

(1939) 08 BOM CK 0004
In the Bombay High Court
Case No : Second Appeal No. 166 of 1938

Rustomji Dossabhai Billimoria

APPELLANT

Vs

Bai Moti

RESPONDENT

Date of Decision : 17-08-1939

Acts Referred:

Registration Act, 1908 — Section 49
Transfer of Property (Amendment) Supplementary Act, 1929 — Section 10, 15
Transfer of Property Act, 1882 — Section 53A

Citation : AIR 1940 Bom 90 : (1939) 41 BOMLR 1310

Hon'ble Judges : Sen, J; John Beaumont, J

Bench : Division Bench

Final Decision : Allowed

Judgement

John Beaumont, Kt., C.J.—This is a second appeal from the Assistant Judge of Thana. It raises a point of law which has given rise to a certain amount of difference of opinion amongst the High Courts in India, the question being; whether Section 53A of the Transfer of Property Act, which came into operation on April 1, 1930, applies to transactions which took place before that date.

2. In the present case the plaintiff transferred to the defendant certain Immovable property in February and March, 1926, and the purchaser was let into possession, but the documents of transfer were not registered. This suit was filed on June 20, 1935, and by it the plaintiff, i.e. the vendor, seeks to recover possession of the property, her case being that the defendant cannot rely on the transfers to himself because they are not registered and cannot be given in evidence by reason of Section 49 of the Indian Registration Act. The answer of the defendant is that he is entitled to give his transfers in evidence: u/s 53A of the Transfer of Property Act. The learned trial Judge held that the defendant was entitled to rely on Section 53A of the Transfer of Property Act, but in appeal the learned Assistant Judge held that Section 53A could not operate upon a transaction which took place before that section was introduced by the

legislature. It is conceded on this appeal that the transfers in question are such as to fall within the operation of Section 53A, and the only question is whether the section has any retrospective effect.

3. There have been a lot of cases in India on the question and, I think, the preponderating view of most of the High Courts, including this High Court,, is that Section 53A does apply to a transaction which took place before April 1, 1930, provided that the suit in which the question arises was commenced after April 1, 1930. But curiously enough none of the cases in which that view has been accepted deal with one argument which Mr. S.T. Desai has urged for the respondent, which is, I am disposed to think, the strongest argument in his favour, and therefore I will deal with the question more fully than otherwise I might have thought it necessary to do.

4. Section 53A of the Transfer of Property Act came to be enacted in these circumstances :?There were cases in India in which the doctrine of part performance, which is a doctrine invented by Courts of Equity in England in order to mitigate hardships resulting from the application of the Statute of Frauds, which requires certain contracts to be in writing, had been applied in India in order to mitigate what was considered the hardship resulting from a strict application of the Indian Registration Act. In *G.F.C. Ariff Vs. Rai Jadunath Majumdar Bahadur*, the Privy Council held that those cases were wrongly decided, and that there was no justification for introducing the English equitable doctrine of part performance into India for the purpose of defeating the plain terms of an Indian statute. In that state of affairs the Legislature passed as from April 1, 1930, Section 53A of the Transfer of Property Act, the effect of which is to introduce in certain cases the doctrine of part performance as an answer to non-registration under the Indian Registration Act. No doubt the general principle is that Acts of the legislature are not given retrospective effect unless the language makes it clear that such was the intention, but I apprehend that in applying that principle one must have regard to the general character of the Act in question, and when construing an Act introduced for the purpose of applying an equitable doctrine to certain transactions considered *ex hypothesi* to be lacking in equity one should not assume that the legislature intended that the Act should not have retrospective effect, but wished to preserve rights acquired in such transactions. I therefore read Section 53A without any pre-conceived idea that in all probability the legislature did not intend it to have any retrospective operation.

5. Now, what the section provides is that "where any person contracts to transfer for consideration any Immovable property "and the transfer contains the provisions specified in the section, "then, notwithstanding that the contract, though required to be registered, has not been registered, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession. "The section in the

opening words" where any person contracts" uses the present tense. It does not say" shall have contracted "or" shall hereafter contract", and I think the use of the present tense denotes that the question whether the section is to operate or not should be answered at the time when it arises, that is when the suit is filed. The section in effect provides that where there is a contract of a certain nature, then certain results are to follow. That seems to me to be the natural meaning of the language, and that is the meaning which has been accepted by this Court in *Tukaram Ganpatrao Surve Vs. Atmaram Vinayak Gondhalekar*, , by the High Court of Patna in *Wakefield v. Kumar Rani Sayeeda Khatun* ILR (1936) Pat. 786 and by the High Court of Calcutta in *Ashutosh Chattopadhyay and Others Vs. Nalinakshya Bandopadhyay and Others*, , to mention only some of the cases. The High Court of Madras in *Kanjee and Mooljee Bros. v. Shanmugam Pillai* ILR (1932) Mad. 169 has taken a different view, and has held that Section 53A in its terms has no retrospective effect. I am unable to agree with that view. I prefer the view taken by the other High Courts.

