

(1937) 08 CAL CK 0017
In the Calcutta High Court

Sk. Mahammed Hushen

APPELLANT

Vs

Jamini Nath Bhattacharji

RESPONDENT

Date of Decision : 19-08-1937

Acts Referred:

Transfer of Property Act, 1882 — Section 53A

Citation : AIR 1938 Cal 97

Hon'ble Judges : Nasim Ali, J;B.K. Mukherjea, J

Bench : Full Bench

Judgement

Nasim Ali, J.—The facts which are not in dispute in this appeal are these : One Jagabandhu Chakravarti was the owner of the lands which are the subject matter of the present appeal. He borrowed Rs 250 from the defendants and executed a bond hypothecating these lands in favour of the defendants on 10th December 1928 as a security for repayment of the said loan. He then put the defendant in possession of the mortgaged lands in lieu of interest. The mortgage bond, however, was not registered. Thereafter Jagabandhu died. In the year 1912 the plaintiff brought a suit against the heirs of Jagabandhu for recovery of some money and obtained a money decree on 22nd May 1933. This decree was put to execution and the plaintiff purchased the mortgaged lands on 16th February 1934 in execution of the said decree. He then obtained symbolical possession through Court. He could not however get actual possession as the defendant did not allow him to do so. The plaintiff thereafter instituted a suit in the 3rd Court of the Munsiff at Habiganj in the District of Sylhet for recovery of possession of the lands purchased by him from the defendant on declaration of his title thereto.

2. The trial Court declared the plaintiff's title to the disputed lands but dismissed his claim for khas possession as he was of opinion that the defendant was protected from eviction by Section 53A, Transfer of Property Act. The plaintiff appealed to the lower Appellate Court. This appeal was heard by the Additional District Judge of Sylhet. The learned Judge was of the opinion that Section 53-A, Transfer of Property Act, had no retrospective effect and as the usufructuary

mortgage bond was executed and the part performance took place before 1st April 1930, on which date Section 53-A came into force, the defendant was not entitled to the benefit of that section. He accordingly allowed the appeal and passed a decree for khas possession by evicting the defendant. Hence this appeal by the defendant. The only point for determination in this appeal is whether the defendant is protected from eviction by virtue of Section 53-A, Transfer of Property Act. This section provides:

Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that the contract though required to be registered has not been registered, or where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefore by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

3. In this case the instrument of transfer, that is the mortgage bond, was executed on 10th December 1928, but the transfer was not completed in the manner prescribed by law, as the bond was not registered, though it was required to be registered by Section 59, T.P. Act, and Section 17, Registration Act. On account of the non-registration of the bond, the defendant has acquired no legal title as usufructuary mortgagee. The mortgagor or his heirs had therefore the legal right to eject him from the mortgaged lands before 1st April 1930, when Section 53-A, which was introduced into the Transfer of Property Act by Act 20 of 1929 (India Council), came into force. If Section 53-A be applied to a state of facts which came into existence before it came into force, and the defendant be given the benefit of this section, the plaintiff's right to eject the defendant existing before the section came into force would be taken away. Philosophical writers denied that any Legislature ought to have power to pass retrospective statutes. The exercise of such power under ordinary circumstances is bound to lead to great injustice. We cannot therefore presume that the Statute which takes away any existing right is intended to apply to a state of facts which came into existence before its commencement. On the other hand, statutes changing the law are presumably "intended to apply to a state of facts coming

into existence after the Act": per Cockburne C. J. in (1877) QBD 269 *Reg. v. Ipswich Union* (1877) 2 Q B D 269. When the effect of the statute would be to make a transfer valid, which was previously invalid, to make an instrument, which had no effect at all and from which the party had liberty to depart as long as he pleased, binding...the prima facie construction of the Act is that it is not to be retrospective : per Lord Blackburn in *Smith v. Callander* (1878) AC 5822 .

But

It is obviously competent for the Legislature if it pleases in its wisdom to make the provisions of Act retrospective : per Lord Ashbourne in (1901) A C 2973.

