet*,’ i.e., no one can convey a better title than he himself possesses. Thus, a transferor of any transaction cannot detrimentally affect the rights of the transferee by the subsequent dealing of the property concerned according to this doctrine.<sup>2</sup>

Despite the existence of laws, individuals in the country repeatedly purchase and sell the same property, resulting in complex issues related to property ownership, occupancy, and transfer. This is possible when the transfer is not properly recorded or when possession is not properly

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<sup>1</sup> B B Mitra and S P Sen Gupta, *Transfer of Property Act* (21st edn, Kamal Law House 2021) 344; *Grihayan Limited v Government of Bangladesh, through the Secretary, Ministry of Public Works and Urban Development, Bangladesh Secretariat, Dhaka and others* (1995) 47 DLR 12 (AD); *Arunachalam v Sivan* [1970] AIR 226 (Mad); *Sirbadh Rai v Raghunath* (1885) 7 ILR All 568; *Karamat v Samiuddin* (1886) 8 ILR All 409; *Narayan v Lakshman* (1905) 29 ILR Bom 42; *Motichand v Sagun* (1905) 29 ILR Bom 46.

<sup>2</sup> Solil Paul (ed), *Mulla on The Transfer of Property Act 1882* (9th edn, LexisNexis 2003) 344; *Nandkishore v Hajarilal* [2009] AIR NOC 2445 (MP).

delivered. Such a chaotic situation leads to suits, paving the way for the superior courts making precedents, and government departments framing guidelines, notifications, statutory rules and orders (SROs), and the legislature making amendments to the existing laws or re-enactments.<sup>3</sup>

In this article, with prevailing amendments and case laws dogma many rudiments and exceptions of priority rights in the property laws of our country are discussed, which will elucidate innumerable instances of contracting parties and their queue of priorities.

## 2. Rudiments of Doctrine of Priority:

Priority of rights created by transfer under the Transfer of Property Act 1882 is specified in section 48, which states:

“Where a person purports to create by transfer at different times rights in or over the same immoveable 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.”

Here, it explores that when by successive valid and complete<sup>4</sup> transfers, rights over the same immoveable property<sup>5</sup> are created by the same person<sup>6</sup> where all the rights cannot be exercised to their full extent or at all co-exist, each later-created right shall be subject to the rights previously created,<sup>7</sup> without any special agreement binding on the earlier transferees.<sup>8</sup> Thus, any earlier transfer made by the transferor cannot be discounted, and the rights of the first transferee in a legal sense must be defended since there is a moral validation for the creation of those rights. Henceforth, when two or more interests are created by the same transaction, it becomes difficult to identify the rights and priorities of the succeeding transferees. The doctrine

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<sup>3</sup> Mohammad Towhidul Islam, *Land Law: Text, Cases and Materials* (3rd edn, CHRLR 2023) 1–5.

<sup>4</sup> Mitra and Gupta (n 1) 346.

<sup>5</sup> Shaukat Mahmood and Nadeem Shaukat, *Transfer of Property Act* (4th edn, Legal Research Centre 2006) 213; See also *Krishnaveni Ammal v Subramaniam Chetty* [1938] AIR 547 (Mad); *P Rammurty v A Kalpo Patra and Others* [1963] AIR 136 (Orissa).

<sup>6</sup> *ibid*; *Ma Shwe Mya v Mung Mo Hnaung* [1922] AIR 249 (Mas) (DB).

<sup>7</sup> *Cathiresan Chettiar v Natchiappa Chettiar* [1933] AIR 191, 192 (PC); *Imperial Bank of India v Rai Gyaw Thu & Co Ltd* [1923] AIR 211, 213 (PC); A R Biswas, *Rashbehary Ghose On Law of Mortgage* (6th edn, Kamal Law House 1988) 380.

<sup>8</sup> Transfer of Property Act, 1882 (TPA 1882), s 48; *Sarder Shafiqul Islam v Mahubur Rahman and Others* (2024) 29 BLC 396 (HCD); *Abdul Mannaf Khan and Others v Bangladesh and another* (1986) 38 DLR 201 (AD); *Abdul Gaffar and Others v Md Abdul Miah and Others* (2023) 12 LNJ 44 (AD).

of priority in this situation assists the court in concluding incompatible interests.

Hence, the transferor imports to create rights by transfers which are 'identical in form' and are done at different times. In cases where deeds are executed as of the same date, proof may be gathered as to the date of first execution, and it is the period of concern in categorizing priority rights.<sup>9</sup> And, where it cannot be determined, the transferees will hold the rights as tenants in common or joint tenants.<sup>10</sup> At this juncture, the magnitude of all formed rights is that between transfers; if one is a nullity, section 48 cannot be raised to determine the others' priority. It also articulates that each previously created right will get priority over the later one, unless there is no former reservation or special contract screening among others, the intention of contracting parties that binds the earlier transferee or transferees regarding the subsequent situation.<sup>11</sup> In cases where there are incidents to deal with formal arrangements and legal rights of various secured creditors and special statutes regarding those are silent, specific provisions of the general property law shall prevail. Sometimes, stern adherence to the rule of priority might not be probable, though it may stand as the guiding principle.<sup>12</sup> However, it is to be noted that law, in case of priority, will not affect the rights of a *bona fide* purchaser for value without notice.<sup>13</sup>

Thus, the ground rules for the doctrine of priority are that this doctrine is pertinent for immoveable property. It is within the parties where the transferor is one, and the transferee is more than one. All the transfers, the forms of which are alike and done at different times. Earlier and subsequent rights are created in or over the same immoveable property, and those rights cannot co-exist or be exercised in depth.

Therefore, to assist the court in identifying the rights and priorities concerned when more interests are created by the same transaction, it is essential to have a clear and suitable consideration of the fundamentals and omissions of this doctrine, which are discussed in detail.

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<sup>9</sup> Paul (n 2) 346.

<sup>10</sup> *Ram Ratan v Bishun Chand* (1906) 11 CWN 732; See also Biswas (n 6) 381.

<sup>11</sup> *Gartside v Silkstone & Co* [1882] 21 Ch D 761; See Mitra and Gupta (n 1) 348.

<sup>12</sup> *The State of Karnataka and Others v State of Tamil Nadu and Others* (2018) 4 SCC 1.

<sup>13</sup> *Md Abdul Gafur and Others v Md Badsha Matbor and Others* [2024] LEX/BDHC/1745/2024 (HCD).