6. But the matter does not rest there. Reliance is placed on Section 63 of Act XX of 1929, which is the Act, by which the Transfer of Property Act was amended. The addition to the Transfer of Property Act of Section 53A was introduced by Section 16 of the amending Act. Section 63 of the amending Act provides in effect that nothing in any of the sections enumerated shall be deemed in any way to affect transactions which took place before April 1, 1930. Now, Section 16 is not amongst the sections enumerated, but Section 63(d) deals with the sections which are not so enumerated and provides that:

nothing in any other provision of this Act shall render invalid or in any way affect anything already done before the first day of April, 1930, in any proceeding pending in a Court on that date ; and any such remedy and any such proceeding as is herein referred to may be enforced, instituted or continued, as the case may be, as if this Act had not been passed.

7. It seems to me that that section, though not very happily worded, amounts to this that in the case of the enumerated sections, which do not include Section 16, their provisions have no retrospective effect and do not apply to any transaction which took place before April 1, 1930 ; and the provisions of the other sections of the Act, which include Section 16, do not affect anything which took place before April 1, 1930, in a suit pending in a Court on that date, and I think the final words of Sub-section (d) are merely consequential and enact positively that remedies and proceedings which have been saved by the earlier part of the section can be enforced as if the section had not been passed.

8. It was held by this Court in *Suleman Haji Ahmed Umar Vs. P.N. Patell*, , and the view has been accepted by other High Courts, that the omission from Section 63 of Section 16 amongst the enumerated sections is a clear indication of the intention of the legislature that that section should apply in the case of transactions which took place before April 1, 1930, and I think that there is a great deal of force in that contention.

9. The learned Assistant Judge relied on a judgment of Mr. Justice Tyabji in *Chhaganlal v. Chunilal* (1933) 36 Bom. L.R. 277 in which he analyses the terms of Section 63. But in that case the suit had been filed before April 1, 1930, so that the question with which we have to deal did not arise. There is no doubt that Section 53A would not apply to a suit filed before the date when the section came into operation. It seems to me that so far as Section 63 is concerned it does not in terms cover this case ; but it does undoubtedly indicate that the legislature intended Section 53A to apply to transactions which took place before April 1, 1930, where the suit was filed after that date.

10. But then we have to consider the effect of Section 15 of Act XXI of 1929, which deals with the Indian Registration Act, and I do not find that that section has been referred to in any of the cases, except the Madras case which I have mentioned. As I have pointed out Section 53A expressly provides that in the contracts referred to in spite of non-registration the transferor is debarred from enforcing his rights. If no amendment had been made in the Indian Registration Act, it seems to me clear that Section 53A would have overridden Section 49 of the Indian Registration Act in respect of contracts falling within the former section. But, I suppose, from excess of caution, the legislature thought it desirable to amend Section 49, and accordingly a proviso was added to that section as from April 1, 1930, which so far as material enacts that an unregistered document affecting Immovable property and required by this Act to be registered may be received as evidence of part performance of a contract for the purposes of Section 53A of the Transfer of Property Act, 1882.

11. Now, that proviso was added by Section 10 of Act XXI of 1929, and Section 15 of that Act is expressed in terms almost identical with those of Section 63 of Act XX, but it applies to the whole Act, and not merely to enumerated sections. It provides

Save as provided in Sub-section (2) nothing in this Act shall be deemed to affect

(a) the terms or incidents of any transfer or disposition of property made or effected before the first day of April, 1930 ;

(b) the validity, invalidity, effect or consequences of anything already done or suffered before the aforesaid date.

12. It is argued that as the transfers in this case were made before April 1, 1930, and had not been registered, they could not be relied upon nor used in evidence, and that the amendment of Section 49 of the Indian Registration Act was expressly given no retrospective effect. If that is correct, as it seems to me to be, and if I am right in thinking that Section 53A of the Transfer of Property Act has retrospective effect, then there would seem to have been a slip in the drafting of the amending Acts, It cannot have been intended to make the amendment of the Transfer of Property Act retrospective, and to make the consequential amendment of the Registration Act non-retrospective, and one has to consider which of the amending Acts represents the true intention of the

Legislature.

13. It seems to me that the amendment of Section 49 of the Indian Registration Act was only passed ex abundante cautela and was not necessary, and the fact that that amendment was not made retrospective cannot, I think, have any great weight in considering whether Section 53A of the Transfer of Property Act is made retrospective. For the reasons which I have already given which are based, first, on the language of Section 53A, and, secondly, on the omission of Section 16 from the enumerated sections in Section 63 of Act XX of 1929, I am of opinion that Section 53A was intended to apply and does apply to transactions which took place before April 1, 1930. In my opinion, therefore, the decision of the trial Judge was right, and this appeal must be allowed and the plaintiff's suit must be dismissed with costs throughout.

Sen, J.

14. I agree.