

(1940) 04 PAT CK 0010
In the Patna High Court

Tika Sao and Others

APPELLANT

Vs

Hari Lal and Others

RESPONDENT

Date of Decision : 12-04-1940

Acts Referred:

Transfer of Property Act, 1882 — Section 92

Citation : AIR 1940 Patna 385

Hon'ble Judges : Manohar Lall, J;Fazl Ali, J;Dhavle, J

Bench : Full Bench

Judgement

Fazl Ali, J .

1. The facts of this case, so far as they are material to the questions to be decided by this Bench, may be briefly stated as follows : In the year 1924, defendants 1 and 2 in the action which has given rise to this reference executed two simple mortgage bonds in favour of one Sundar Sah and in 1925 they executed two other simple mortgage bonds in favour of one Kokil Sah, admittedly a benamidar for. Saukhi Sah and others. Saukhi Sah and Sundar Sah belonged to the same family and there being a private partition between them, Sundar Sah acquired the right to realize all the dues under the first two bonds and Saukhi Sah similarly acquired the right to realize the dues under the last two bonds. Defendants 1 and 2 afterwards executed several mortgage bonds in favour of the appellants in the year 1926, and on 25th April 1927 they also executed a mortgage bond in favour of the plaintiffs and defendants 3 to 6 for a sum of Rs. 13,000.

2. The points to be noted in regard to the last bond are firstly, that it provided among other things that the bulk of the consideration money was to be used by the plaintiff in paying off the four bonds executed by defendants 1 and 2 in favour of Sundar Sah and Saukhi Sah in the years 1924 and 1925 and secondly, that mauza Marsua was not one of the properties mortgaged under this bond, though it had been mortgaged under three of the bonds executed by defendants 1 and 2 in favour of Sundar Sah and Kokil Sah between 1924 and 1925.

3. The plaintiffs claimed in their action that by payment of the prior mortgage bond of 1924 and 1925 they had been subrogated to the position of the mortgagees under those bonds and they were, therefore, entitled to sell Marsua to realize the sum paid by them to liquidate the incumbrance on it. The defendants, on the other hand, contended that the plaintiffs were not entitled to subrogation and could not proceed against Marsua. On these facts two questions have been referred to this Bench and they have been formulated as follows:

(1) Whether a subsequent mortgagee, who pays up and redeems the earlier mortgages as a part of the covenant in his mortgage is entitled to claim subrogation so as to give him the right to enforce the rights of the earlier mortgagees as a plaintiff in an action or whether he can use the earlier mortgages as a shield only irrespective of the fact that the properties mortgaged to him are different from the properties covered by the earlier mortgages so redeemed.

(2) Whether the provisions of Section 92 of the amended Transfer of Property Act are retrospective.

4. I propose to deal first with the second question which has assumed great importance in view of the conflicting decisions of the various High Courts upon it. It appears that the Allahabad, Calcutta and Bombay High Courts and the Chief Court of Oudh have held that the Section is retrospective whereas the opposite view has been expressed by the Madras, Rangoon and Nagpur High Courts. In *Jagdeo Sahu v. Mahabir Prasad* AIR 1934 Pat 127 a Division Bench of this Court held that the Section was not retrospective and the same view was expressed by another Division Bench in *Jagadamba Prasad v. Anadi Nath Roy* AIR 1938 Pat 887 in regard to Section 53-A on a line of reasoning which is equally applicable to Section 92. On the other hand in *Ramdayal Sen v. Chakrapani Nandi* AIR 1936 Pat 60 Luby J. agreeing with the Full Bench decision of the Allahabad High Court in *Hira Singh and Others Vs. Jai Singh and Others* expressed the opinion that the Section was retrospective.

5. A similar opinion was expressed by Courtney Terrell C.J. with regard to Section 53-A in *John Gurney Wakefield Vs. Kumar Rani Sayeeda Khatoon*, Being myself a party to the judgments delivered in some of these cases, I must candidly admit that while dealing with those cases I had not the advantage of examining the question as fully as I have been able to do on the present occasion. Section 92 has been added to the Transfer of Property Act by Section 47 of Act 20 of 1929 and if there was nothing else in the Act, it would have been difficult to hold that it was intended to be retrospective. The general rule is that any new law that is made should ordinarily affect future transactions, not past ones, because as Earle C.J. pointed out in *Midland By. Co. v. Pye* (1861) 10 CB 179:

It manifestly shocks one's sense of justice that an act legal at the time of doing it should be made Unlawful by some new enactment.

Lord Cranworth accordingly laid down in *Kerr v. Ailsa* (1854) 1 Macq 736 that

unless there be something in the language, context or object of an Act of Parliament showing a contrary intention, the duty and practice of Courts of Justice is to presume that the Legislature enacts prospectively and not retrospectively.

6. The same view was expressed by the Privy Council in AIR 1927 242 (Privy Council) in these words:

While provisions of a statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment.

The question to be decided therefore is whether there is anything in the language, context or object of the Amending Act to show that Section 92 was intended to be retrospective. For the purpose of deciding this question, it becomes necessary to consider the effect of Section 63 which is the last Section of the Amending Act and which runs as follows:

Nothing in any of the following provisions of this Act, namely Rs. 3, 4, 9, 10, 15, 18, 19, 27, 80 Clause (c) of Section 31, Sections. 32, 33, 34, 36, 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 the first 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 provisions of this Act shall render invalid or in any way affect anything already done before the first day of April 1980, 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 if the Legislature intended that none of the provisions of the Amending Act should be retrospective, it was hardly necessary to insert this long and elaborate Section in the Act. It would have been enough to make a simple provision that none of the Sections was to have retrospective effect or to make no provision whatsoever in this respect, because the general rule is that a new law shall not ordinarily affect past transactions. It was also not necessary to discriminate between the 22 Sections, which are specifically mentioned in the Act, and the other Sections and to make separate provisions for them. As to the 22 Sections it is clearly stated that they should not have retrospective operation

in any case whatsoever, whereas the provision with regard to the other Sections is that they shall not have retrospective operation in respect of anything already done before 1st April 1930 in any proceeding pending in a Court on that date. I think that this clearly implies that these other provisions of the Act shall affect transactions effected before 1st April 1930, if no proceeding was pending in a Court on that date Or, in other words, if the action was brought after that date.

8. This seems to me to be the only logical interpretation of Clause (d) of Section 63, but this clause is so clumsily worded that in *Bank of Chettinad Ltd. v. Maung Aye* AIR 1938 Rang 806 a Full Bench of the Rangoon High Court relying on the last part of this very provision, came just to the opposite conclusion. In that case one of the learned Judges, Dunkley J., tried to recast the latter part of Clause (d) as follows:

Any remedy in respect of any right, title, obligation or liability already acquired, accrued or incurred before 1st April 1980, may be enforced, instituted or continued, as the case may be, as if this Act had not been passed.

