

(1936) 08 CAL CK 0025

In the Calcutta High Court

Case No : Appeals from Original Decrees Nos. 30, 156 and 159 of 1935

Dantmara Tea Co., Ltd. and Others

APPELLANT

Vs

Probodh Kumar Das and Others

RESPONDENT

Date of Decision : 18-08-1936

Acts Referred:

Citation : (1936) 08 CAL CK 0025

Final Decision : Allowed

Judgement

D.N. Mitter, J.—This is an appeal by Defendant No. 1, Dantmara Tea Company, Limited, against the decision of the Additional Subordinate Judge, Chittagong, dated the 31st January, 1935, by which he decreed the suit of the Plaintiffs for certain negative declarations, for perpetual injunction, and for other reliefs which are mentioned in prayers Nos. III, IV and V of the plaint. The subject-matter of the dispute is a tea garden known as Kaiycherra Tea Estate. According to the statement made by the Plaintiffs in the plaint this garden was owned by a limited Company and that Defendant No. 4, Messrs. Gillanders Arbuthnot and Company, were owners in possession of the property known as Kaiy-cherra Tea Estate. The plaint alleges that Defendant No. 5, Santinidhan Roy, entered into an agreement with Messrs. Gillanders Arbuthnot and Company for the purchase of the said property along with factories, machineries, etc., for a sum of Rs. 85,000 on terms and conditions contained in a letter dated the 19th August, 1931, which was subsequently re-dated the 8th / 10th October, 1931. This agreement is annexed to the plaint and has been marked with the letter " B." The plaint next states the further terms of the said agreement to which we may have to refer hereafter. The plaint further states that Plaintiff No. 1, Probodh Kumar Das, guaranteed the due performance of the undertakings by the said Defendant No. 5 in the letter, just referred to, to Messrs. Gillander Arbuthnot and Company; that in consideration of Plaintiff No. 1 gnaranting the performance of the terms contained in the said letter and for other valuable considerations, the said Defendant No. 5, Santinidhan Roy, agreed that the Plaintiff No. 1 should have eight annas out of the sixteen annas share of the said properties contracted to

be purchased from Defendant No. 4, Messrs. Gillanders Arbuthnot and Company; that in pursuance of he said arrangement referred to above Rs. 15,000 were paid to Messrs. Gillanders Arbuthnot and Company on the 16th October, 1931, and that Defendant No. 5 Santinidhan also executed an "on demand" promissory note for Rs. 70,000 (Rupees Seventy thousand) in favour of the vendors Messrs. Gillanders Arbuthnot and Company, and that thereupon Plaintiff No. 1 and Defendant No. 5 were put in possession of the said Kaiyacherra Tea Estate, factories, machineries, etc., on or about the 21st October, 1931, by Defendant No. 4, Messrs. Gillanders Arbuthnot and Company; that thereafter Plaintiff Das and Defendant No. 5 appointed their own manager and staff for working the Tea Estate and began to manage the same with their joint funds, that Messrs. Gillanders Arbuthnot and Company got a decree against Santinidhan Roy in a suit on the Original Side of this Court on the basis of the said promissory note dated the 16th October, 1931, just referred to; that the Plaintiffs and Defendant No. 5 have been treated by Messrs. Gillanders Arbuthnot and Company ever since the transaction as purchasers and owners of the properties in question and that therefore they or any person claiming through them are estopped from denying the title of Plaintiff No. 1, Probodh Kumar Das and Defendant No. 5, Santinidhan Roy; that on the 24th February, 1932, Plaintiff No. 1 and Defendant No. 5 jointly hypothecated the crop of the year 1932 of the said Kaiyacherra Tea Estate to the Bhowanipur Banking Corporation, Limited, who has been impleaded as Defendant No. 6 to the suit, in order to secure the sum of Rs. 30,000 for working the garden, with the knowledge and consent of Messrs. Gillanders Arbuthnot and Company; that on or about the 24th September, 1933, when the Indian Tea Control Act (Act XXIV of 1933) came into operation and the Tea Licensing Committee was formed, the names Plaintiff No. 1 and Defendant No. 5 (Probodh Kumar Das and Santinidhan Roy) were entered in the books of the Indian Tea Licensing Committee as joint proprietors of Kaiyacherra Tea Estate and the Export Quota of the year 1933/34 was allotted to the said garden; that the working of the garden jointly by these two proprietors, Plaintiff No. 1 and Defendant No. 5, proved to be inconvenient and it was agreed between them (Probodh and Santinidhan) that the tea garden area should be partitioned and in pursuance of the said agreement the actual partition was effected on 29th January, 1933 and Plaintiff No. 1 Probodh Kumar Das began separately to work and to possess his share of the property known as the Kaiya Division of the Kaiyacherra Tea Estate and Defendant No. 5 Santinidhan Roy began to work his share known as Dalu Division; that on the 20th June, 1933, Defendant No. 6, the Bhowanipur Banking Corporation, Limited, caused a conveyance to be executed in their favour by Defendant No. 5, Santinidhan, in respect of his half share of the Kaiyacherra Tea Estate. The plaint then refers to another suit, No. 60A of 1934, brought by Santinidhan in the Court of the Subordinate Judge of Chittagong for a declaration that the said conveyance is null and void. It may be mentioned here that we have allowed the additional evidence to go in for the purpose of understanding the course which the suit has taken and as a result of that evidence it appears that this suit by Santi against Defendant No. 6 was