### 3. Demurral of the Rule of Priority

There are exceptions to the rule of priority mostly borrowed from English law and hinged on the doctrine of justice, equity, and good conscience.<sup>14</sup> All the exceptions of the doctrine of priority articulate that even if the contracting party's transaction is done first in point of time, it won't get the advantage of priority over the subsequent transfer. The subsequent transfer will be the first in the queue. There are numerous exceptions to this rule, which are discussed in the following:

#### 3.1 Fraud, Mortgage, Charge, and Right of Priority

Among the exceptions to the rule of priority, fraud, misrepresentation, and gross negligence of the prior mortgagee and charge holder are considered. In the case of a mortgage, the mortgagor's accountability is outside the question of priority. It only arises between consecutive mortgagees<sup>15</sup> and not between a mortgagee and a subsequent purchaser.<sup>16</sup> The general property law of our country describes a mortgage<sup>17</sup> as "the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed." And a simple mortgage as stated in section 58 (b) of that Act which can also be contained within the definition of mortgage, says "where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee."

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<sup>14</sup> Biswas (n 7) 381; See *Har v Raghunandan* (1908) 31 ILR All 166.

<sup>15</sup> *Padarath Halwai v Ram Nain* [1915] AIR 21 (PC); See also Paul (n 2) 860.

<sup>16</sup> *Pt Sita Ram v Raj Narayan* [1934] AIR 283 (Oudh).

<sup>17</sup> TPA 1882 (n 8) s 58(a).

Sections 78<sup>18</sup> and 79<sup>19</sup> the Act of 1882 endorses an exception to this rule of priority. In the canon of priority, due to the fraud, misrepresentation, or gross negligence of the parties concerned in a transaction, the right of priority is forfeited. Consistent with section 78, which is based on the law of estoppel, where the prior mortgagee is accused of fraud, misrepresentation, or gross negligence and another person has already been persuaded to advance money for securing mortgage property, the subsequent mortgagee will get priority, not the earlier one, and the prior mortgagee shall be postponed to the subsequent mortgagee. However, these reasons must be the adjoining causes of the inducement for advancing money by the ensuing mortgagee. Where both the mortgagees, i.e., prior and subsequent, are guilty of gross and contributory negligence, the prior mortgagee cannot be postponed to the subsequent one under this section. And since these words are lacking consistency in their meaning, there will be no similar denotation of all these.<sup>20</sup>

However, in the section, the plea of fraud as a ground of an exclusion has resemblance with section 17 of the Contract Act, 1872.<sup>21</sup> In case of fraud, the priority rule entails the subsequent mortgagee to establish the particulars of fraud alleged specifically.<sup>22</sup> Nondisclosure of any fact where it is a duty to speak or silence by the concerned party when it is equivalent to speaking is also fraud, and the mortgagee who did not disclose or is silent

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<sup>18</sup> “Where, through the fraud, misrepresentation or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee.”

<sup>19</sup> “If a mortgage made to secure future advances, the performance of an engagement or the balance of a running account, expresses the maximum to be secured thereby, a subsequent mortgage of the same property shall, if made with notice of the prior mortgage, be postponed to the prior mortgage in respect of all advances or debits not exceeding the maximum, though made or allowed with notice of the subsequent mortgage.”

<sup>20</sup> Mahmood and Shaukat (n 5) 654.

<sup>21</sup> “Fraud means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:-

(1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

(2) the active concealment of a fact by one having knowledge or belief of the fact;

(3) a promise made without any intention of performing it;

(4) any other act fitted to deceive;

(5) any such act or omission as the law specially declares to be fraudulent.

Explanation – Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.”

<sup>22</sup> *Lloyds Bank v P E Guzdar & Co* [1930] AIR 22 (Cal) [28].

cannot assert priority over the subsequent mortgagee.<sup>23</sup> In addition, the term 'misrepresentation' under this section does not necessarily mean fraudulent misrepresentation. It has to be taken in the sense as it is stated in section 18 of the Contract Act, 1872,<sup>24</sup> which embraces cases where there is no intent to deceive, even though any misstatement made by the prior mortgagee will relinquish his priority right.<sup>25</sup>

Likewise, gross negligence, which is a question of fact, depends upon particular circumstances relative to time, place, or person. There is no absolute or intrinsic negligence.<sup>26</sup> Negligence, which is not fraud, nonetheless can be evidence of fraud where it is gross enough as to be discordant with the notion of honesty.<sup>27</sup> English law, however, refuses to postpone the right to priority where gross negligence is solo by any component of fraud.<sup>28</sup> On the other hand, in our country, gross negligence postulates that the prior mortgagee has failed to take reasonable precautions in order to save the subsequent mortgagee from being deceived and renders his own property retention unjust.<sup>29</sup> The act or omission of the prior one needs to be sufficient to create an estoppel.<sup>30</sup> Thus, a slight negligence apart from any element of fraud or misrepresentation on the part of the mortgagee cannot be the cause to postpone him. And neglect in one sense may embrace honest inadvertence where there is no fraud, direct or positive, but it is an absence of good faith, suppositionally due care and attention.<sup>31</sup> Where a mortgage is by deposit of title deeds and possession of those is an essential part of security, the prior mortgagee, if, allows those title deeds to

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<sup>23</sup> *Muhammad Hamiduddin v Shib Sahai* (1899) 21 ILR All 309.

<sup>24</sup> "Misrepresentation" means and includes—

(1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

(2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of any one claiming under him;

(3) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement. See *Shan Maun Mull and Another v Madras Building Co* (1892) 15 ILR Mad 268.

<sup>25</sup> *Mahmood and Shaukat* (n 5) 655.

<sup>26</sup> *Lloyds Bank v P E Guzdar & Co* (n 22) [29]; *Colyer v Finch* (1865) 5 HLC 905.

<sup>27</sup> *Ghulam Fatuna v Gopal Devi* [1943] AIR 113 (Lah); *Rangappa v Imamuddin* [1934] AIR 29, 31 (Nag); *Oliver v Hinton* (1899) 2 Ch 264, 274; *Martinez v Cooper* (1862) 2 Russ 198; *Evans v Bicknell* (1801) 6 Ves 174.

<sup>28</sup> *Northern Counties Fire Insurance Co v Whipp* (1884) 26 Ch D 482.

<sup>29</sup> *State Bank of India v Kerala Financial Corporation* [1983] AIR 38 (Ker); *Dharani v Pramatha* [1936] AIR 283 (Cal).