4. The question is whether the Legislature while enacting Section 53-A, has departed from the general rule that statutes touching the existing right are not to be deemed retrospective. No difficulty arises where the Legislature expressed its intention to take away vested rights in plain and unambiguous language, for in such case the test laid down by Lord Watson in *Young v. Adams* (1898) A C 469 is satisfied. If the test laid down by Lord Watson be applied to Section 53-A, it cannot be held to be retrospective: see *Kanji and Moolji Bros. v. Bhunmugam Pillai* AIR 1932 Mad 734. But this test-is not the only test, as an enactment may be made retrospective by necessary intendment also : see *Colonial Sugar Refining Co. v. Irving* (1905) A C 369 and AIR 1927 242 (Privy Council) . The question in each case is whether the Legislature has sufficiently expressed its intention:

In fact we must look to the general scope and purview of the statute, and at the remedy sought to be applied, and consider what was the former state of law, and what it was that the Legislature contemplated : *Pardo v. Bingham* (1869) 4 Ch A 735.

If it is a necessary implication from the language employed that the Legislature intended a particular section to have a retrospective operation, the Courts will give it such an operation : see *Craies on Statute Law*, Edn. 4, p. 334.

5. Applying this test, Wadia J. of the Bombay High Court in *Suleman Haji Ahmed Umar Vs. P.N. Patell*, Bennet J. of the Allahabad High Court in *Gajadhar Misir Vs. Bechan Chamar* , and my learned brother M. C. Ghose J. in *Ashutosh Chattopadhyay and Others Vs. Nalinakshya Bandopadhyay and Others*, have come to the conclusion that Section 53-A is retrospective. In India registration is necessary to complete certain classes of transfer of immovable property. Where the matter advanced beyond the stage of a contract to transfer and the transferee was put into possession of the property without a registered instrument of transfer (in cases where such registered instrument is necessary for effecting the transfer), the equitable doctrine of part performance, which was resorted to in England in order to prevent fraud resulting from the strict application of the statute of frauds, was applied in numerous cases in this country in order to prevent fraud from the rigorous application of the law of registration by the High Courts in India and by the Judicial Committee in

Mohammad Musa's case *Mahomed Musa v. Aghore Kumar Ganguli* AIR 1914 P C 27 before the Indian Legislature introduced Section 53-A, T.P. Act. This section imported in a modified form the English doctrine of part performance into this country.

6. Before the introduction of Section 27-A in the Specific Relief Act by Act 21 of 1929, which is supplementary to Act 20 of the same year, contracts to leases, which required registration but which were not registered, could not be specifically enforced even if possession had been delivered to the lessee in part performance of the contract. Section 27-A created this new right and laid down expressly that it would apply to contracts to leases after 1st April 1930. In Section 53-A, T.P. Act, however we do not find any express provision stating that it would apply to transfers effected after 1st April 1930.

7. I now proceed to deal with the question whether the intention of the Legislature to make Section 53-A retrospective has been sufficiently expressed by any necessary implication of the language used by it. The material provisions are contained in Section 63 of Act 20 of 1929. It is a saving clause and is in these terms:

Nothing in any of the following provisions of this Act, namely Rs. 3, 4, 9, 10, 15, 18, 19, 27, 30, Clause (c) of Section 31, Sections 32, 33, 34, 35, 46, 62, 66, 67, 58, 59, 61 and 62 shall be deemed in any way to affect : (a) the terms or incidents of any transfer of property made or effected before the 1st day of April 1930, (b) the validity, invalidity, effect or consequences of anything already done or suffered before the aforesaid date, (c) any right, title, obligation or liability already acquired, accrued or incurred before such date, or (d) any remedy or proceeding in respect of such right, title, obligation or liability; and nothing in any other provision of this Act shall render invalid or in any way affect anything already done before the 1st 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.

8. This section first lays down that certain amendments made by Act 20 of 1929 shall not be deemed to affect the terms or incidents of any transfer of property made or effected before 1st April 1930. Section 16 of this Act which introduced Section 53-A in the Transfer of Property Act is not one of them. Why did the Legislature say expressly that these amendments only would be retrospective and not the rest? There would have been no necessity for this provision, unless the Legislature wanted to make a distinction between amendments which would not be retrospective and amendments which would be retrospective. An Act may be retrospective in the sense that it applies to all transfers before it comes into force whether actions relating to such transactions are started before or after the Act comes into operation. It may also be retrospective in the sense that it will bring within its operation all transactions completed before it begins to operate provided these transactions have not been already the subject matter of litigation

before the Act comes into force. The words in Clause (d) of Section 63 quoted above, namely:

Nothing in any of the provisions of the Act (Section 16 comes under this head) shall render invalid or in any way affect anything already done before 1st April 1930, in any proceeding pending in a Court on that date.

can have no meaning unless the Legislature was making a distinction between pending actions relating to transfers completed before the Act comes into force and actions relating to such transactions which may be started after the Act comes into force. The object of the Legislature in providing that the provisions of Act 20 of 1929 other than those which are not to be retrospective would not apply to pending actions was to indicate to what extent these other provisions would not be retrospective. The necessary implication is that the other amendments would be retrospective in cases not coming within the exception. By excluding cases to which these other amendments would not apply, the Legislature was by implication indicating the cases to which they would apply. These other provisions, in my judgment, are therefore retrospective in the second sense indicated above, namely that they would apply to transactions completed before 1st April 1930 provided that they have not been already made the subject matter of litigation before that date. In other words they would apply to actions relating to transactions completed before 1st April 1930 started after that date.