dismissed for non-prosecution. The plaint next proceeds to state that the Plaintiffs have been informed that Defendant No. 6, the Bhowanipur Banking Corporation, Limited, has transferred the said eight annas share of Santinidhan to one Chandmull Batia, Defendant No. 2, in the benami of Defendant No. 7, namely, Chandannagore Tea Company, Limited. The plaint then proceeds to recite that one of the terms of agreement for partition between Plaintiff No. 1, Probodh Kumar Das, and Defendant No. 5, Santinidhan, was the right of pre-emption in either party and with regard to such right of pre-emption Plaintiffs reserve their right to seek for necessary reliefs after the disposal of the other suit, No. 60A of 1934, just referred to. In paragraph No. 19 of the plaint the Plaintiffs state that Santinidhan Roy, when he was away from the Tea Estate for the purpose of defending a criminal case instituted by the Bhowanipur Banking Corporation, Limited, made over possession of his share of the Kaiyacherra Tea Estate known as Dalu Division to Probodh Kumar Das for necessary management and protection thereof. It is further alleged that since he has been given over possession of the said estate, Probodh has maintained the staff and paid all Government revenues, requisite taxes and all other public demands. In paragraph No. 20 of the plaint Plaintiffs allege that Probodh was informed that Defendant No. 4, Messrs. Gillanders Arbuthnot and Company, were inviting applications for the purchase of the Kaiyacherra Tea Estate. In paragraph No. 23 of the plaint some important allegations are made and it is necessary to reproduce the same. It is stated in the said paragraph that:

On the 17th April, 1934, the Plaintiff No. 1 Probodh Kumar Das sold his right, title and interest in the Kaiyacherra Tea Estate to the Plaintiff No. 2 Messrs. R. K. Roy & Co., Ltd., a private Ltd. Company registered under the Indian Companies Act by a deed of conveyance and the said Messrs, E. K. Roy & Co., Ltd., are therefore invested with all the rights of the Plaintiff No. 1 Probodh Kumar Das in respect of the properties in suit. On the 11th June. 1934, the Plaintiff on his own behalf and on behalf of Messrs. R. K. Roy & Co., Ltd., wrote a letter to the joint Controller, Indian Tea Licensing Committee, requesting him to issue the intimation of the allotment of the Export Quota of the Kaiyacherra Tea Estate to them.