<sup>30</sup> *Rangappa v Imamuddin* [1934] AIR 29, 31 (Nag); *Ratan Lal v Mukundi* [1933] AIR 299, 300 (All).

<sup>31</sup> *Obaidul Huq Chowdhury, Transfer of Property Act* (4th edn, DLR 2013) 365.

pass again into the possession of the mortgagor without sufficient reason, the prior one would be deferred to the subsequent mortgagee.<sup>32</sup> However, section 78 has no application and ought not to be applied to overthrow the privileges of an indefeasible title holder who, by continuous possession or prescription, has acquired his title.<sup>33</sup>

In section 79, when studying section 93<sup>34</sup> of the general property law<sup>35</sup> deals with an instance where two different mortgagees' rights and priorities are determined according to the circumstances that are mentioned in those sections. The number of mortgagees' is vital as this section has no relevance where there is only one mortgagee, and also has no application to the question regarding the character and constitution of the said mortgage.<sup>36</sup> Correspondingly, in line with section 79, where a prior mortgage expresses the maximum secured amount and protects the future advances, a puisne or subsequent mortgagee, with notice of the earlier mortgage, will not get priority over ensuing advances made by the earlier mortgagee within the articulated maximum amount.<sup>37</sup> However, a definite figure as the maximum amount is not a necessity to be mentioned; it is sufficient if the maximum amount is expressed in such terms as can be determined when required.<sup>38</sup> It's a question of fact and will depend on the construction of the deed, where precision is needed on whether the mortgage is securing the balance due at the time the mortgage was created, or the balance that may be found due from time to time up to a certain limit.<sup>39</sup> This section, however, has no application in the instance where, before the second mortgage, the previous transferee alleges interest on the sum advanced in his mortgage.<sup>40</sup> Conversely, this outcome will be changed if the subsequent mortgagee is without notice of the earlier one. However, after the insertion of section 53D by the Act No. XXVII of 2004 (with effect

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<sup>32</sup> Shaukat Mahmood and Nadeem Shaukat (n 5) 655, 657.

<sup>33</sup> Mitra and Gupta (n 1) 1007.

<sup>34</sup> "No mortgagee paying off a prior mortgage, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his original security; and, except in the case provided for by section 79, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance."

<sup>35</sup> TPA 1882 (n 8).

<sup>36</sup> Mahmood and Shaukat (n 5) 658.

<sup>37</sup> Paul (n 2) 347.

<sup>38</sup> *Durga Prasad v Mario Galstaun* [1955] AIR 194, 394 (Cal); *Brijmohan Singh v Dukhan Singh* [1931] AIR 33 (Pat).

<sup>39</sup> Mahmood and Shaukat (n 5) 659.

<sup>40</sup> *Allahabad Bank Ltd v Benares Bank Ltd* [1938] AIR 473 (All).

from 1<sup>st</sup> July 2005)<sup>41</sup>, no immoveable property will be re-mortgaged or sold without the written consent of the mortgagee, and if it is made otherwise, it will be void. So, after this amendment, the subsequent mortgagee obviously needs the written consent of the earlier mortgagee.

Also, the words in the section ‘express the maximum’ are for further advances, which may or may not be made, and do not impose a compulsion to advance up to a maximum limit. Where a lessee executed a mortgage of a leasehold property for securing payment of rent and interest, where the rent *per annum* was stated, the court held this ‘stated *per annum*’ as the maximum secured amount within the meaning of section 79.<sup>42</sup> As to future advances, if the maximum amount is not fixed, concerned mortgages will lack priority.<sup>43</sup> The maxim relates here is *certum est quod certum reddi potest*.<sup>44</sup> Also, in the case of *Imperial Bank of India v U Rai Gyaw*<sup>45</sup> this rule is illustrated by the Privy Council.<sup>46</sup> However, as an exception to the general rule of priority,<sup>47</sup> the burden of proving lies on the party who asserts it.<sup>48</sup>

Intermittently, concerning section 48 of the Transfer of Property Act, by enforcing priority rights, which is also applicable for the recovery of the due loan amount in mortgages, the primary charge holder shall prevail over the subsequent charge holder and so forth.<sup>49</sup> Where the security is sold, out of the sale proceeds, the court, at first, has to pay the entire amount due to the first charge holder, and the remaining amount may be realised by the second holder.<sup>50</sup> The implementation of a mortgage due through sale requires a separate civil suit to be instituted and cannot be done in execution proceedings.<sup>51</sup>

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<sup>41</sup> “No immoveable property under registered mortgage shall be re-mortgaged or sold without the written consent of the mortgagee, and any re-mortgage or sale made otherwise shall be void.”

<sup>42</sup> *Dalip Narayan v Chait Narayan* (1912) 16 CLJ 401, 403.

<sup>43</sup> *Imperial Bank of India v U Rai Gyaw* [1923] AIR 211 (PC).

<sup>44</sup> “If something is capable of being made certain, it should be treated as certain”. See OUP, ‘certum est quod certum reddi potest’ (*Oxford Reference*, 2025) <<https://www.oxfordreference.com/display/10.1093/oi/authority.20110803095559777>> accessed 04 May 2025.

<sup>45</sup> *Imperial Bank of India v U Rai Gyaw Thu and Co Ltd.* (n 43).

<sup>46</sup> Paul (n 2) 347.

<sup>47</sup> TPA 1882 (n 8) s.48.

<sup>48</sup> *Dharani v Pramatha* [1936] AIR 283 (Cal) (DB).

<sup>49</sup> *ICICI Bank v SIDCO Leathers* (2006) 10 SCC 452.

<sup>50</sup> *Karnataka Financial Corporation v State Bank of India* [2011] AIR 130 (Kant).

<sup>51</sup> *Punjab and Sind Bank v MMTC Limited* [2016] AIR 15 (Del); *MR Satwaji Rao v B Shama Rao* 2008 5 SCC 124.