9. The defendant in the present case therefore is entitled to the benefit of the protection given by Section 53-A, T.P. Act. The result therefore is that this appeal is allowed, the judgment and decree of the lower Appellate Court are set aside and those of the trial Court are restored with costs in this Court as well as in the lower Appellate Court.

B.K. Mukherjea, J.

10. This appeal is on behalf of the defendant and arises out of a suit commenced by the plaintiff for recovery of possession of the property in suit on establishment of his title by purchase at an execution sale. The disputed property belonged admittedly to one Jagabandhu Chakravarty. The plaintiff got a money decree against the heirs of Jagabandhu in M.S. No. 253 of 1932, and in execution of the same the lands were sold and purchased by the plaintiff. The plaintiff obtained symbolical possession, but on his attempting to get actual possession was resisted by the defendant, which led to the institution of the present suit. The defence was that the defendant was a girbidar or usufructuary mortgagee in respect of the lands in suit under an unregistered mortgage bond executed by Jagabandhu on 10th December 1928 by which he was given possession of the property in lieu of interest. The defendant contended that the plaintiff was not entitled to recover possession without redeeming his mortgage.

11. The mortgage bond was executed to secure an advance of Rs. 250 and u/s 59, T.P. Act, it required registration, The question therefore was whether the

defendant could claim the rights of a mortgagee in possession, when the document upon which he relied was legally insufficient to create a mortgage under the provisions of the T.P. Act. To get over this difficulty, the defendant relied upon the doctrine of part performance, as laid down in Section 53-A, T.P. Act, and his argument was that as the terms of the contract could be ascertained with reasonable certainty from the unregistered mortgage bond, and as he was let into possession in pursuance of the same, he was entitled to be protected under that section. The trial Court gave effect to this contention, and gave the plaintiff a conditional decree for possession subject to his redeeming the defendant's mortgage. On appeal by the plaintiff, the lower Appellate Court held that Section 53-A was not retrospective and could not affect a transaction which was before 1st April 1930. As Section 53-A did not apply, the plaintiff was given an unconditional decree for ejectment against the defendant.

12. It is against this decision that the present second appeal has been preferred. The whole controversy centres round the point as to whether it is open to the defendant to avail himself of the defence provided for in Section 53-A, T.P. Act, when the suit was instituted after 1st April 1930, but the transaction itself, under which the defendant was let into possession, was before that date. The point is not free from doubt, and there is a marked divergence of judicial opinion upon it; the Madras High Court being of opinion that the section is not retrospective, and can-not affect transactions prior to 1st April 1930 (56 Mad 1695), while the Allahabad and Lahore High Courts have held distinctly that it applies to all suits started after the date when the section came into force, even though the transactions were earlier in point of time : Shyam Sundar Lal and Another Vs. Din Shah and Others and Banarasi Das v. Ali Muhammad AIR 1936 Lah 5. The Allahabad view has been taken by the Bombay High Court in Suleman Hazi Ahmed Umar v. P.N. Patell AIR 1933 Bom 381 and by my learned brother M.C. Ghose in this Court in Ashutosh Chattopadhyay and Others Vs. Nalinakshya Bandopadhyay and Others, . A statute which deals with substantive rights would not ordinarily be construed as retrospective in its operation. It would operate only on facts which came into existence after the statute is passed, unless a contrary intention can be gathered either from express words or by necessary implication. The language of Section 53-A itself is not clear or explicit on this point, and the question therefore is as to whether a necessary inference of giving the section a retrospective operation to any extent does arise, either from the nature of the provisions contained in the statute itself or from other circumstances which can in law be referred to, for throwing any light upon its meaning. As Lush J. observed in (1880) 5 Q B D 217 South Eastern Ry. Co. v. Ry. Commissioners at page 240:

While we are to collect what the Legislature intended from what it has said, we must look not at one phrase or one section but at the whole of the Act, and must read it by the light which the state of law at the time throws upon it.