The Plaintiffs then refer to some correspondence with the Tea Licensing Committee (Defendant No. 3) and specially to the letter of the said Committee dated 21st June, 1934, (Sch. E to the plaint) by which they refer to the conveyance in favour of the Dantamara Tea Company, Ltd. (Defendant No. 1) and state that the conveyance sufficiently indicates the title of the Dantamara Tea Co. to deal with the quota. In paragraph No. 26 the Plaintiffs really state the cause of action for the suit and

submit that in view of the facts and circumstances which have already been referred to, Messrs, Dantamara Tea Company Limited or Chandmull Batia (Defendant No. 2) could not and did not derive any title whatsoever in the said Kaiyacherra Tea Estate by virtue of the alleged purchase and conveyance

produced before the Indian Tea Licensing Committee and that they were debarred from claiming any sort of right including the Export Quota Right, in respect of the Kaiyachorra Tea Estate as against the Plaintiff's claim; and the Tea Licensing Committee was not justified nor within their rights, nor entitled to hold the Dantamara Tea Company Limited, as the proprietors of the Kaiyacherra Tea Estate and issue intimation of the allotment of Export Quota Right to the said Company and the said Indian Tea Licensing Committee have further no right to register any transfer of the Quota Rights which the said Dantamara Tea Company Limited have made or may purport to make hereafter.

2. On these allegations Plaintiffs asked for five declarations which are referred to at pages 15 and 16 of the first part of the paper-book. The substantial declarations which are sought for are (1) that the Defendants Nos. 1, 2 and 4 have no right or title to the property in suit and that they or any person claiming through them are debarred from enforcing any right to the Kaiyacherra Tea Estate, including the right to sell tea with the Export quota allotted to the said Kaiyacherra Tea Estate or to assign any quota right, (2) that Defendants Nos. 1, 2 and 4 may be restrained by a perpetual injunction from interfering with the possession of the Plaintiffs of the properties or claiming title to or interest in any quota right in respect of the tea garden, (3) that the export right and the production rights allotted to the Kaiyacherra Tea Estate by the Indian Tea Licensing Committee belong exclusively to the Plaintiffs who are in rightful and actual possession of the property in suit, (4) that the Indian Tea Licensing Committee (Defendant No. 3) are not entitled to, nor justified, nor authorised to hold that Messrs. Dantmara Tea Company, Limited are the proprietors of the Kaiyacherra Tea Estate, and (5) that Defendant No. 3, the Indian Tea Licensing Committee, have no right to remove the names of Plaintiff No. 1, Probodh Kumar Das and Santinidhan Roy without their consent from the books and records of the Indian Tea Licensing Committee.

3. Separate defences were filed by the different Defendants. Defendant No. 1 by his written statement contended in paragraph No. 4 of the said written statement that the suit is not maintainable in its present form. In paragraph No. 7, Messrs. Dantmara Tea Company, Limited indicate that the Kaiyacherra Tea Company, Ltd., was at all material times" previous to the 1st February, 1934, the owner of the properties in suit and Messrs. Gillandars Arbuthnot and Company were the mortgagees thereof. They recite in this paragraph the order of the High Court for compulsory winding up of the said Company. They point out that in the course of the liquidation proceedings on the 19th May, 1930, the liquidators applied for and obtained an order from the High Court granting them leave to sell the assets free from encumbrances with the consent of the mortgagees and that pursuant to the said order Messrs. W. S. Creswell and Company held a sale on the 27th February, 1931, on behalf of the liquidators, and Messrs. Gillandars Arbuthnot and Company was declared the highest bidder and purchaser, and that no conveyance was executed in favour of Messrs. Gillandars Arbuthnot and Company by the Company or the liquidators. They also denied in this paragraph