However, the rule of priority is also supportive of a Government debt over all other unsecured debts.<sup>52</sup> Where the debts are secured, the Government will not have priority, and any claim by it will be subject to prior encumbrances, unless anything contrary is provided by law.<sup>53</sup> However, the first mortgagee, in case of an English mortgage, will have rights of priority over the debt of the government regarding the mortgaged property, even though its priority relates to the concerned moveable properties.<sup>54</sup> In case of a simple mortgage suit, the mortgagee's preference over other simple creditors concerning the rents and profits collected by a receiver triumphs, though those cannot be appropriated in priority over a government debt, for instance, income tax, fine, etc.<sup>55</sup>

Also, regarding mortgages, where successive transfers of the same property are done, priority rules specify that the later transaction is subject to the prior transfer. In the event of selling mortgaged property between two purchasers, the title of the remaining equity of redemption will be determined through the rule of priority regarding respective sales and not regarding respective mortgages. And in this case, the absolute title and right of redemption of all the subsisting mortgages will be acquired by the first buyer of equity of redemption.<sup>56</sup> This rule is also applicable between competing auction purchasers.<sup>57</sup> Where in execution of a succeeding mortgagee's mortgage decree, a third party bought the concerned property, it's the prior mortgagee who later on purchased the property got through a decree, albeit he is unentitled a decree for possession and it is bound by the purchaser's right to redeem the mortgage property as well as the prior mortgagee cannot compel to redeem and claim the equity of redemption as against the purchaser even if, it is based on his purchase.<sup>58</sup> In a mortgaged estate, the rights of interested persons cannot be impaired by a subsequent agreement made to other parties<sup>59</sup> since the applicability of section 48 is for the same property and not among substituted security rights.<sup>60</sup> Also, priority rights are pertinent to the date of agreement and not to its terms or conditions. Thus, where a subsequent agreement holder had the knowledge

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<sup>52</sup> *Pichu Vadhiar v The Secretary of State for India* (1917) 40 ILR Mad 767; *Dost Md Khan v Mani Ram* (1907) 29 ILR All 537, 542–543.

<sup>53</sup> *Ma Joo Tean v Collector of Rangoon* [1934] AIR 321, 323 (Rang).

<sup>54</sup> *Bank of Upper India v Administrator-General of Bengal* (1917) 45 ILR Cal 653.

<sup>55</sup> *ITO v Indian Insurance & Banking Corporation* [1954] AIR 197 (Mad).

<sup>56</sup> *Ramkinkar v Hareram* [1933] AIR 181 (Cal).

<sup>57</sup> *Gangadhar v Lakshman* [1930] AIR 221 (Bom).

<sup>58</sup> *Jagat v Abdul* [1935] AIR 139 (Cal); *Nathmal v Nilkanth* [1933] AIR 25 (Bom); *Surendra v Ahmad* [1933] AIR 912, 913 (Cal); *Niharmala v Sarojbandhu* [1933] AIR 728, 731 (Cal).

<sup>59</sup> *HV Low & Co v Pulin* [1933] AIR 154 (Cal).

<sup>60</sup> *Krishnaveni v Subrahmanyam* (n 5).

of the prior agreement, this prior one will get priority in law over the later agreement. However, between legal and equitable mortgages, a formal registered legal mortgage will get priority over the equitable one.<sup>61</sup> In the case of *Imperial Bank of India v U Rai Gyaw*<sup>62</sup> it is articulated that legal and equitable mortgages are indistinguishable, and the legal one triumphed over the equitable mortgage unless the legal holder, by his acts, did something which rendered it impossible to assert his paramount rights regarding the mortgage.<sup>63</sup>

On the other hand, along with the mortgage disputes regarding charges<sup>64</sup> will fall under these sections.<sup>65</sup> And a subsequent mortgage where the mortgagee is without notice of the oral, non-possessory charge will prevail over that type of charge<sup>66</sup> since there is no transfer of interest in the matter of charge.<sup>67</sup>

### 3.2 Theorem of Priority in Registered Instruments

Various sections like 17, 17A, 18, 47, 48, 49, 50 of the Registration Act 1908, sections 54, 54A of the Transfer of Property Act 1882, and 21A of the Specific Relief Act, 1877, of all these Acts express the self-evident proposition of priority. Doctrine of priority in case of registered instruments, which can be compulsorily or optionally registrable, unregistered, and oral instruments, requires the deeds to be antagonistic, i.e. effect of one transaction cannot be given without the intrusion of the other.<sup>68</sup> Theorem of priority in registered instruments, where instruments are registered and unregistered, emphasises the registration of instruments. Registered instruments acquire priority over unregistered ones<sup>69</sup> and instruments which are already registered will prevail over oral instruments.<sup>70</sup> Application of this rule, however, is very limited and bound

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<sup>61</sup> *Dayal v Jivraj* (1877) 1 ILR Bom 237.

<sup>62</sup> *Imperial Bank of India v U Rai Gyaw Thu and Co Ltd* (n 43).

<sup>63</sup> Paul (n 2) 345.

<sup>64</sup> TPA 1882 (n 8) s 100.

<sup>65</sup> *ICICI Bank v SIDCO Leathers* (n 49); *Firestone Tyre and Rubber Co v Management* [1973 AIR 1227 (SC)].

<sup>66</sup> *Sesha Iyer v Srinivasa Ayyar* [1921] AIR 459 (Mad); *Amar v Shoshi* (1903) 31 IA 24.

<sup>67</sup> Paul (n 2) 345.

<sup>68</sup> *Ishri Prasad v Gopi Nath* (1912) 34 All 631, 635.

<sup>69</sup> TPA 1882 (n 8) s 50; *Bank Asia Limited v Industrial Promotion and Development Company of Bangladesh (IPDC)* (2017) 25 BLT 222 (HCD); *Re Monolithic & Co* (1915) 1 Ch 643 (CA); *Hicks v Powell* (1869) LR 4 Ch App 741; *Battison v Hobson* (1896) 2 Ch 403; *Black v Williams* (1895) 1 Ch 408.

<sup>70</sup> TPA 1882 (n 8) s 48.

by the rule of notice.<sup>71</sup> Also, among transfer instruments, after registration, compulsorily registrable instruments will get priority over optionally registrable ones.<sup>72</sup>

Likewise, in cases where two deeds are registered on the same day, it is the principle of execution and not the registration of deeds among successive transfers that regulates the priority of one instrument over another<sup>73</sup>, even though the former instrument goes along with possession<sup>74</sup> or because of fraud and misrepresentation, or for any other reasonable cause<sup>75</sup> the registration of deeds is delayed.<sup>76</sup> The above-mentioned is the upshot of the Registration Act, 1908.<sup>77</sup> Fractions of concerned day and exact time of registration in case of priority of title are certainly relevant and determine the question of priority. And it is for the contracting parties to adduce evidence regarding these.<sup>78</sup>

And where it is not possible to ascertain the execution date, all the instruments will be effective according to the principle of *pari passu* and simultaneously. The statement ‘in the absence of a special contract or reservation binding the earlier transferees’,<sup>79</sup> to give effect to the intention of the parties, reveals an intention to give effect *pari passu* to consecutive transfers or provide preference to the later deed over the earlier ones. In a case where a subsequent mortgage was done by a registered deed and without notice of the earlier oral charge, the oral one, even made earlier in time, did not get priority over the subsequent one.<sup>80</sup> In this situation, priority rights of successive transfers can be determined by the pooled

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<sup>71</sup> *Bhikki Rai v Udit Narain* (1903) 25 ILR All 366; *Harnandun Singh v Jawad Ali* (1900) 27 ILR Cal 468; *Diwan v Jadho* (1896) 19 ILR All 145; *Krishnamma v Suranna* (1892) 16 ILR Mad 148; *Abool v Raghu* (1886) 13 ILR Cal 70; *Hathi v Kuvarji* (1885) 10 ILR Bom 105.