These words, he pointed out, may well be construed to mean that no provision of Act 20 of 1929 shall affect any such rights as had already been acquired or had accrued before 1st April 1930. With great respect, however, I venture to suggest that that is not the correct interpretation, because it altogether overlooks the meaning of the words "as is hereinafter referred to" which immediately follow the words "such proceeding or remedy." The words "such remedy or proceeding" as is hereinafter referred to" mean "such remedy or proceeding" as has been saved in this Section or has been declared to remain unaffected by the 22 Sections mentioned in the Section and the other provisions of the Act. It will be noticed that in Clause (d) the word "such" has been used at more than one place. It occurs before the words "right, title, obligation or liability" in the first part of the clause and before the words "remedy" and "proceeding" in the latter part of the clause.

9. The use of the word "such" before "right, title, obligation or liability" suggests that the reference is to the same words used in Clause (e) which runs as follows: Any right, title, obligation or liability already acquired, accrued or incurred before such date (the date being the 1st April 1930).

The words "remedy" and "proceeding" obviously referred to the remedy or proceeding in respect of the right, title, obligation or liability mentioned in Clause (c) and the word "proceeding" also refers to the same word used in the middle part of the clause. Thus Clause (d) when it is read with the relevant words of the main Section which governs its first part may be recast as follows:

Nothing in any of the following provisions of this Act...shall be deemed in any way to affect any remedy or proceeding in respect of any right, title, obligation or liability already acquired, accrued or incurred before 1st April 1930; and nothing in any other provisions of this Act shall render invalid or 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 saved, may be enforced, instituted or continued, as the case may be, as if this Act had not been passed.

Section 63, Clause (d) is clearly divisible into three parts, the dividing line being indicated by the two colons (or semicolons which we find in some reprints of the Act) which occur at the end of the first and second parts. The first part must be read with the words "shall be deemed in any way to affect" with which the Section opens.

10. The second part provides that the provisions of the new Act other than the 22 Sections mentioned therein shall not affect anything already done in pending actions. The third part provides that the remedy and proceeding referred to in the Section may be enforced, instituted or continued as if the Act had not been passed. In *Kundanlal v. Faqir Bakhsh* AIR 1938 Oudh 127 a Full Bench of the Oudh Chief Court has expressed the view that by oversight the second part of the clause has been misplaced, its proper place being at the end of the clause. With this view also, I respectfully disagree, though I agree with the main conclusion arrived at by the learned Judges of the Oudh Chief Court as to the meaning of the Section.

11. I do not think that for the proper construction of the Section it is at all necessary to suggest that the Legislature has made any mistake in drafting this Section. In my opinion, the third part has not been misplaced, because it contains not only the words "such remedy" which apparently refer to the "remedy" mentioned in the first part but also the words "such proceeding" which refer to the "proceeding" mentioned both in the first and the second parts. It substantially provides that the remedy and proceeding referred to in the first part may be enforced, instituted or continued and the proceeding referred to in the second part may be continued as if the Act had not been passed. This part is merely consequential and explains what is meant by the provision that the remedy or proceeding referred to in the Section shall not be affected by the provisions of the Act. It is in a sense redundant, because the meaning of the Section will not be affected in any way if it is omitted, but instances of such tautology will be found in the General Clauses Act and many other Acts where similar provision has been inserted to make the meaning of the preceding words absolutely clear.

12. In AIR 1937 All 5884 Sulaiman, C.J. has dealt with the very question which is now before this Bench as follows:

No doubt the ordinary rule of interpretation of a statute is that it should not be considered to have a retrospective effect so far as substantive rights are concerned unless it expressly says so. In India there is the provision in the General Clauses Act, Section 6, to a similar effect. But in this Amending Act there is much more than a mere omission. There is an express reference to certain specified Sections which are not to be retrospective and there is an express

reference to all the other provisions of the Act which are not to be retrospective in a certain contingency. It seems to follow that barring that contingency the other provisions of the Act were intended to have a retrospective effect. The reason is not far to seek. The Legislature had apparently thought that these other Sections are merely explanatory in their character and declare the law which had existed prior to this amendment. Whether the Legislature was right or wrong in this assumption is not a matter for us to consider. We must give effect to the language of the Act as it stands and hold that the Sections of the Transfer of Property Act not dealt with in the Sections enumerated in Section 63, have a retrospective effect at least where no action was pending on 1st April 1930.

With these observations I respectfully agree subject to this reservation only, that in my opinion it is not necessary even to suppose that the Legislature may possibly have been labouring under some misconception as to the effect of Section 92 and other Sections which are not mentioned in Section 63. It is true that by enacting Section 92 the Legislature has attempted to crystallize the law of subrogation as it was found on the date of the amendment, but it has also added something. This will be illustrated by reference being made to para. 3 of the new Section which deals with what is described by Mookerjee, J. in *Gurdeo Singh v. Chandrika Singh* (1909) 36 Cal 193 as "conventional subrogation." Before this new Section was inserted in the Act, mere agreement between a mortgagor and the person who advanced money to him for redeeming a prior mortgage was sufficient to give him the right of subrogation, and all that was required was that there should be some evidence of the intention that the mortgage which had been paid off was to be kept alive: see *Dinobandhu Shaw Choudhury v. Jogmaya Dasi* (1902) 29 Cal 154 and *Mahomed Ibrahim Hussain Khan v. Ambika Pershad Singh* (1912) 39 Cal 527

13. Under the new Section however, it is necessary that this agreement should be made by a registered instrument. Thus, the view that Section 92 was intended to be retrospective and to affect old transactions if put in suit after the coming into force of the Act of 1929 may cause some hardship to persons who would have had the right of subrogation under the old law but cannot claim it under this Section, if there is no registered agreement in their favour; but this by itself would be no ground for holding that Section 92 was not intended to be retrospective. The majority of the cases where the right of subrogation arises fall under the first two paragraphs of the Section. Para. 3 is confined only to a limited class of cases where a creditor has not paid off a prior mortgage with his own money but with the money of his debtor or mortgagor.

14. As was pointed out by Sir Rash Behari Ghosh in his *Treatise on Mortgage*, p. 364, Edn. 5:

The real question in all such cases is whether the payment made by a person who is not in any way interested in the mortgaged property or the right of redemption was a mere loan to the debtor on his personal security or whether it was made under an agreement that he should be substituted for the creditor.

In many cases the Court had to rely merely upon the fiction of an agreement holding that the intention of the person who advanced the money must have been to keep alive the mortgage. The new Section leaves no room for any presumption or fiction. It says that there must be an express agreement in writing and it must be registered. The object of the new provision may have been to protect puisne mortgagees against a simple creditor who would acquire priority in many cases, if the old state of law was allowed to continue.

15. It may well be that the Legislature did not look with favour upon retrenching the rights of a puisne mortgagee in favour of a simple creditor merely upon a fiction of law, where there was no clear agreement properly evidenced and decided that this provision should be retrospective except in cases which were already pending on 1st April 1930. The question, however, need not be pursued, because in my opinion whatever the reason for the change in the law may be, the intention of the Legislature to make Section 92 retrospective to the extent indicated above can be clearly implied from the language of Section 63 and the scheme of the Act.