the allegations made in paragraph No. 1 of the plaint that Defendant No. 4 was in possession as mortgagee and not as owner. In paragraph No. 15 of the said written statement they point out that the Indian Tea Control Act (Act XXIV of 1933) came into operation on the 21st September, 1933, and that the answering Defendant makes no admission with regard to any of the statements and submissions in paragraphs Nos. 12 and 13 of the plaint. In paragraph No. 34 of the written statement the Dantamara Tea Company, Limited, states that the Plaintiffs not having a registered conveyance regarding the Kaiyacherra Tea Estate from either the liquidators or Defendant No. 4 cannot plead any title thereto, and therefore not entitled to a declaration that the Export Quota rights belong to the Plaintiffs, and that the Plaintiffs have not even asked for declaration of their title to Kaiyacherra Tea Estate or any portion thereof, that as such the prayer for injunction on the export quota rights and production rights is not maintainable. This paragraph in the written statement contains the allegation which has led to the framing of the issue with regard to the right of the Plaintiff to maintain the suit. In paragraph No. 37 Defendant No. 1 alleges that the Plaintiffs have no title in or possession of eight annas share of the Kaiyacherra Tea Estate and that as such his prayers for declaration in respect to the other half is not maintainable. It is not necessary to refer to the defence of the other Defendant, namely, Defendant No. 4, Gillandars Arbuthnot and Company, except to point out that in paragraph No. 2 of the said written statement they allege that the Defendant firm was at one time the owner in possession of the said Tea Estate as alleged in paragraph No. 1 of the plaint but such interest had ceased prior to the institution of this suit. In so far as the defences of Defendant No. 6, the Bhowanipur Banking Corporation, and Defendant No. 7, the Chandernagore Tea Company, Limited, are concerned, it is sufficient to say that the written statement which was filed by Defendant No. 7 on the 12th September, 1934, challenged the rights of the Plaintiffs to the Dalu Division of the garden, see Bk. A. [50-52]. In paragraph 8 of the written statement of Defendant No. 7 it is alleged.

that after the conveyance by Santinidhan Roy in favour of Defendant No. 6 on the 20th June, 1933, Defendant No. 6 got possession of the same and worked the Dalu portion of the estate and thereafter Defendant No. 6 in pursuance of agreement for sale put this Defendant in possession of the same on the 8th April, 1934,"since when this Defendant is working the garden.

4. This Defendant applied to amend this written statement and in the petition for amendment para. 3 (see p. 4 Bk. in P. A. 159 of 1935) alleged that he paid consideration for the purchase of the property on the 1st February, 1934, to Defendant No. 5 in Calcutta and was put in possession of the Dalu Division on the 8th February, 1934, that the events between these two dates prove conclusively that before the 8th February, 1934, an officer of the Bhowanipur Banking Company came to Chitt-gong for settling with the Defendants and was obstructed by the Plaintiffs. In short they challenge the Plaintiffs' right with regard to half share of the Dalu Division. On this state of pleadings a large

number of issues were framed by the Subordinate Judge. (See Bk. A. p. 126). But for the purposes of the present appeal, it would not be necessary to consider them all, since the controversy before us has centered round the question as to whether the Plaintiffs can succeed in the suit asking for declarations and perpetual injunction as already mentioned in view of the fact that the Plaintiffs have got no title to the properties in suit. It appears from; a perusal of the long judgment of the Subordinate Judge that on the question of the Plaintiffs' title he has come to the conclusion adverse to that of the Plaintiffs and he has based his judgment on what he considers to be the statutory right of the Plaintiffs as based on sec. 53A of the Transfer of Property Act as amended in the year 1929. A large portion of the judgment has been devoted to the discussion of that question and the contention before us on behalf of the Appellant is that sec. 53A of the Transfer of Property Act does not entitle the Plaintiffs to maintain the suit. There has been a further contention on behalf of Defendants Nos. 6 and 7 in addition to the contention that sec. 53A gives no title to the Plaintiffs to maintain the suit, viz., that there is absolutely no justification for the suit being decreed with reference to the half share of the estate known as Dalu Division. It is pointed out that the Plaintiffs have not in their plaint alleged any title to the eight annas share of the estate known as Dalu garden and on the other and, as I have stated before, the Plaintiffs' case is that they are in possession of the same as managers. It is said that the Subordinate Judge was clearly in error in decreeing the suit with regard to the half share on the footing that the Plaintiffs are the mortgagees in possession in respect of that share merely because they have paid Government demands and revenue of the half share of the estate and these Defendants have appealed separately and their appeal has been numbered as 159 of 1935.