<sup>72</sup> *Mitra and Gupta* (n 1) 346.

<sup>73</sup> *Xavier v John* [2011] AIR 103 (Ker); *Sher Muhammad v Muhammad Hassan Siddique* [1997] MLD 778; *Kuldip Singh v Balwant Kaur* [1991] AIR 291(P&H); *Azeezulla v Bhabhutimul* [1973] AIR 276 (Mys); *Ramaswami Pillai v Ramasami Naicker* [1960] AIR 396 (Mad); *Champat Rao v Mahadeo* [1937] AIR 143, 144 (Nag).

<sup>74</sup> *Mahmood and Shaukat* (n 5) 215.

<sup>75</sup> *Courtaux v Hewetson* (1875) LR 6 PC 407, 422.

<sup>76</sup> *Ram Padarath v Nimar Singh* [1942] AIR Oudh 172, 173.

<sup>77</sup> Section 47 says “a registered document shall operate from the time which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration”.

<sup>78</sup> *Union of India (UOI) and Others v GS Chatha Rice Mills and Others* (2021) 2 SCC 209.

<sup>79</sup> TPA 1882 (n 8) s 48.

<sup>80</sup> *Mitra and Gupta* (n 1) 345, 349.

operation of both general property law<sup>81</sup> and laws relating to the registration of documents.<sup>82</sup>

However, instances regarding the contract of sale, presently under the Registration Act 1908, in sections 17(1) (g) and 17A, any contract for sale needs to be registered. It is also stated in section 54<sup>83</sup> and 54A<sup>84</sup> of the Transfer of Property Act, 1882, and section 21A<sup>85</sup> of the Specific Relief Act, 1877. These sections have been inserted by Act No. XXVII of 2004 with effect from 1<sup>st</sup> July 2005. These are now within the compulsory registrable instruments. However, after 2005, there will be no contract of sale without registration, even if it is along with delivery of possession, though previously possession or delivery of possession got preference over registered instruments. Also, according to the Specific Relief Act, 1877, section 21A contract for sale that is not registered cannot be enforced specifically unless the contract is in written form and registered. These are mandatory requirements, leaving no scope for the court's discretion to sanction any departure from this.<sup>86</sup>

On the other hand, in registration issues, the title will not pass to the vendee by the mere registration of the sale-deed without the sale of possession of the alleged property or any proof of consideration paid, partly paid, or

<sup>81</sup> TPA 1882 (n 8) s 48.

<sup>82</sup> Registration Act, 1908 (RA 1908), ss 47 and 49; Section 49 says "No document required to be registered under this Act or under any earlier law providing for or relating to registration of documents shall-

(a) 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 immoveable property, or

(b) confer any power to adopt,

unless it has been registered."; *Chhagan Lal v Chumilal* [1934] AIR 189 (Bom).

<sup>83</sup> "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. Such transfer, in the case of tangible immoveable property or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

<sup>84</sup> 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 can be made only by an instrument in writing and registered under the Registration Act, 1908, whether or not the transferee has taken possession of the property or any part thereof.

<sup>85</sup> Notwithstanding anything to the contrary contained in this Act or any other law for the time being in force, no contract for sale of any immoveable property can be specifically enforced unless-

(a) the contract is in writing and registered under the Registration Act, 1908, whether or not the transferee has taken possession of the property or any part thereof; and

(b) the balance amount of consideration of the contract is deposited in the court at the time of filing the suit for specific performance of the contract.

<sup>86</sup> Probir Neogi, *The Law of Specific Relief* (1st edn, Mullick Brothers 2011) 327.

promised to be paid for it.<sup>87</sup> Also, without reference to the other circumstances, mere registration won't even transfer the concerned property; indeed,<sup>88</sup> although without registration, it will not create, declare, transfer, limit or extinguish right, title or interest whether in present or in future in the concerned property.<sup>89</sup> However, an unregistered sale deed may be admissible in evidence merely for any collateral matters like nature of possession, character, as well as the position of the property holder, etc.<sup>90</sup>

### 3.3 Estoppel in the Doctrine of Priority

Split from sections 115<sup>91</sup> to 117 of the Evidence Act, 1872 equitable principle of estoppel, which comes into play when equity entails that a party needs to be estopped from withdrawing their promise.<sup>92</sup> It forbids a person from reversing his earlier statement or conduct before any court of law. This is within one of the exceptions of the doctrine of priority. The representation here needs to be made from one person to another as to

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<sup>87</sup> *Ibrahim v Sardar Ahmed* (1955) 7 DLR 62(WP).

<sup>88</sup> *Ainuddin Ahmed v Samaddi Hajari* (1955) 7 DLR 443.

<sup>89</sup> RA 1908 (n 82) s 49; See *Rahima Khatun v Sufia Begum* (2013) 18 BLC 191; *Muhammad Bashir v Muhammad Siddique* [1997] MLD 3263; *Gulshan v Ameer Ali* [1997] PLD 292 (Kar); *Khadija Karim v Zia-ur-Rehman Khanzada* [1999] PLD 223 (Kar); *Tawakal Hussain v Shamim Fatima Rizvi* [1999] MLD 1, *Muhammad Younis v Muhammad Bibi* [2001] YLR 2789; *Abdul Khaliq v Sultan* [2001] YLR 2223; *Muhammad Ismail v Maqbool Ahmed* [2001] CLC 252; *Abdul Samad v Muhammad Hanif* [2001] YLR 2093.

<sup>90</sup> *Nur Khanum v Sheikh Ahmed* (1957) 9 DLR 50 (WP) (Pesh); *Zainab Bai v Ibrahimji* [1962] PLD 209 (WP) (Kar); *Dawood & Co.* [1962] PLD (WP) (Kar) 368.