16. An examination of the provisions of the Amending Act which was under consideration for several years shows that the important changes made by it in the existing Act were in regard to these matters: (i) the omission of the words "Hindus and Buddhists" in Section 2 whereby the provisions of Chap. 2 will apply to all cases except those governed by a special rule of Mahomedan law (Section 3 of the Amending Act); (ii) the provision making registration amount to notice of a registered document (Section 4); (iii) the validity of transfers in favour of a class when some members of that class are unable to take (Section 9); (iv) the validity of a direction as to accumulation for a certain period and for certain purposes (Section 10); (v) the statutory recognition of the doctrine of part performance (Section 16); (vi) the abolition of the remedy of foreclosure in the case of all mortgages except a mortgage by conditional sale or an anomalous mortgage providing expressly for foreclosure (Section 31); (vii) the provision compelling a mortgagee to exhaust his remedies against the mortgaged property before enforcing his personal remedy (Section 33); (viii) the amendment of the provisions regarding sale without the intervention of the Court (Section 34); (ix) insertion of a new Section 69-A providing for the appointment of a receiver in cases where a mortgagee is competent to exercise a power of sale u/s 69 of the Act (Section 35); (x) the principle of "subrogation" (Section 47); (xi) the modification of the law of "merger" (Section 51); (xii) the provision requiring leases to be executed by both parties (Section 55).

17. It is significant that all the Sections which introduced these amendments excepting Sections 16, 47 and 51 have been specifically referred to as being not retrospective. Section 16 gave effect to the doctrine of part performance and Section 47 deals with the question of "subrogation." It is difficult to suppose that the exclusion of these Sections was merely accidental. In my opinion, it was deliberate and was designed to show that these Sections would have

retrospective operation. These two Sections were made retrospective, because they give clear statutory recognition to two important doctrines of equity, the doctrines of part performance and subrogation for which there was no complete or adequate provision in the existing Act. In *Rustomji Dossabhai Billimoria Vs. Bai Moti*, Beaumont C.J., dealing with Section 53-A made the following observations:

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 53-A without any pre-conceived idea that in all probability the Legislature did not intend it to have any retrospective operation.

18. Section 51 of the Amending Act which has also not been specifically referred in Section 63 makes certain changes in Section 101, T.P. Act, and substantially provides that where a mortgagee or a charge-holder acquires the rights of the mortgagor or owner, the merger of the two interests shall not be the rule but an exception. Sections 101 and 92 are in a sense complementary Sections and that was probably the reason why they were both made retrospective. It has been brought to our notice that Act 20 of 1929 was not brought into operation until 1st April 1930, though it had received the assent of the Governor-General in Council on 1st October 1929, and was promulgated for general information on 12th October 1929. Thus, there was sufficient time for intending suitors to institute their suits before 1st April 1930, if they did not want the new provisions of the Act other than those specifically mentioned in Section 63 to affect anything done before that date. In *Manjhoorl Bibi v. Akel Mahmud* 17 CWN 889 Lord Campbell dealing with 11 and 12 Vict., Chap. 43 observed as follows:

If the Act had come into operation immediately after the time of its being passed, the hardship would have been so great that We might have inferred an intention, on the part of the Legislature, not to give it a retrospective operation; but when we see that it contains a provision suspending its operation for six weeks, that must be taken as an intimation that the Legislature has provided that as the period of time within which proceedings respecting antecedent damages or injuries might be taken before the proper tribunal.....a certain time was allowed before the Act was to come into operation and that removes the difficulty.

19. The principle laid down by Lord Campbell has been applied in this country by Mookerjee J. in *Manjhoorl Bibi v. Akel Mahmud* 17 CWN 889 and by Sir Lawrence Jenkins in *Gopeshwar Pal Vs. Jiban Chandra Chandra*, and this Court has also adopted it in *Reyasat v. Gopi Nath* AIR (1939) Pat 122 and *Biranchi Singh v.*

Nand Kumar AIR (1939) Pat 282. I do not see why the principle should be applicable only to oases where there has been a change in the law of limitation and not apply to other cases where vested rights have been affected by the new legislation. But, it is not necessary at all to resort to this principle in the present case, as, in my opinion, the language of Section 63 and the scheme of the Amending Act show that Section 92 and many of the other Sections not specifically included therein were intended to have retrospective operation.

20. A few of the Sections have either made only verbal changes in the old Act or deleted some of the old provisions already covered by the new amendments and so no question of their retrospective operation really arises.

21. Our attention has been drawn to the decision of the House of Lords in *James Gardner v. Edward A. Lucas* (1878) AC 582 which has been greatly relied upon by the Rangoon and Madras High Courts in *Bank of Chettinad Ltd. v. Maung Aye* AIR (1938) Rang 806 and *Srinivasulu Naidu v. Damodaraswami Naidu* AIR (1938) Mad 779 respectively. One of the questions which arose in that case was whether an agreement for a lease which was not in proper form according to the old law of Scotland could be given effect to in view of the Conveyancing (Scotland) Act, 1874 which had dispensed with several requirements as to form. The answer to this question depended on whether Section 39 of that Act was retrospective in operation so as to govern the agreement which had been executed prior to the commencement of the Act. Lord Cairns, on examination of the Statute of 1874, found that with regard to some of the Sections, there was a clear statement that they shall apply only to instruments written after the passing of the Act; and with regard, to other Sections, there was an equally clear statement that those Sections shall apply to things done both before and after the passing of the Act. There was a third class of cases of which Section 39 was an example, in regard to which the Act contained no clear and explicit statement as to whether it was to be retrospective or merely to be prospective.

22. Lord Cairns pointed out that having regard to the provisions of the Act the effect of holding Section 39 to be retrospective would have been to make those documents valid which under the law as it stood at the time they were executed had no validity at all. His observations as to these documents were as follows:

They were not things which were voidable, or things as to which there could be any question; they were absolutely removed out of nature, as it were, just as much as if the paper on which they were written never had been in existence. They did not require therefore to be struck out or to be sentenced to condemnation; they were things which, for the purpose of title, or any property or persons they might affect, were as though they never had been written.

23. The other noble Lords expressed the same view in different words and they all came to the conclusion that Section 39 was not retrospective. Lord Hatherley, in dealing with an argument which was advanced to show that the Act was retrospective observed as follows:

I think Mr. Benjamin pointed out one clause which said that it should not have any effect upon any matter anterior to the passing of the Act. I can only say in the language of conveyancing, it was ex majore cautela that that should be put in. I do not think we could found any inference upon that, but that we should rather be led to expect the same phraseology employed in the particular clause in question, were such meaning sought to be conveyed.

Lord O'Hagan pointed out the dangerous consequences of giving retrospective operation to the Section in these words:

A man who, on the faith of the construction....had advanced a large sum of money on a purchase would, if the view of the appellants were adopted, be deprived of all his outlay. An heir or next of kin, who for a number of years had possessed property in the assurance that the law of the land had given it to him and would protect him in it, might find himself all at once deprived of that property by an ex post facto decision, and his family are beggared by a construction of which nobody perhaps had ever thought before.

He then proceeded to observe as follows:

With such consequences staring us in the face, we are required to give a retrospective meaning to this Act of Parliament: and this, I repeat, although we have not only no express words capable of such a meaning, but we have in the Act of Parliament itself, in one of its Sections, a clear declaration that, save where otherwise expressed, it shall be of future operation; and then we have the Act pointing out in express words the circumstances in which it was intended to be retrospective,.