5. In order to understand the main contention of Mr. C. C. Biswas who appeared for Messrs. Dantamara Tea Company it is necessary to state a few relevant facts. It appears both from the statements made in the plaint and the written statement and from the documents which have been placed before us that the garden was mortgaged by Kaiyacherra Company, Ltd., to Messrs. Gillanders Arbuthnot & Company on the 21st December, 1923. On the 17th March, 1930, Messrs Gillanders Arbuthnot & Company applied for the compulsory winding up of the Kaiyacherra Tea Co., Ltd. On the 29th April, 1930, the winding up order was made by Mr. Justice Buckland sitting in the Original Jurisdiction of this Court. See Ex. R, printed at page 29 of the second part of the paper-book. By that order Official Liquidators were appointed and on the 19th May, 1930, it was further ordered that the said Official Liquidators be at liberty to sell the undertaking of the said Company free from encumbrances with the consent and concurrence of the mortgagees and for that purpose to appoint "auctioneers at a remuneration to be fixed by them not exceeding a commission of two and half per cent, on the sale proceeds. See Ext. S. printed at page 31 of the second part of the paper-book. On the 27th February, 1931, the sale was held by Messrs. Creswell and Company. Messrs. Gillanders Arbuthnot & Company, Limited was the purchaser,

being the highest bidder. On the 24th August, 1931, the Official Liquidators obtained an order from this Court that they be at liberty to sell to Messrs. Gillanders Arbuthnot & Company, Limited for Rs. 10,000 free from encumbrances., See Ext. Q. printed at page 35 of the second part of the paper-book. Out of this sum of Rs. 10,000 Rs. 5000 were, purported to have been paid to Messrs. Gillanders Arbuthnot & Company, Limited to satisfy all debts due to them. The property according to the direction given by the High Court was to be conveyed by the Official Liquidators to Messrs. Gillanders Arbuthnot & Company or to their nominee. But before such a conveyance was actually executed it appears that there was an agreement between Messrs Gillanders Arbuthnot & Company and Santinidhan, Defendant No. 5, by which it was agreed that Messrs. Gillanders Arbuthnot & Company would sell to Santinidhan the entire garden for a sum of Rs. 85000. This agreement is contained in the letter dated the 8th October, 1931, printed at page 37 of the second part of the paper-book. (Bk. B.). It appears that in pursuance of this agreement the payment of the consideration money of Rs. 85000 was to be made in instalments, namely, Rs. 15000 were to be paid on delivery of possession on the 16th October, 1931. Rs. 10,000 on or before the 31st January, 1932 and the balance in three equal instalments on the 31st October, 1934. In order to secure the balance Rs. 70,000 Santinidhan was made to execute a promissory note and subsequently he was to execute a mortgage by depositing the title deeds which was to be in the nature of an equitable mortgage. It appears that the sum of Rs. 15000 was paid and the purchaser Santinidhan took possession on the 21st October, 1931, that is 5 days later. As appears from the said agreement the property was to be conveyed to Santinidhan or to his nominee on payment of Rs. 15000. It appears from the plaint that Mr. P. K. Das stood a guarantor in respect of this payment. It appears from the letter of Mr. P. K. Das to Messrs. Orr Dignam and Company that he agreed to stand as guarantor, for he approved of the draft of agreement for the undertaking in question. See Ext. 19 printed at page 57 of the second part of the paper-book. It also appears that he agreed to pay the amount outstanding on account of principal and interest immediately on being called upon to do so. It appears that Messrs. Gillanders Arbuthnot & Company accepted this offer which was made in the letter dated the 8th October, 1931, by Santinidhan. A question was raised by the learned Advocate for the Appellant that there was no completed contract as to call for the application of sec. 53A to the present case. It was argued that the acceptance of the offer was not signified on the letter containing the offer but it was contained in a separate letter and that therefore there was no such contract as would attract the application of section 53A, to the present case, apart from the question as to whether the present suit can be brought. We are not very much impressed with the argument. In our opinion the letter containing the offer and the letter of acceptance constitute a contract to transfer for consideration any immovable property by writing signed by Messrs. Gillanders Arbuthnot & Co., from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty within the meaning of sec. 53A of the Transfer of Property Act. To continue the subsequent narrative of the