13. Before I come to the Act itself by which this section was introduced, it may

be useful to enquire, as to whether the state of law at the time when the Amending Act was passed, and the object which the Legislature had in introducing the section could throw any light upon its interpretation. This is a permissible matter to look into for the purpose of construing a statute, provided it is taken with the warning that we must not strain the language of a statute unduly by attempting to bring it within the supposed intention of the Legislature (Maxwell, p. 19, Edn. 7). Now, when this section was introduced into the statute book, there was already a large body of decisions of the different High Courts in India, which recognized and gave effect to the doctrine of part performance, as a measure of equity, justice and good conscience. The doctrine can be said to have been formally recognized by the Indian Courts since the decision of the Judicial Committee in 42 I. A.I. 12 but even before that relief on somewhat analogous grounds was given, principally by this Court, by invoking what is known as the principle of *Walsh v. Lansdale* (1882) 21 Ch D 9. This was introduced for the first time in *Bibi Jawahir v. Chaterpat* (1906) 2 C L J 343 and was since then followed in numerous cases, of which the cases in *Singheeram v. Bhagabat* (1910) 11 C L J 543 *Secretary of State v. Forbes* (1912) 16 C L J 217 *Gajendra Nath v. Ashraf Hossain* AIR 1923 Cal 130 and *Kanti Chandra Ghose and Others Vs. Brojendra Mohan Goswami and Others*, may be cited as instances. Though this doctrine was frequently mixed up in later oases with that of part performance, and though both were invoked in and applied to the same set of circumstances, there is in fact a difference between them, both as regards the scope and application, as well as the principles upon which they purport to be based.

14. The doctrine in *Gajendra Nath Dey Vs. Moulvi Ashraf Hossain*, is based upon the principle that "equity looks that as done which ought to be done," and if the defendant in an action of ejectment had an enforceable right to enforce specific performance of a contract entitling him to remain in occupation of the land, it would furnish a complete defence to the action commenced on the strength of the plaintiff's legal title. To invite the application of the principle in (1882) 21 Ch D 916 there must therefore be a contract which is capable of being legally proved, and a subsisting right to enforce the contract specifically at the time when the subsequent legal question comes to be determined. When either of these elements were wanting, then the doctrine, strictly speaking, could not be applicable, though there are instances in the reported cases of our Courts, where relief was given to the parties on the basis of this doctrine, even though the document adduced in evidence to prove the contract was inadmissible in law: vide *Sarat v. Sham Chand* (1912) 16 C L J 71 and *Puchha Lal v Kunj Behari* AIR 1914 Cal 21. The doctrine of part performance on the other hand is of much wider application. It owed its origin in England to the decisions of Equity Courts, who devised this equitable remedy to afford relief in cases where certain kinds of contracts which came u/s 4 of the statute of frauds could not be proved and specifically enforced for want of any evidence in writing which the statute required. The statute did not make the contract a nullity, but barred the legal remedies which otherwise might have been enforced. Lord Selborne in the

leading decision in *Maddison v. Alderson* (1883) 8 A C 467 pointed out

That the statute had in view the simple case, when a man is to be charged upon the contract only, and not upon equities which arise upon the *res gesta* subsequent to and arising out of the contract.

15. If acts have been done in pursuance of the contract, which is referable to the contract alone, then, so long as the connexion of the *res gesta* with the alleged contract does not depend upon mere oral evidence, but is reasonably to be inferred from the *res gesta* themselves, justice seems to require some limitations upon the statute. If in such a case conveyance was refused and an action of ejectment brought by the vendor or his heirs, nothing could be done towards ascertaining and adjusting the equitable rights and liabilities of the parties without taking the contract into account. As the matter had advanced beyond the stage of contract, and was not confined to the contract merely as contemplated by the Statute of Frauds, his Lordship held that the contract should be regarded and the equities of the parties adjusted on that basis. In England, the principle is generally invoked to aid the plaintiff in a suit for specific performance, where the contract sought to be enforced is a parol contract not capable of being proved in law, but which has been performed in part by delivery of possession or otherwise, which is unequivocally referable to the contract itself. It is based on the broad principle that a party cannot take advantage even of an Act of Parliament to commit fraud on others.