<sup>91</sup> This section says “when one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.”

<sup>92</sup> *Rewa Tollway P Ltd v The State of Madhya Pradesh and Others* [2024] AIR 3868 (SC); *The State of Rajasthan and Others v Sharwan Kumar Kumawat and Others* [2023] AIR 3586 (SC); *The Government of Tamil Nadu and Others v Tamil Nadu Makkal Nala Paniyalargal and Others* [2023] 3SCR 390; *Union of India (UOI) and Others v Unicorn Industries* [2019] AIR 4436 (SC); *The Goa Foundation v Sesa Sterlite Ltd and Others* (2018) 4 SCC 218; *Pratima Chowdhury Kalpana Mukherjee & Another* [2014] AIR 1304 (SC); *M/S Bhagwati Vanaspati Traders v Senior Superintendent of Post Office, Meerut* [2015] AIR 901 (SC); *Transmission Corporation of Andhra Pradesh Ltd and Others v Sai Renewable Power Pvt Ltd and Others* (2011) 11 SCC 34; *State of Arunachal Pradesh v Nezone Law House, Assam* [2008] AIR 2045 (SC); *Tamil Nadu Electricity Board and Others v Status Spinning Mills Ltd and Others* [2008] AIR 2838 (SC); *Kusumam Hotels (P) Ltd v Kerala State Electricity Board and Others* [2008] AIR 2796 (SC); *Virender Nath Gautam v Satpal Singh and Others* [2007] AIR 581 (SC); *Bannari Amman Sugars Ltd v Commercial Tax Officer and Others* (2005) 1 SCC 625; *Hira Tikoo v Union Territory, Chandigarh and Others* [2004] AIR 3648 (SC); *Kasinka Trading and Others v Union of India (UOI) and Others* [1995] AIR 874 (SC).

existing facts and not of law,<sup>93</sup> in a manner making the person who is misrepresented to have faith in that statement as true and must act upon that belief. That person should suffer a loss by such misrepresentation.<sup>94</sup> Also, this doctrine of estoppel as a rule of evidence<sup>95</sup> cannot be ignored,<sup>96</sup> and where both parties have knowledge about the matters in their dispute, it should not come into conflict with the statutes and regulations. Thus, any claim of priority by the initial transferee who was aware of the subsequent transfer and substances thereof will be barred by the principle of equity and the rule of estoppel.<sup>97</sup> Moreover, where no grounds or notice are given, and any decree is passed in contradiction of the subsequent transfer, it will be treated as being against all legal norms.<sup>98</sup>

On the other hand, where, through parody, the prior transferee prompted another to advance money or to accept the concerned property with good faith without the knowledge of previous encumbrance, the prior transferee will be estopped from asserting his priority rights against such other person.<sup>99</sup> In an instance where there are two successive mortgages, in case of priority, the puisne mortgage is subject to the earlier one.<sup>100</sup> A mortgagee's claim of priority will not be lost unless he did something which clogged him from avowing it.<sup>101</sup> However, this is poles apart from where a previous mortgage is inoperative; the latter will get priority over the entire interest of the mortgage, as if no prior mortgage exists.<sup>102</sup>

### 3.4 Limitation, Res Judicata, and Exclusion of Priority

Another exclusion of the rule of priority falls in res judicata and limitation of suits. Any claim of priority may be lost by limitations and res judicata. Res judicata is recognised as a legal procedure and incorporated in section

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<sup>93</sup> *Steel Authority of India Ltd v Union of India & Others* [2006] AIR 3229 (SC).

<sup>94</sup> *Joynanda Degree College, Kaharol, Dinajpur v Ministry of Education, Bangladesh Secretariate and Others* (2018) 13 ALR 78 (HCD); *Dilip Kumar Mukherjee and Others v Chairman, Rajuk and Others* (2016) 36 BLD 647 (HCD); *Ancient Traders Limited v Chittagong Port Authority* (2013) 1 CLR 385 (HCD); *Monjurul Alam Billah and Others v Bangladesh* (2017) 9 ALR 265 (HCD); *Mohan Aliah v Md. Haon Alia and Others* [2013] LEX/BDHC/0447/2013 (HCD).

<sup>95</sup> *Municipal Committee v Harda Electric Supply Co (Private)* [1964] AIR 101 (MP).

<sup>96</sup> *Director General of Foreign Trade and Others v Kanak Exports and Others* (2016) 2 SCC 226.

<sup>97</sup> *Siraj Miah v Mohammad Miah* (2005) 57 DLR 356 (HCD).

<sup>98</sup> *Muhammad Quaid Wahab v Nuzhat Aziz* [1997] MLD 3091; *Abdus Samad Khan v Wazed Ali Fakir* (1992) 44 DLR 495.

<sup>99</sup> Mahmood and Shaukat (n 5) 217.

<sup>100</sup> *State v Raja Ram* [1966] AIR 233 (AP).

<sup>101</sup> *Khetra Nath v Harsukdas* [1927] AIR 538, 542 (Cal).

<sup>102</sup> *Ramkaran v Kanhaiyala* [1937] AIR 189 (Nag).

11 of the Code of Civil Procedure 1908.<sup>103</sup> It is the final decision of the court that prevents concerned parties from repeating the legal processes regarding issues that were or could have been raised in particular cases; in a sense, it is *pro tanto*.<sup>104</sup> Among the two stages of the same litigation, conscious adjudication of any dispute on merits when it has been decided at an earlier stage of the same litigation, the plea of *res judicata* in these instances can be raised.<sup>105</sup> If any prior transaction in any dispute falls under the plea of *res judicata* by the other contracting parties, the rule of priority in favor of the earlier transferee will be forfeited, and the rights of the subsequent transferee will prevail. Regarding limitations of suits, it falls under procedural law and bars a person from exercising his right to sue once afterwards limitation period is over, as designated by the existing law of the country.<sup>106</sup> A suit regarding priority is subject to Article 132 of the Limitation Act, 1908. When a suit was filed under that Act, after the expiration of the period of limitation, it was barred by the law against all intermediary mortgagees, when the enforcement of the initial mortgage had expired.<sup>107</sup> Thus, in suits, to get the advantage of the priority rule, the law of limitation has to be considered and observed.