events it appears that after the payment of Rs. 15000 and another Rs. 2000 Messrs. Gillanders Arbuthnot and Co., were compelled to file suits for realisation of the balance. As a matter of fact in a suit which was heard in a summary procedure under Or. 37, in the Original Jurisdiction of this Court, a decree was obtained against Santinidhan on this promissory note. It does not appear that this decree was executed and the sum realised. Mr. P. K. Das was made liable in this, matter by the Original Jurisdiction of this Court. But it appears that the decree against him was set aside on appeal by Mr. Justice Lort-Williams and Mr. Justice Costello, because it was pointed out that the terms of the contract had been varied with reference to the surety and consequently Mr. P. K. Das was not liable and the surety was accordingly discharged [See Ex. B (Book B page 336)] from liability. The other subsequent events have been described in several paragraphs of the plaint which have already been referred to and it is not necessary to reproduce them again.

6. Another chapter of events will now have to be referred to to show the circumstances under which Dantmara Tea Co., Ltd., acquired their title to the disputed garden. It appears that by the conveyance, Ex. 34 (Bk. B. page 263) which was executed on the 1st June, 1934, Messrs. Gillanders Arbuthnot and Co. assigned their right, title and interest in the garden to Messrs. Dantmara Tea Company Limited. On the same date a registered deed of sale was executed in favour of Messrs. Dantmara Tea Company Limited by the liquidators Ex. G (Bk. B page 232). This is the title of Defendant No. 1. The question as to whether it was open to Messrs. Gillanders Arbuthnot & Co., Ltd., to execute the deed of assignment or to join in deed of sale executed by the liquidators of the Kaiyacherra Tea Co., Ltd., or as to whether good title to the garden has been acquired by the Dantmara Tea Co., Ltd., are matters which need not be considered in the present suit in the view which we are taking with regard to the provisions of sec. 53A of the Transfer of Property Act giving any right to the Plaintiff to maintain a suit of the kind brought. There can be no question that in the circumstances mentioned in sec. 53A of the Transfer of Property Act, there can be no transfer of title. The Subordinate Judge of the Court below has also come to the same conclusion. There is very high authority for the contention raised on behalf of the Appellant that sec. 53A can only be availed of as a defence, that, to use an unforensic expression, it can be used as a shield and not as a sword and that it is not possible to a person who is entitled to the benefit of that section to bring a suit as Plaintiff for the purpose of enforcing his right under that section. In order to understand the precise scope of sec. 53A, it is just necessary to refer to the position which had been previously taken up with regard to the equitable doctrine of part performance of contracts in India. It appears that in a case decided by the Privy (Council, viz., the case of *Arif v. Jadunath Majumdar* L. R. 58 I. A. 91: s.c. 35 C. W. N, 550 (1931), the whole question was considered. It was doubted in that case if the English equitable doctrine of part performance should be applied in any case so as to modify the effect, of an Indian Act and it; was pointed out that an English equitable doctrine