24. These italicised words will show that there is a marked difference between the Conveyancing (Scotland) Act of 1874 and the Act with which we are now dealing. In the Act of Scotland as was noticed by Lord Hatherley no express words were used to make Section 39 retrospective while such words had been used with regard to certain other Sections. In the present Act, none of the Sections has been expressly made retrospective. Here, we find a clear cut division of the Act into two parts, one consisting of Sections which are not to be retrospective in any case pending or future, and another consisting of other Sections, which are not to be retrospective only in pending cases. It is true that there was a saving clause in the Act of Scotland also to the effect that nothing in the Act would affect pending actions, but that clause had a different" significance when read with the other Sections many of which contained within themselves words showing whether they were to be retrospective or to be merely prospective.

25. The learned advocate for the appellant has put forward two further arguments to show that the Sections other than the 22 Sections specified in the Act are not retrospective. One of these arguments relates to Section 92, and the other to Section 53-A. As to Section 92 it is contended that inasmuch as it expressly refers to Section 91 which is not retrospective, it must also be held to

be not retrospective. There is however a very simple answer to this argument. The only reference to Section 91 to be found in Section 92 is in these words:

Any of the persons referred to in Section 91, etc. shall have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee.

26. It is obvious that Section 91 has been referred to in this Section merely to avoid repetition and the reference is of no greater consequence than a reference to a Section containing definition of certain words and phrases. Such a reference can raise no such presumption as the learned advocate asks us to raise. The argument with regard to Section 53-A was a twofold one. It was pointed out firstly that Act 21 of 1929, which was an Act passed to supplement the Transfer of Property (Amendment) Act of 1929, has made two notable changes, one in the Specific Relief Act and another in the Registration Act. In the Specific Relief Act a new Section 27-A has been inserted which provides that where a contract to lease immovable property is made in writing signed by the parties thereto or on their behalf, either party may, notwithstanding that the contract, though required to be registered, has not been registered, sue the other where there has been part performance of the contract except in certain cases specified in the Section. The Act expressly provides that this provision will apply to contracts entered into after 1st April 1930. Section 10 of the Act has made an important amendment in the Registration Act by adding the following proviso:

Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chap. 2 of the Specific Relief Act, 1877 or as evidence of part performance of a contract for the purpose of Section 53-A, T.P. Act, 1882, or as evidence of any collateral transaction not required to be effected by registered instrument.

27. As the effect of Section 15, Act 21 of 1929, is to render the Act prospective where it affects rights already acquired, it is contended that Section 53-A also could not have been intended to be retrospective, because otherwise the three supplementary Sections cannot be worked together. Speaking for myself, I find no inconsistency whatsoever in the view that Section 53-A, T.P. Act, is retrospective, while Section 27-A, Specific Relief Act, is not so. Section 27-A relates only to a contract to lease immovable property, whereas Section 53-A deals with contracts for the transfer of immovable property in general. Section 27-A enables a party to enforce a contract of lease which but for the new Section might not be enforceable, whereas Section 53-A enables a transferee with an incomplete title to use the doctrine of part performance as a shield): to protect his possession. As has been pointed out by the Judicial Committee of the Privy Council in AIR 1940 1 (Privy Council) .

Section 53-A, T.P. Act, confers no right of action on a transferee in possession

under an unregistered contract of sale. The right conferred by the Section is one available only to a defendant to protect his possession. The Section is so framed as to impose a statutory bar on the transferor and it confers no active title on the transferee.

28. Section 27-A, Specific Relief Act, on the other hand, confers an active title on the lessee, provided that the contract of lease was entered into after 1st April 1930. That being so, I do not see how there can be any conflict between the two Sections, if one of them is held to be retrospective and the other to be not retrospective. There may, however, appear at first sight to be some difficulty in working together the new provisions of Section 49, Registration Act, and Section 53-A, T.P. Act, if it is held that the former is not retrospective and the latter is retrospective. The suggestion made by the learned Chief Justice of the Bombay High, Court in *Rustomji Dossabhai Billimoria Vs. Bai Moti*, is that the Legislature has by oversight omitted to make the new proviso to Section 49, Registration Act, retrospective, but I think that there may be another explanation also. The new proviso to Section 49 relates to a matter of evidence only and there is ample authority for the view that if any alteration is made in a rule of evidence, the alteration shall be ordinarily deemed to be retrospective. Section 15 of Act 21 of 1929 provides that nothing in the Act shall be deemed to affect the validity or invalidity, effect or consequence of anything done before 1st April 1930 or any right, title, obligation or liability already acquired, accrued or incurred before such date.

29. This Section cannot affect the retrospective operation of Section 53-A, Act 20 of 1929, which is a different Act, if that Section can otherwise be held to be retrospective. Nor does it, in my judgment, affect the retrospective operation of Section 10 of Act 21, because Section 10 merely introduces a change in the rule of evidence.

Section 49, Registration Act, lays down that no document requiring registration shall (i) affect any immovable property comprised therein or (ii) be received as evidence of any transaction affecting such property. The change introduced by the new Act by adding a new proviso to Section 49 does not supersede the law of registration, nor does it in any way affect the first part of Section 49 which says that no document requiring registration which is not registered shall affect any immovable property comprised therein.

30. The new proviso does not say that the person who has an incomplete title will acquire a complete title notwithstanding the non-registration of his document of title. It merely affects the second part of Section 49 which is a pure rule of evidence. On general principles therefore, such a provision may be retrospective specially when it is not covered by the words used in Section 15 of the Act. This view, I am glad to know, is supported by the decision of Ghose J., in *Sm. Swarnamayee Basu v. Saraju Bala Debi* 43 CWN 956 which was brought to my notice after I had independently come to the same conclusion as that learned Judge. I do not, however, wish to pursue the matter, because I think that for the

purpose of construing Section 63 one must confine oneself to the language of the particular Act of which it is a part and not refer to the provisions of any other Act.

31. In my opinion, therefore, Section 92, T.P. Act, must be held to be retrospective subject to certain qualifications, but as the word "retrospective" is sometimes used in a loose sense, I wish to add a word of explanation. A statute may be retrospective in relation to a suit, that is to say, it may be applied to suits brought before it was passed, or in relation to transactions which were entered into before its commencement. This being made clear, I would formulate my reply to the question with which we are dealing as follows : Section 92 will have retrospective operation in regard to transactions effected before 1st April 1930 except in cases pending on that day and except as to rights and liabilities arising before 1st July 1882 when the Transfer of Property Act came into force.

32. This last qualification seems to be necessary in view of Section 2, T.P. Act, which lays down that:

Nothing herein contained shall be deemed to affect any right or liability arising out of a legal relation constituted before this Act comes into force or any relief in respect of any such right or liability.

The second question which we have to answer reads thus:

Whether a subsequent mortgagee, who pays up and redeems the earlier mortgages as a part of the covenant in his mortgage, is entitled to claim subrogation so as to give him the right to enforce the rights of the earlier mortgagees as a plaintiff in an action or whether he can use the earlier mortgages as a shield only irrespective of the fact that the properties mortgaged to him are different from the properties covered by the earlier mortgages so redeemed.