### 3.5 Privileged Salvage Lien in Priority Rights

‘Lien’ in its prime and legal sense is the right of that person who possesses the property of another lawfully or continuously till the current and ensuing claims of that person in possession are satisfied. In its ancillary sense, it is the right of a person having no cold feet with the possession of the property concerned, but the right exists against the owner corresponding to a legal lien. This right arises in equity, by Act or under an order of the court.<sup>108</sup> And where priority is given in a transaction over another earlier transfer to safeguard the property from forfeiture, loss, or destruction, it becomes an

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<sup>103</sup> No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court. See Aayushi Swaroop, Upasana Sarkar, ‘Doctrine of Estoppel’ (*iPleaders Blog*, 12 February 2024) <<https://blog.iplayers.in/doctrine-of-estoppel-in-the-indian-evidence-act/#:~:text=1.,2.>> accessed 03 May 2025.

<sup>104</sup> *Liberty Fashion Wears Limited v Bangladesh Accord Foundation and Others* (2018) 6 CLR 107 (HCD).

<sup>105</sup> *Erach Boman Khavar v Tukaram Shridhar Bhat and Others* [2014] AIR 544 (SC).

<sup>106</sup> Limitation Act, 1908 is the existing law that provides the period of limitation for suits of our country.

<sup>107</sup> *Mahomed Ibrahim Hossein Khan v Ambika Persad Singh* (1912) 39 Ind App 68 (PC).

<sup>108</sup> Lord Simonds, *Halsbury’s Laws of England* (vol 24, 3rd edn, UK Law Book Sellers Ltd 2023) 142–43.

exception to the general rule touching the priority rights, and it is in favor of certain advances, like salvage, known as a salvage lien.<sup>109</sup>

However, where there is no such reason for protecting property from loss or destruction, there is no claim of preference over any other earlier claims or mortgages.<sup>110</sup> This lien is for the salvor and is considered one of the privileged liens.<sup>111</sup> It ranks above every other charge on the property, even though it won't override the rights of third parties.<sup>112</sup> Therefore, for the conservation of a leasehold property, a statutory charge given to the interested person will get priority over any other encumbrances on the tenancy.<sup>113</sup> Also, for this type of exception, it should be noted that the person making the payment either must have some interest in the subject matter or rights or else duties towards the owner of the concerned property, obliging him to make the expenditure<sup>114</sup>. Lacking any interest or duties towards the owner, becoming just a mere volunteer, will not give the right to claim a salvage lien.<sup>115</sup> As well, where there is a court's order to have a first charge over the other earlier mortgages of a property, which is a security given by a Receiver in order to raise a loan for preserving the property, this is within a salvage lien and one of the exceptions of the priority rules. It will have a preference consistent with the inverse order of their corresponding dates.<sup>116</sup> However, in English law, this lien is confined to a maritime lien.<sup>117</sup> In our country, when a 'common law lien' is created concerning the dealings of a vessel, it can be termed as 'maritime claim,' and the list of those claims has been provided in clauses (a) to (r) of section 3(2) of the Admiralty Court Act, 2000.<sup>118</sup>

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<sup>109</sup> *Topcom Holdings Limited v Government of Bangladesh and Others* (2020) 72 DLR 380 (HCD).

<sup>110</sup> *Mahmood and Shaukat* (n 5) 217.

<sup>111</sup> *Pasupati v Narayan* (1897) 1 CWN 519.

<sup>112</sup> *Clark v Holland* (1854) 18 Jur 1007; *Angell v Bryan* (1845) 2 J&L 763; cf *Pinkett v Wright* (1842) 2 Hare 120.

<sup>113</sup> *Sheo v Bandhu* (1900) 22 ILR All 321.

<sup>114</sup> *Biswas* (n 7) 193.

<sup>115</sup> *Middleton v Magney* (1864) 2 Hem & M 233; *Unity Bank v King* (1858) 25 Beav 72; *Neesom v Clarkson* (1845) 4 Hare 97.

<sup>116</sup> *Giridhari Lal v Dharendra* (1906) 34 ILR Cal 427; *Re Glasdir Copper Mines Ltd* (1906) 1 Ch 365.

<sup>117</sup> *ICICI Bank v SIDCO Leathers* (n 49).

<sup>118</sup> Section 3(2) (a) any claim to the possession or ownership of a ship or to the ownership of any share thereof or for recovery of documents of title and ownership of a ship, including registration certificate, log book and such certificates as may be necessary for the operation or navigation of the ship; (b) any question arising between the co-owners of a ship as to possession, employment or income of that ship; (c) any claim in respect of a mortgage of or charge on a ship as to share therein; (d) any claim for damage done by a ship; (e) any claim for damages by a damaged ship; (f) any claim for loss of life or

### 3.6 Priority and Owelty in Equality of Partition

Owelty or sometimes it is termed as owelty money, is a sum of money used to balance the value of the portion of disputed property when actual partition is impossible or detrimental to one or more of the parties. Instances of owelty on partition arise when it is not possible to split the disputed land into equal shares, or owing to the fluctuating qualities of land, there is no equitable distribution. Here, one co-sharer is required by a written agreement or the court's order to pay to the other co-sharer. This payment makes each party's allotted portion identical in value.<sup>119</sup> Endowing owelty from earlier times is a necessity in partitioning property.<sup>120</sup> Aimed at more expedient and fair partition or allotment of land, the court can make an order for

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personal injury sustained in consequence of any defect in a ship or in her apparel or equipment, or of the wrongful act, neglect or default of the owners, charterers or persons in possession or control of a ship or of the master or crew thereof or of any other person for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession in the navigation or management of the ship, in the loading carriage or discharge of goods on, in or from the ship or in the embarkation or disembarkation of persons on, in or from the ship; (g) any claim for loss of or damage to goods carried in a ship; (h) any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship; (i) any claim in the nature of salvage of life from a ship or cargo or any property on board a ship or the ship itself or its apparel, whether services were rendered on the high sea or within territorial waters or inland waters or in a port, (including any claim arising by virtue of the application by or under section 12 of the Civil Aviation Ordinance, 1960, of the law relating to salvage to aircraft and their apparel and cargo); (j) any claim as to towage in respect of a ship or an aircraft; (k) any claim as to pilotage in respect of a ship or an aircraft; (l) any claim in respect of goods or materials supplied to a ship for her operation or maintenance; (m) any claim in respect of construction, repair or equipment of a ship or dock charges or dues; (n) any claim for wages by a master or member of the crew of a ship or any claim for any money or property under the provisions of the Merchant Shipping Ordinance, 1983, hereinafter referred to as the Ordinance, or which is recoverable as wages in the Court of law; (o) any claim by a master, shipper, charterer or agent in respect of disbursements made on account of or for the purpose of a ship; (p) any claim arising out of an act which is or is claimed to be a general average act; (q) any claim arising out of bottomry or respondentia; (r) any claim for forfeiture or condemnation of a ship or of goods which are being or have been carried, or have been attempted to be carried, or for the restoration of a ship or any such goods, after seizure, or for droits of Admiralty including any other power to grant reliefs as are provided under the provisions of the mentioned Ordinance or any other jurisdiction which was vested in the High Court Division as a Court of Admiralty immediately before commencement of this Act and any other jurisdiction as to any matter in connection with ships or aircraft which has by custom been exercised by the High Court Division as a Court of Admiralty.