affecting the provisions of an English statute should not be applied by analogy to such a statute as the Transfer of Property Act with the effect of contravening the clear provisions of the statute. In that case the facts were that the Appellant before the Privy Council having verbally agreed with the Respondent to grant him a permanent lease of a plot of land at Rs. 80 per month, let him into possession. Shortly afterwards the Respondent, with the knowledge and approval of the Appellant, erected structures on the land at a cost of over Rs. 10,000. In December, 1918, the said Appellant definitely refused to grant the Respondent the agreed lease, and in 1923 sued to eject him after a month's notice to quit. Under the Indian Limitation Act, 1908, Sch. I, Art. 113, the Respondent's right to sue for specific performance of the verbal agreement was barred in December, 1921. In such state of facts their Lordships of the Privy Council; held that there being no lease made by a registered document as required by sec. 107 of the Transfer of Property Act, 1882, the Appellant was entitled to eject the Respondent with liberty to him to apply to remove the structures; had the Respondent's right to sue for specific performance not been barred, he could have claimed the execution of an instrument which he could have registered, the Appellant's suit being stayed in the meantime. We said at the beginning in the present case that there can be no title in the Plaintiffs because it is admitted that there has been no conveyance by Messrs. Gillanders Arbuthnot and Company in favour of Santimidhan Roy and under sec. 54 of the Transfer of Property Act a sale of a property of the value of Rs. 100 and upwards can only be (effective if there has been a registered instrument in respect of the same. In the present case there has been no such instrument. In view of the decision of the Privy Council if this transfer had been effected before the enactment of sec. 53A of the Transfer of Property Act, there could be no question that the Plaintiff could not rely on this equitable doctrine of part performance. The reason given by Lord Russel of Killowen who delivered the judgment of the Judicial Committee is stated in the following passage:

Whether an English equitable doctrine should in any case be applied so as to modify the effect of an Indian Statute may well be doubted; but that an English equitable doctrine affecting the provisions of an English statute relating to the right to sue upon a contract should be applied by analogy to such a result as to create without any writing an interest which the statute says can only be created by means of a registered instrument appears to their Lordships in the absence of some binding authority to that effect, to be impossible. Whether any such authority exists will be considered later.

Then their Lordships reviewed English cases and came to the conclusion that the doctrine was of no assistance to the party who had invoked it in that case. This was in the year 1931. In the meantime the legislature has enacted sec. 53A which, it has been said in a later decision by the Judicial Committee of the Privy Council in the case of *Pir Baksh v. Mahomed Tahar* L. R. 61 I. A. 888: c 39 C. W. N. 34 (1934). would not apply to the case before their Lordships. In *Pir Baksh's* case L. R. 61 I. A. 888: c 39 C. W. N. 34 their Lordships had to consider the

effect of this new enactment. That was undoubtedly a case to which the provisions of sec. 53A would not apply. But after referring to Arif's case L. R. 58 I. A 91: s. c. 35 C. W. N. 550 (1931). and to another case, viz., Cunimbhoy and Company v. Creet L. R. 60 I. A /1971 s. c. 37 C. W. N. 265(1932), Lord Macmillan proceeded to deal with the effect or rather the operative effect of, sec. 53A. The following passage which is taken from page 397 of the report is pertinent to the present controversy. Lord Macmillan said this:

It remains to take note of the fact that since the present suit was brought, the law in India has been altered by the Transfer of Property (Amendment) Act, XX of 1929, which has inserted a new sec. 53A in the principal Act, whereby a Defendant in an action of ejectment may, in certain circumstances, effectively plead possession under an unregistered contract of sale in defence to the action. Their Lordships' view as expressed in the present case, must therefore be understood to be referable to the state of the law before this partial importation into India of the English equitable doctrine of part performance.

7. It has been contended on behalf of the Respondents both by Mr. S. N. Banerjee and Mr. Kanjilal that the equitable doctrine of part performance has been bodily imported into India by the enactment of sec. 53A. This contention is contrary to the dictum of the Privy Council just quoted. It is next said that it is merely an obiter dictum and it was not necessary for the Privy Council to consider the precise scope of the section. As has been pointed out even an obiter dictum of the Privy Council is entitled to the greatest weight and we are, in the absence of any direct authority of the Privy Council to the contrary, bound by what has been laid down by the Privy Council in this case although by way of "obiter." The effect of sec. 53A is that it has only imported partially the English equitable doctrine of part performance as appears in the valuable Commentary on the Transfer of Property Act by Sir Dinshah Fardunji Mulla in the 11th Edition of his work at page 262 under note (11). "The section." says the learned author,

has been described by the Privy Council as "a partial importation into India of the English equitable doctrine of part performance.

Then referring to the principle of part performance the learned author proceeds to state this:

By virtue of this section part performance does not give rise to an equity as in England, but to a statutory right. This right is more limited than the English equity in two respects, (1) the contract must be in writing, and (2) it is available only as a defence.