As this question is to be answered with reference to the present law, there is no difficulty in answering it. Before Section 92 was enacted, subrogation was nowhere defined in the Transfer of Property Act. The new Section, however, explains the meaning of this expression as well as defines the rights of the person who may be subrogated. The first two paragraphs of the Section run as follows:

Any of the persons referred to in Section 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee.

The right conferred by this Section is called the right of subrogation, and a person acquiring the same is said to be subrogated to the rights of the mortgagee whose mortgage he redeems.

33. It is clear from these two paragraphs that the person who is subrogated to

the position of a prior mortgagee has the same rights as that mortgagee. In other words, he cannot only use the earlier mortgages as a shield but also enforce the rights of the earlier mortgagee. If the case however falls under para. 3, Section 92 and not under para. 1, then all that is necessary is that the mortgagor should have agreed by a registered agreement that the person advancing money to him should be subrogated to the position of an earlier mortgagee. It is to be noted that even before Section 92 was introduced into the Transfer of Property Act the right of subrogation was allowed to two classes of persons, viz. (1) persons who having a pre-existing interest in the property paid off a prior charge for the protection of their own interest and (2) persons who acquired an interest in the property by reason of their advancing money to pay off an existing mortgage debt.

34. The law of subrogation was to be found partly in Sections 74 and 75 of the old Act and partly in judicial decisions. Section 74 merely enacted that every second or subsequent mortgagee on discharging the next prior mortgage would be entitled to all his rights. By reading Section 74 with Section 75 this rule was extended to all cases where a prior mortgage had been discharged.

35. Apart from these Sections, however, and even before they were enacted, the Courts used to allow subrogation to persons other than a second or a subsequent mortgagee in special cases on principles of equity, justice and good conscience. One of those oases was where a person acquired an interest in some property only by reason of his advancing money to pay off an existing mortgage debt thereon. The law so far as can be gathered from the judicial decisions on the subject prior to the enactment of Section 92 was briefly this: If a person advanced money for the purpose of paying off a mortgage and took a mortgage or sale, ordinarily the mortgage which was paid off was deemed to be discharged, because money received in consideration of a mortgage or sale of property was the property of the mortgagor or the vendor though the hand which paid the money was the hand of the vendee or the mortgagee.

36. But on this general rule was engrafted an important exception in regard to those cases where there was an implied or express agreement between the mortgagor and the person who advanced money to him for payment of an earlier mortgage that the mortgage which is paid off would be kept alive for the benefit of the latter. In such-cases the practice in England was that the purchaser or mortgagee who advanced the money to pay off an earlier mortgage had it assigned to a trustee for himself or had a declaration inserted in the deed that the charge should be treated as kept alive for the purpose of protecting him against any incumbrances. But as was pointed out by the Judicial Committee:

In India the art of conveyancing has been and is of a very simple character and so a formal transfer of a mortgage is seldom made and intention to keep it alive also seldom formally expressed.

37. In view of this fact the Judicial Committee held in *Gokaldass Gopaldas v.*

Puranmal Premasukdas (1884) 10 Cal 1085 that we must look to the intention of the person who paid off the earlier mortgage and if he intended to keep it alive for his own benefit, it must be treated as having been kept alive. In that case Sir Richard Couch observed as follows:

The obvious question to ask in the interest of justice, equity and good conscience is, what was the intention of the party paying off the charge? He had a right to extinguish it and a right to keep it alive. What was his intention? If there is no express evidence of it, what intention should be ascribed to him? In the familiar instance of a tenant for life paying off a charge upon the inheritance, he is assumed, in the absence of evidence to the contrary, to have intended to keep the charge alive. It cannot signify whether the division of interest in the property is by way of successive charges. In each case it may be for the advantage of the owner of a partial interest to keep on foot a charge upon the corpus which he has paid.

The same view was expressed by the Judicial Committee in *Dinobandhu Shaw Choudhury v. Jogmaya Dasi* (1902) 29 Cal 154, *Mahomed Ibrahim Hussain Khan v. Ambika Pershad Singh* (1912) 39 Cal 527. In *Dinobandhu Shaw Choudhury v. Jogmaya Dasi* (1902) 29 Cal 154 one Mustafi had advanced a sum of Rs. 40,000 for the purpose of discharging two prior mortgages which were discharged and a question arose as to whether the mortgage in favour of Mustafi had priority over an attachment of property which had come into effect before the date of the mortgage.

38. Their Lordships of the Privy Council held that in the circumstances the intention of the parties was that the earlier mortgages should not be extinguished by merely being paid off but were to be kept alive for the benefit of the respondent. Lord Lindley after referring to the decisions in *Mohesh Lal v. Bawan Das* (1883) 9 Cal 961 and *Gokaldass Gopaldas v. Puranmal Premasukdas* (1884) 10 Cal 1085. stated that the effect of these decisions was that when the owner of an estate pays charges on the estate which he is not personally liable to pay. the question whether those charges are to be considered as extinguished or kept alive for his benefit is a simple question of intention and the intention may be found in the circumstances attending the transaction or may be presumed from a consideration of the fact whether it is or is not for his benefit that the charge should be kept on foot. He then observed as follows:

Here the mortgagor was paying off his own debts, but he was doing so for the benefit of Mustafi and in performance of the agreement with him.

39. In *Mahomed Ibrahim Hussain Khan v. Ambika Pershad Singh* (1912) 39 Cal 527 there was a mortgage in favour of one Alfian effected on 17th February 1888 for the purpose of discharging a zarpeshgi debt dated 20th November 1874. Their Lordships after referring to the facts of that case observed as follows:

The Rs. 12,000 lent by Mt. Alfian were in accordance with the agreement between Mt. Alfian, and Kishan Kumar Singh, applied in paying off the zarpeshgi debt, that

on payment of that debt the zarpeshgi deed of 20th November 1874 was handed over to Mt. Alfian and that Mt. Alfian when she lent her Rs. 12,000 intended to keep alive for her benefit and protection the charge which had been created by the zarpeshgi deed of 20th November 1874.

As I have already stated in *Gurdeo Singh v. Chandrika Singh* (1909) 36 Cal 193 Mookerjee J. referred to this class of subrogation as conventional subrogation, that is to say, subrogation arising out of an agreement whether express or implied. Thus, the Courts in India recognized conventional subrogation even before Section 92 or Section 74 was enacted, and Section 92 has merely crystallized the law on the subject with this difference only, that now subrogation will not be granted unless the mortgagor has by registered instrument agreed that the person who has advanced money to him with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed.

40. The next question which may be considered is whether under the old law a person who was subrogated could enforce as a plaintiff the rights of the earlier mortgagee or he could use it as a shield only. A careful examination of the authorities on the subject will show that the law in this respect was the same as we find embodied in Section 92 now. I am fortified in this view by several authoritative decisions and I shall first refer to *Gopi Narain v. Bansidhar* (1905) 27 All 325 the facts whereof were these: On 20th July 1899 one Fateh Chand executed a mortgage on conditional sale in favour of Bansidhar and Kunj Behari Lal. A few months later Fateh Chand executed a second mortgage in favour of Anant Ram and Bansidhar. Anant Ram sold his half share to Gaya Prasad with the result that Bansidhar and Gaya Prasad became the second mortgagees. In 1893 two suits were brought by the first and the second mortgagees respectively for foreclosure on both the mortgages and these suits were decreed on 3rd January 1896 which was within the period fixed for redemption. Gaya Prasad paid into Court the decretal amount under the first mortgage and thereafter made an application that the decree for foreclosure of the mortgaged property may be prepared in his favour. This application was dismissed on the ground that the proper remedy for Gaya Prasad was to institute a suit.