16. The case in *Mahomed Musa v. Aghore Kumar Ganguli* AIR 1914 P C 27 which was decided in 1914, as has been said already, is the first case where the Judicial Committee referred to this principle of part performance in connexion with Indian law. In that case there was a previous suit between the parties for enforcement of a mortgage bond in the year 1873. The suit was compromised and the terms were that the mortgaged properties should be divided between the mortgagor and the mortgagees in certain shares, the mortgagees releasing their security and the mortgagor agreeing to execute proper deeds of conveyance relating to the properties allotted to the mortgagees. The agreement was neither registered nor incorporated in the decree nor were the deeds of sale executed, but the parties for a long time enjoyed their shares in every way as if the transfer was made. Many years afterwards, the heirs of the mortgagor brought a suit against the heirs of the mortgagees for redeeming the original mortgage. The defendants set up the agreement in defence, but the reply to that given by the plaintiffs was that the document being neither registered nor incorporated in the decree was not admissible in evidence. Their Lordships held that the equity of redemption was extinguished. After pointing out that no written conveyance was necessary in the year 1873 and that the parties had for a long time arranged their rights of property in terms of the compromise, Lord Shaw observed:

That even if the *Razinarna* and the decree taken together were considered to be defective or inchoate as elements making up a validly concluded agreement for the extinction of the equity of redemption, the actings of the parties had been

such as to supply all defects.

17. His Lordship then quoted certain passages from the judgment in (1883) 8 A 0 467 and certain observations of Professor Bell and observed that:

There is nothing in the law of England or India inconsistent with it, but, upon the contrary, these laws follow the same rule.

18. Two years later similar remarks were again made by the Judicial Committee in *Malraju Lakshmi v. Venkata Narasimha* AIR 1916 P C 9 where the decision in *Mahomed Musa v. Aghore Kumar Ganguli* AIR 1914 P C 27 was expressly referred to in the judgment. In this case however, a valid and perfectly enforceable contract was satisfactorily established by evidence. These remarks of the Judicial Committee in the two cases mentioned above were described as obiter, in the subsequent case in AIR 1931 79 (Privy Council) which was decided by the Judicial Committee in the year 1931 and that view was reiterated in 61 I. A. 388.27

19. But whatever the subsequent pronouncements of the Judicial Committee might have been, after the decision in *Mahomed Musa v. Aghore Kumar Ganguli* AIR 1914 P C 27 the different High Courts in India applied in a large number of cases the doctrine of part performance not only in protecting the possession of defendants where oral agreements were not actually followed by deeds but also admitted in evidence, documents evidencing completed transactions, which were not admissible for want of registration, to prove the contract of transfer, provided the transferee had taken possession in pursuance thereof. The doctrine was applied along with that in (1882) 21 Ch D 916 in many cases, e.g. AIR 1934 235 (Privy Council) , *Khagendra Nath v. Sonatan Guha* AIR 1916 Cal 722 *Jnan Chandra Das v. Hari Mohan Sen* AIR 1918 Cal 923 *Syam Kishore De v. Umesh Chandra* AIR 1920 Cal 388 *Bapu Apaji v. Kashi Nath* AIR 1916 Bom 1 and *Vizagapatam Sugar Development Co. v. Muthuramareddi* AIR 1924 Mad 271 while in many others it was applied without reference to the other doctrine and even under circumstances where the contract was not specifically enforceable at that date: vide *Shafikul Huq v. Krishna Gobinda* AIR 1919 Cal 607 *Meher Ali v. Aroatannessa Bibi* AIR 1919 Cal 845 *Mt. Salamatuz-Zamani Begam v. Masha Allah Khan* AIR 1918 All 211 *Ram Sewak Rai v. Sheo Naik Rai* AIR 1923 All 433 *Mt. Kunti v. Gajraj* AIR 1924 All 826 *Sandu Valji Vs. Bhikchand Surajmal*, and *Ahmed Hassan Vs. Hassan Mahomed Malek*, . In some cases, again, the doctrine was employed as an active equity in aid of the plaintiff in a suit to enforce specific performance or for recovery of arrears of rent : *Hiralal Ramnarayan Vs. Shankar Hirachand*, and *Jogendra v. Kurpal Harehi & Co.* AIR 1923 Cal 63. On the other hand, there was the dissentient opinion expressed by some Judges who held that the doctrine of part performance could not override the statutory provisions of the Transfer of Property Act or the Registration Act and could not create interests in violation of these statutory provisions (see *Ramgopal Vs. Tulshi Ram and Another* and *Sanjib Chandra Sanyal Vs. Santosh Kumar Lahiri and Others*, a view which was accepted by the Judicial Committee later on in

Malraju Lakshmi v. Venkata Narasimha AIR 1916 P C 9 and AIR 1934 235 (Privy Council) .