8. The right, in our opinion, is really the right which has been conferred on the Defendant and is available to him for the purpose of protecting his possession. It must be, limited !to cases where the transferee had taken possession and against whom the transferor or anyone claiming through him, is debarred from enforcing any right other than that which is expressly Provided in the contract. It has been very forcibly argued by Mr. Banerjee that such a limited construction

should not be put on sec. 53A and he lays stress on the words " the transferor shall be debarred from enforcing any right"- and argues that these words suggest that the right is available to the party whether he is a Defendant in the suit or is a Plaintiff in the action. But this argument fails to take note of the departure which the Indian Statute (makes?) from the English law. Under the English law, the equity of part performance is an active equity, for the person in possession may enforce in an independent suit further proceedings. As for instance, in a suit for specific performance or for compensation one can retain possession. That is the right which is given in sec. 53A. The proper procedure which should have been taken by the Plaintiffs is to sue for specific performance, which they say is still available to them and to get their title perfected by such suit. Instead of taking that course which was suggested in Arif's case L.R.58 IndAp 91: s.c. 35 C. W. N. 550 (1931) by the Privy Council the Plaintiffs have brought a suit for injunction and for a negative declaration that Defendants Nos. 1, 2 and A have no rights. That no title can be conferred by this section is the view which has been taken in other cases also. We are referred to the case of Ma Kyi v. Ma Thon I. L. R. 13 Rang. 274 (F. B.) (1935) where the learned Chief Justice, Sir Arthur Page, takes the same view, and there is another case which was not cited at the Bar, namely, Kuchwar Lime and Stone Company v. Secretary of State 17 pat. L. T. 217 (1936): A. I. R. 19361 where two learned Judges of the Patna High Court say this with reference to this question:

The Judicature Act has not effected any alter, ation of the law in this respect. Sec. 53A, T. P. Act, does not provide that under the circumstances stated therein a good title passed to the transferee. It only says that the transferor shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has, taken possession.

9. In our opinion the right conferred by sec. 53A is a right available only to the Defendant to protect his possession. It is only in the case of specific performance that part performance assists the Plaintiff. This will be clear when we compare the provisions of sec. 27A of the Specific Relief Act. Sec. 27A of the Specific Relief Act is the only case recognised by the Indian Legislature where the equity of part performance is an active equity, as in English law, sufficient to support an independent action by the Plaintiff. In this view we are of opinion that the suit as framed is not maintainable and consequently must be dismissed as against the Respondents. This disposes also of the other two appeals which have been brought by the two groups of Defendants, viz.; Defendants Nos. 6 and 7 and Defendant No. 2, viz. Appeal No. 159 of 1935 and No. 156 of 1935 respectively.

10. Another point has been raised and must be considered. It is argued for the Respondents that even if the suit is not maintainable under sec. 53A, the Plaintiffs being in possession are entitled to maintain the suit for injunction and reliance is placed on the case of Ismail Ariff v. Mahomed Ghous L. R. 20 I. A. 99: s. c. I. L. R, 20 cal. 834(1893) But the obvious distinction is that in the case before the Privy Council Defendant was a trespasser whereas in the present case

Defendants claimed under a colour of title from the liquidator and Gillandars through whom Plaintiffs also claim. This contention must be overruled.

11. The result is that Appeal No. 30 is allowed with costs both of this Court and of the Court below. The costs are to be paid to Mr. Biswas' client Defendant No. 1. The Plaintiffs are also to pay costs of this Court to Defendant No. 3, viz., Indian Tea Licensing Committee-hearing-fee, three gold mohurs and to Messrs. Gillandars Arbuthnot and Company, Defendant No. 4- hearing-fee, three gold mohurs. Appeal No. 159 is allowed with costs. Appeal No. 156 is also allowed with costs -hearing-fee, three gold mohurs.

12. The cross-objection is not pressed. It is dismissed without costs. The application is allowed to be withdrawn.

S.K. Ghose, J.

I agree.