41. Gaya Prasad then instituted a suit which was dismissed by the High Court on the ground that the suit was misconceived and his proper remedy was to apply in the execution department for an order of foreclosure. The Judicial Committee reversed this decision and held that Gaya Prasad was entitled to maintain the suit. In the whole of this proceeding it was not questioned that Gaya Prasad by reason of having paid off the prior mortgagee acquired the same rights as those of the prior mortgagee and could enforce that right.

In *Dinobandhu Shaw Choudhury v. Jogmaya Dasi* (1902) 29 Cal 154 to which reference has already been made the facts were these: In 1891 certain property which was subject to two mortgages was attached by the Sheriff of Calcutta at the instance of a creditor. At the time of the attachment the mortgagor was

making arrangements with one Mustafi for an advance to enable him to pay off the two mortgages and this arrangement was duly carried out in October 1891. The result was that the old mortgages were paid off and the properties comprised in them were re-conveyed to the mortgagor and the deeds by which they were re-conveyed were made over by him to Mustafi and he executed a mortgage bond in favour of the latter.

42. In July 1892 part of the property mortgaged was sold. under execution to Dinobandhu who claimed to be entitled to the property bought free from encumbrance. Thereupon, Mustafi having died, his widow brought a suit claiming a lien over the full amount of the mortgage bond. This claim was upheld and it was held that though the mortgagor had paid off his own debts out of the money received from Mustafi, he had done so for the benefit of the latter and in performance of the agreement with him. Mustafi was thus allowed to enforce his charge upon the property. What is to be noted is that Mustafi did not merely use his right to subrogation as a shield, but he was allowed to enforce it by means of a suit.

In *Mahomed Ibrahim Hussain Khan v. Ambika Pershad Singh* (1912) 39 Cal 527 it was recognized that the right of subrogation acquired by Mt. Alfian on payment of the zarpushgi debt of November 1874 could be enforced by means of a suit, but as the suit had been brought after the right of the prior mortgagee to enforce his mortgage had been barred it could not succeed.

43. This case also confirms the view that the right of subrogation could be enforced even under the old law. In *Udhishter Singh and Another Vs. Kausilla and Others*, a suit was brought by a puisne mortgagee and a preliminary decree was passed in that suit. The plaintiff was given the right to redeem a prior mortgage covering the mortgaged property as well as other property. The preliminary decree, however, did not specify this property as the property to which the mortgagee-plaintiffs were entitled in the event of non-payment. The plaintiff-mortgagees having paid off a prior mortgage it was held that they were entitled, notwithstanding this omission, to final decree for sale of the property comprised in both mortgages. In this case strictly speaking the question as to whether the subrogee could enforce his right by means of a suit or use it as a shield did not directly arise, but it does not seem to have been questioned throughout the proceeding that his right could be enforced.

44. Other cases cited on the subject were *Mohammad Tabarak Ali Khan v. DalipNarain Bingham* AIR (1927) Pat 117 and *Kamalapati Devi v. Jageshwar Dayal* AIR (1939) Pat 375 but I think that I have said enough to show that a person who is subrogated to the position of a prior mortgagee has all the rights of that mortgagee including the right of enforcing the mortgage. Section 74 of the old Act, though it contained only an incomplete statement of the law of subrogation, makes this clear and the expression "subrogation" itself means the substitution of one creditor for another by operation of law. In my opinion, therefore the answer to the second question should be that a person who is subrogated is

entitled to enforce the prior mortgage, in respect of which he acquires a right of subrogation, as well as use it as a shield. It may be that in most cases he will be satisfied with using it as a shield only but the right to enforce it is there and can be exercised when necessary.

Dhavle, J.

45. I have had the advantage of reading the judgments prepared by Fazl Ali and Manohar Lall JJ. Section 63 is a saving clause, and if there had been no saving clause at all, none of the provisions of Act 20 of 1929, so far as they purport to affect the acquisition of rights would have been held applicable to rights acquired before the passing of the Act. What the saving clause does in form is to limit what may be called the retrospective operation of the new provisions. The first part of Section 63 is restricted to the 22 Sections specified in it, and provides that no rights already acquired will be affected by the provisions of this group of Sections. It is important to notice that in this part the question of whether the saving is to extend to future litigation or is to be confined to pending litigation is not raised. In the second part of the Section it is provided that the other Sections shall not affect (to put it very briefly) pending litigation. The non saving of past transactions as regards future litigation in relation to these other Sections does contrast not only with the saving in the first part Of the Section but also with that in the second part; and the third part of the Section merely puts these two savings together. It seems to me that in the very nature of things these savings cannot run into each other; that for instance, no question could arise whether the right of subrogation now mentioned in Section 92 could in any event be affected by any of the 22 Sections specified in part 1 of Section 63.

46. Being expressed in somewhat general terms the Section is undoubtedly not very easy to follow, but I find it a little difficult to agree in the view expressed in Lucknow and suggested in other places, that the three parts of the Section are not logically arranged. My learned brother Fazl Ali J. has not only examined the structure of the Section very closely but also dealt in detail with the position under the old Transfer of Property Act and the case law as we find it at the time of the passing of the Amendment Act 20 of 1929. I do not think it necessary to develop that point over again, but consider it sufficient to express my entire agreement with Fazl Ali J., as regards both the points referred to this Full Bench.

Manohar Lall, J.

47. I regret that I have the misfortune to differ from the views expressed by Fazl Ali J., upon the second question which invites a decision as to whether the provisions of Section 92 of the amended T.P. Act are retrospective. It is unnecessary to state the facts of the present case because the question which requires to be answered is an abstract question of law wholly independent of the facts. It should be stated at the outset that the word retrospective is inappropriate, and the question is not whether the Section is retrospective. Retrospective operation is one matter, interference with existing rights is another.

If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective. See the observations of Buokly L.J. in *West v. Gwynne* (1911) 2 Ch D 1 . The illustration at page 12 makes the distinction clear:

Take the case of a contract to pay money upon the event of a wager, or the case of an insurance against a risk which an Act subsequently declares to be one in respect of which the assured shall not have an insurable interest. In such a case, if the event has happened before the Act is passed, so that at the moment when the Act comes into operation a debt exists, an investigation whether the transaction is struck at by the Act involves an investigation whether the Act is retrospective. Such was the point which arose in *Moon v. Durden* (1848) 2 Ex 22 and *Knight v. Lee* (1893) 1 QB 41. But if at the date of the passing of the Act the event has not happened then the operation of the Act in forbidding the subsequent coming into existence of a debt is not a retrospective operation, but is an interference with existing rights in that it destroys A's right in an event to become a creditor of

The question to be decided here is whether the third part of the provisions embodied in Section 92, which confer the right of subrogation on a person who has advanced to a mortgagor money with which the mortgage has been redeemed provided there is an agreement by a registered instrument is addressed to the case of all agreements or only of some, namely those agreements embodied in documents registered after the passing of the Act on 1st April 1930.