20. This was the state of law laid down by judicial decisions at the time when Section 53-A, T.P. Act, was introduced. Now, if we turn to the wording of the section, we find that the Legislature did not accept the view expressed in the oases mentioned above, that the doctrine of part performance could not be applied against the statutory provisions of the Transfer of Property Act or the Registration Act. It did mean to give a statutory recognition to the equitable doctrine of part performance, as it was applied by Judges, untrammelled by any question of specific performance of the agreement to transfer, but it intended to recognize it, subject to certain limitations. In the first place it was made inapplicable to parol agreements, and in order to bring the case within the purview of the section, a document in writing is necessary, signed by the party, from which the terms of transfer could be ascertained with reasonable certainty. In the second place, it has been made available only as defence. On both these points, the Legislature did intend to override the existing decisions, which made no distinction between oral and written contracts or those which allowed the plaintiff to use it as an active equity. I think that it is not possible to assume that the Legislature proceeded upon the view that the existing decisions which recognized the doctrine of part performance were wrong in law, and that it was going to provide a totally new remedy in the new section where there was none under the existing law. If that was so, the section could not but be prospective and could not affect any transaction under the old law. If however as I think the Legislature did accept the doctrine of part performance, as it was generally applied at the time, and only restricted it in two ways as indicated above, the doctrine thus restricted might very well be intended to be applicable in respect of all suits commenced after 1st April 1930 irrespective of the actual date of the transaction. That the Legislature had this intention would appear from the provision of Section 63 of Act 20 of 1929. This Act which is called the Transfer of Property Amendment Act and which by Section 16 introduced Section 53.A in the T.P. Act lays down in Section 63 that;

Nothing contained in any of the following provisions, namely 8s. 3, 4, 9, 10, 15, 18, 19, 27, 30, Clause (c) of Section 31, Sections 32, 33, 34, 35, 46, 52, 55, 57, 58, 59, 61 and 62 shall be deemed in any way to affect: (a) the terms or incidents of any transfer of property made or effected before 1st April 1930, (b)... (c) any right, title, obligation or liability already acquired, accrued, or incurred before such date or (d) any remedy or proceeding in respect of such right, title, obligation or liability; and nothing in any other provision of this act shall render invalid, or in any way affect anything already done before 1st 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.

21. This therefore prevents only certain specified sections of the Amended Act

from being retrospective; with regard to the rest which include Section 16, the implication is that they would be retrospective with this exception that pending suits would not be governed by the new section. The Legislature no doubt speaks in a voice which is not very clear but is somewhat dubious like that of the ancient oracles, but no other inference seems possible from the language used. Section 63 purports to be a saving clause, and is not in any way inconsistent with the actual provisions of the Act. If it is said that all changes in substantive law are presumably prospective, and it is to emphasise this fact that the section has been introduced *ex abundanti cautela*, then there is no reason why some sections only were mentioned and the rest omitted. If the sections that are omitted are held to be not retrospective, it is difficult to see why a special provision was made to save all pending actions. All these point to the conclusion that the intention of the Legislature was that when the transaction took place before 1st April 1930 and a suit or proceeding was pending in respect of the same, the new section would not affect the rights of the parties in the pending litigation. It follows that when no action is pending, and the suit is commenced after the Act came into force, it would be open to the defendant to avail himself of the protection conferred by Section 53-A, T.P. Act.

22. I am not much impressed by the argument put forward on behalf of the appellant that the section does not create any right but merely imposes a bar, and there, fore ought to take effect from the date of its commencement. If the defendant is allowed to raise a bar, to that extent certainly it is an encroachment on the rights of the plaintiff, and this by itself is no reason why earlier transactions would be affected when there was no such bar. The fact that the Proviso to Section 49, Registration Act, which was introduced by Act 21 of 1929, and which allowed an unregistered document, which otherwise required registration, to be used as evidence on and from 1st April 1930, to prove acts of part performance, u/s 53-A, T.P. Act, may indirectly support the view taken above that Section 53-A, T.P. Act, was meant to be applicable to all suits commenced after 1st April 1930, but it is by no means decisive on the point. It is really the provision of Section 63 of Act 20 of 1929 which in my opinion concludes the matter, and I agree with my learned brother in holding that Section 53-A, T.P. Act, would apply to a suit instituted after 1st April 1930 even though the transaction itself was earlier in point of time. The result is that the appeal is allowed, the judgment and decree of the lower Appellate Court are set aside and those of the trial Court restored.