<sup>119</sup> Thomson Reuters, 'Owelty of Partition' (*Thomson Reuters Practical Law*, 2025) <[https://uk.practicallaw.thomsonreuters.com/w-001-4146?transitionType=Default&contextData=\(sc.Default\)&firstPage=true#:~:text=A%20sum%20of%20money%20that,be%20divided%20into%20equal%20shares](https://uk.practicallaw.thomsonreuters.com/w-001-4146?transitionType=Default&contextData=(sc.Default)&firstPage=true#:~:text=A%20sum%20of%20money%20that,be%20divided%20into%20equal%20shares)> accessed 02 May 2025.

<sup>120</sup> *Corpus Juris Secundum*, vol 68, s 15; See also *TS Swaminathaudayar v The Official Receiver of West Tanjore* [1957] AIR 577 (SC).

r pecuniary compensation or equality of partition, popularly known as owelty.<sup>121</sup> This is basically a lien employed as little as possible<sup>122</sup> to avert injustice or avoidable inequality.<sup>123</sup>

In a partition decree, when owelty is made, the privileged member is eligible for a lien over disputed property. Another member who has to pay the owelty is allotted to the portion of the property of a higher value. This type of lien can be expressly declared, or if it is not so, by necessary implication, for the amount of such owelty, a lien will be created. Also, this lien creates a deduction from the corpus of disputed property and is not devoid of any possessory dealings regarding the property. Where the disputed property has other encumbrances,<sup>124</sup> to determine the question of priority, it is indispensable to ascertain the portion of the substituted property that has another encumbrance. And at this juncture, all other encumbrances will be subject to the lien created by the decree.<sup>125</sup> Where in a partition decree, co-sharers were awarded owelty money, as one of the exceptions of section 48, that lien for owelty money deserves priority over the prior mortgages on the property allotted to the person bound to pay the owelty.<sup>126</sup> However, in case of any failure to pay instantly, the owed amount will be considered as a charge against the property and will be assessed likewise.<sup>127</sup> This type of owelty money of partition is also one of the exceptions to the doctrine of priority.

### 3.7 Mislaid of Priority and Decree or Order of Courts of Law

Priority of rights regarding successive transfers will be forfeited by any decree or order of a Court. Courts of Law, if they think fit, can order or give any decree supportive of any subsequent transfer occasioning it to prevail over the earlier transfer. And the rights of the succeeding transferee will get preference, following the rule of priority. In case of a partition suit, it is by the decree of owelty, a lien created and will have priority over all other encumbrances.<sup>128</sup> However, this is also applicable, along with others, to a salvage lien and in its ancillary sense arises in equity, by Act or under an

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<sup>121</sup> *Tribhanga Bihari Bhanja v Prahlad Chandra Tung* [2005] AIR NOC 652 (Cal).

<sup>122</sup> Frederick F Lawrence, *Equity Jurisprudence* (vol I, Matthew Bender & Co 1929) 1227.

<sup>123</sup> *Tribhanga Bihari Bhanja v Prahlad Chandra Tung* (n 121).

<sup>124</sup> *Shahebzada Mohommed Kazim Shah v R S Hill* (1907) 35 ILR Cal 388.

<sup>125</sup> *TS Swaminathaudayar v The Official Receiver of West Tanjore* (n 120).

<sup>126</sup> *Poovamalingam Servai v Veeraji* [1926] AIR 186 (Mad); *Shahebzada Mohommed Kazim Shah v R S Hill* (n 124).

<sup>127</sup> Thomson Reuters, 'Owelty of Partition' (n 119).

<sup>128</sup> *TS Swaminathaudayar v The Official Receiver of West Tanjore* (n 120).

order of the court, where it will get priority over any other subsequent transfer.<sup>129</sup>

#### **4. Aftermaths of Priority Rights**

The paramount importance of priority rights created by successive transfers is that different transfers follow different laws in accordance with the transactions. But the application of priority rights in successive transfers follows the time of creation of those rights. In other words, prior rights will get priority over subsequently created rights. However, transactions over which priority rights are created need to be formal and accomplish all the legal requirements. Otherwise, it can be recognized as a ground of occasioning more fraud than it averts. In certain cases, in order to do justice, the Transfer of Property Act regarding contractual and statutory rights needs to be stern where special statutes are silent. Under the disputed transaction, when rights are formed in or over different immoveable properties, the priority rule will not apply. In the case of a mortgage and the priority rule, consecutive mortgagees will be the parties. There cannot be any rivalry between a mortgagee and an ensuing purchaser in the pertinence of the doctrine of priority. In case of exceptions, priority doesn't have to be stripped. Based on the particular instances, those forfeitures can be refused just like English law. However, the sanctity attached to registered instruments will constantly afford primacy and priority over unregistered documents. On the other hand, priority rights regarding registration issues are facing snags concerning the 'doctrine of notice' since it is factual that the Registration Act is silent about that matter, and the courts of law ought not to interpret the concerned Act to reverse any prior title of the suit property. The combined operation of general property law and the Registration Act is desirable.

#### **5. Conclusion**

Advantages in time will be in advance to get the advantage of the law. Based on law and justice, the doctrine of priority enunciates that subsequent transfer is not invalid but subject to the earlier created rights. It affords protection for the transferee from any succeeding dealings of the transferor with the property concerned. This doctrine encompasses its leeway under the Registration Act 1908 and the Specific Relief Act 1877. This principle of natural justice, in its deeper consideration, aids the law in safeguarding the earlier and already established legal title, with the exception of distinct reasons. Even if it is an equitable principle, provisions of the section are imperious and cannot be disdained by and large on equitable grounds. In the interest of justice, these rules need to be strictly construed.

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<sup>129</sup> Lord Simonds, *Halsbury's Laws of England* (n 108).