48. The question therefore is as to the ambit and the scope of the Act and not as to the date from which the new law as enacted by the Act is to be taken to have been the law. Numerous authorities have followed the dicta of eminent Judges in England who have laid down the principles that should be kept in view by the Courts when they are called upon to construe a statute which professedly alters the law affecting the rights of the litigants. These cases are quoted in the judgment of Roberts C.J., in the Full Bench case reported in AIR 1938 Bang 3069 and establish the canons of construction which I ventured to point out in the case dealing with the applicability of Section 53-A of "the amended T.P. Act in *Jagadamba Prasad v. Anadi Nath Roy* AIR (1938) Pat 887 . In every case the Court is required to find out the intention of the Legislature as expressed by the words deliberately and carefully adopted by it.

49. In many cases it will be a useful guide to see the state of law which existed before the amendment was introduced and then to see if the amending Act has taken away the rights which existed in a litigant before the Act was passed or, as it is sometimes expressed, whether the act, legal at the time of doing it, has been rendered unlawful by the new enactment, always keeping in mind that as a matter of principle an Act is not without sufficient reason taken to be retrospective because there is a presumption that it speaks only as to the future. It is common ground that a person who had advanced before the passing of the

amending Act to a mortgagor money with which the mortgage has been redeemed was under the old law subrogated to the rights of the mortgagee whose mortgage has been redeemed even though the mortgagor had not agreed by a registered instrument that such " person shall be so subrogated provided the Courts could inter such an agreement upon the facts of the case in circumstances which are amply illustrated by the decisions of their Lordships of the Judicial Committee reported in *Mohesh Lal v. Bawan Das* (1883) 9 Cal 961 and *Mahomed Ibrahim Hussain Khan v. Ambika Pershad Singh* (1912) 39 Cal 527. The question to be determined is whether such a person who has advanced money to the mortgagor before 1st April, 1930 under circumstances which secured to him the right of subrogation is to be debarred from exercising that right by reason of the fact that he has not taken the precaution of having an agreement with the mortgagor by a registered instrument, which precaution was unknown to him and which is being introduced for the first time by Section 47 of Act 20 of 1929 which received the assent of the Governor-General on 1st October 1929 but came into force on 1st April 1930.

50. The difficulty which has arisen in the applicability of this Section to transactions which took place before 1st April 1930 arises from the demonstrably ambiguous words used by the Legislature in Section 63 of the Amending Act. By that Section the provisions of the Amending act Acontained in the 22 enumerated Sections are expressly declared not to affect the terms or incidents of any transfer of property, or the validity, invalidity, effect or consequences of anything already done, or any right, title, obligation or liability already acquired, accrued or incurred before 1st April 1930 nor any remedy or proceeding in respect of such right, title, obligation or liability. Then reference is made to the other provisions of the Amending Act and it is provided 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, 1980 in any proceeding pending in a Court on that date.

51. The intention and meaning of the Legislature up to this place is clear, namely that the provisions of the 22 Sections shall not affect what has happened before 1st; April 1930 and that the provisions of the other part of the Act shall not affect anything already done in any proceeding pending on that date. But it will be noticed that nothing is stated as to whether the other provisions of this Act shall apply so as to affect the validity of anything already done or the right, title and obligation already acquired before such date. It is, however, suggested that the Court must necessarily draw an inference that the Legislature intended that the other provisions of this Act shall "operate so as to affect everything which has not been brought before a Court in any proceeding pending on 1st April 1930. Then follows the concluding portion of Section 63 which enacts that

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.

52. It is argued that it is unreasonable to think that the Legislature took the trouble of expressing itself in such an elaborate way if its intention was not that the provisions of the Sections other than the 22 Sections enumerated in the opening words of Section 63 were to apply to all transactions effected before 1st April 1930, unless these have been made the subject of any proceeding pending on that date. Therefore, in some reported cases the learned Judges, feeling the apparent difficulty in construing the concluding portions of this Section, have attempted to re-cast the Section by transposing the words that follow from the second line of Sub-clause (d) : for instance see *Kundanlal v. Faqir Bakhsh* AIR (1938) Oudh 127. But, in my opinion, this mode of the construction of a statute is novel and with respect it is not permissible to the Courts to do so. If the Legislature has taken the trouble to enact the Section in an elaborate way it must be assumed to have also taken the trouble to express its meaning in and by the words which it has chosen to put in the Section.

53. The critical question to consider is what is the meaning of the words "any such remedy and any such proceeding as is herein referred to." It seems to me that the words are capable of one meaning only. The word "such" necessarily implies that the remedy and proceeding referred to has been already dealt with. Proceeding therefore from the concluding words of this Section I look above and find that in Sub-clause (d) the words used are "any remedy or proceeding in respect of such right, title, obligation or liability." Here again, the word "such" is used and therefore I have to look above for seeing the right, title, obligation or liability which is referred to and I find that the right, title, obligation or liability is expressly mentioned just above in Sub-clause (c), that is to say, "any right, title, obligation or liability already acquired, accrued or incurred before such date." It seems to me therefore on a pure grammatical and plain reading of the Section that the words of Section 63 are a positive direction to the Courts that any remedy and any proceeding in respect of any right, title, obligation or liability already acquired, accrued or incurred before 1st April 1930 may be enforced, instituted or continued, as the case may be, as if this Act had not been passed. I see no difficulty in so understanding the Section because this satisfies the requirements of the ordinary rules of construing a statute and also avoids the shocking of one's sense of justice if it was not held that the act of payment to a mortgagor which was legal at the time of doing it in such circumstances as gave the right of subrogation to the creditor is still kept lawful. It may be observed that the last line of this Section is "as if this Act had not been passed" and not as if the 22 Sections enumerated in the opening paragraph of Section 63 had not been passed.

54. I therefore find myself in agreement with the views expressed by the learned Judges of the Rangoon High Court and in particular I agree respectfully with the observations of Dunkley J. where he arrives at the same conclusion in these words:

There is no justification whatever for holding that in this sentence the expression

"such remedy" means and includes only a remedy in a pending proceeding. Consequently, the conclusion would appear to be that Section 63 specifically provides that no provision of Act 20 of 1929 shall affect vested rights which were acquired or accrued before 1st April 1930.

Let me read Section 63 by using the word "subrogation," with which we are concerned at the relevant places. The Section would read thus: "Nothing in any of the following provisions of this Act (namely the 22 Sections) shall be deemed in any way to affect any right of subrogation already acquired or accrued before the first day of April 1930 or any remedy or proceeding in respect of such right of subrogation and" nothing in any other provisions 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 remedy of subrogation may be enforced, instituted or continued as if this Act had not been passed."

55. I do not see any difficulty in so reading the Section. This is at least one plain reading of the Section and if the Legislature chooses to employ ambiguous words the Courts will refuse to give a construction which would interfere with the existing rights. An instructive Case is reported in 31 IA 30.83 In that case the suit was brought by the heirs of Imtiaz Fatima to recover certain villages which were in her possession when she died in December 1894. She was the surviving widow of one Murtaza Bakhsh, who died in 1865. The defence to the action was that as provided by Act 1 of 1869 which came into operation in January of that year the name of Murtaza Bakhsh was entered in certain lists as required by that Section and by virtue of Section 10 of the Act the Courts were compelled to regard such lists as conclusive evidence that the persons named therein were talukdars or grantees within the meaning of the Act and therefore it was contended that as Section 10 provides that the Court shall take judicial notice of these lists and shall regard them as conclusive evidence that the persons therein named are such talukdars, it must be held that on the death of Murtaza Bakhsh the estate vested in the widows for life and on the death of the surviving widow, namely Imtiaz Fatima, the defendants as the next heirs of her husband were entitled to succeed.

56. Lord Lindley in dealing with this contention while delivering the judgment of the Board observed as follows:

The whole Case turns on the entry of Murtaza Bakhsh's name in two of the lists ordered to be made by the Act of 1869. Section 10 of the Act compels the Courts to regard such lists as conclusive evidence that the persons named therein are taluqders or grantees within the meaning of the Act. When the lists referred to are looked at, it will be found that there are six lists: see Section 8. Murtaza Bakhsh's name is in the first and third. The entries therefore by 8s. 8 and 10 are conclusive evidence (1) that he is to be considered as having been a taluqdar within the meaning of the Act: see Section 2, 8, list 1, and (2) that he was a taluqdar to whom as and had been made declaring that the succession to the estates comprised in it should be regulated by the rule of primogeniture: see

Sections 2, 8, list 3.

These enactments are clear and peremptory, and would be decisive if they applied to this case. It is not however in accordance with sound principles of interpreting statutes to give them a retrospective effect. The Court cannot construe Rs. 8 and 10 so as to deprive the successors of the estates of a person who had died before those Sections came into operation of rights which they acquired on his death.

57. It may be useful to consider the language of Section 92 itself and find out if the terms of the Section themselves indicate whether the Court is bound to construe this Section so as to make it applicable to transactions before 1st April 1930 and thus interfere with vested rights. The first part of Section 92 refers to Section 91 which is expressly omitted from the operation of transaction before 1st April 1930. I agree that it cannot be reasonably argued that by reason of this fact alone all the provisions of Section 92 should be held to have a similar effect but observe the true import of the provisions thereafter. The second clause states that the right conferred by this Section is called the right of subrogation. But there existed what was called a conventional right of subrogation in favour of a person if he satisfied the requirements laid down by the decisions already referred to irrespective of the fact whether the mortgagor had agreed with that person by a registered instrument or not. There was no statutory right of subrogation to be found anywhere within the four corners of the unamended Transfer of Property Act and a restricted kind of right is now being inserted for the first time by Section 92. The Legislature is therefore recognizing a limited right which they are conferring by this Section.

58. It is reasonable therefore to assume that the Legislature intended to confine this new right to events that had happened after 1st April 1930. The Section does not profess to deal with rights which existed already before 1st April 1930. It seems to me therefore that the language of Section 92 itself suggests that it cannot apply to transactions which had happened before 1st April 1930.

I may at this stage conveniently and shortly deal with the arguments which were accepted in some cases that where an interval of time is left between the date of the publication of the Act in the Gazette and the date on which it comes into force it must be assumed that the Act has retrospective operation on earlier transactions because, so it is argued, it was open to the litigants to enforce their right of action if they so chose before the date upon which the Act came into operation. This argument has been authoritatively rejected in *James Gardner v. Edward A. Lucas* (1878) AC 58

. In that case the instruments which had failed in the formalities required, by the earlier Act would have become valid and operative upon property or upon persons by the passing of the Act of 1874. Therefore it was argued that, in the words of Lord Cairns: the whole of the subjects of Scotland upon whose property the shadow of any instrument which had failed in its formalities had

fallen before the Act passed, would be subject to have that Instrument springing into validity and operating upon their property or upon their persons unless within the two or three months to which I have referred--the commencement of the Act was two or three months after the date of the royal assent--they instituted an action of declarator to have the instrument declared invalid,

but Lord Cairns repelled the argument observing:

The thing might have passed out of their recollection, it might have been treated years before the Act of 1874 had passed as a document which went *pro non scripta*, and yet they might find that under the ambiguous words of Section 39 the instrument came again into validity. The proposition only requires to be stated in that way to show that this is a construction which your Lordships would not arrive at unless compelled by the strongest and clearest words of the statute. It is admitted that the words are not clear, that they are ambiguous, and if so it appears to me that these considerations to which I have adverted would at once lead your Lordships to refuse to adopt that construction which would produce the gross injustice and the gross anomalies to which I have referred.

60. These observations apply *a fortiori* to the present case when it is remembered that the right of subrogation is both an offensive and a defensive weapon, that is to say, it can be used as a sword or as a shield. I fail to understand how a person who has a right of subrogation and wants to use it as a defence to an action can exercise that right by becoming a plaintiff in the action between October 1929 and April 1930 because unless a suit is instituted by a third person over whom he has no control he cannot exercise the right of subrogation as a defence. I cannot conceive that the Legislature would take away the existing rights without saying so in clear, unambiguous and express terms. I wish to draw attention at this place to the observations of Lord O'Hagan at p. 601 in *James Gardner v. Edward A. Lucas* (1878) AC 582 where he assumed that up to the year 1874, when the Act in question was passed, there was absolutely no validity in the deed and proceeded:

Can we suppose that in that year, no right existing, as the conditions of a valid execution had not been fulfilled, the Legislature intervened, and by equivocal words, without any expression or clear intention, and in direct opposition apparently to public policy and private interest, established a right that never before had any existence? I shall not occupy your Lordships' time by saying again what has been already said of the evils resulting from such an interpretation and the unreasonable consequences attaching to it. A man who, on the faith of the construction which, as I think, must now be taken to be correct, had advanced a large sum of money on a purchase would, if the view of the appellants were adopted, be deprived of all his outlay. An heir or next of kin, who for a number of years had possessed property in the assurance that the law of the land had given

it to him and would protect him in it, might find himself all at once deprived of

that property by an ex post facto decision, and his family are beggared by a construction of which nobody perhaps had ever thought before. Those are consequences of a very serious kind; and although Mr. Benjamin said that in a matter of this sort there are no vested interests which your Lordships should regard, I cannot concur with him. The vested interests are those of a "man who, acting upon the law as he understands it, and as it really turns out to be, has advanced his money or changed his position; and it cannot be said that in these circumstances such interests do not deserve protection.

Lord Blackburn in concluding his speech in that case observed:

My ground for saying that Section 89 is not retrospective is, that if it were retrospective it would have the effect of making that a valid contract which, as the law stood at the time it was executed, was not valid at all.

61. Although this case deals with a converse situation, in my opinion, the observations of these noble Law Lords who took part in the discussion are of great assistance in supporting me in the conclusion at which I have arrived because the construction that Section 92 must apply to all past transactions would involve the consequence, as was forcibly pointed out by Lord O'Hagan at p. 601, of depriving the rights which undoubtedly existed to a person who on the faith of the law which obtained before 1st April 1930 had advanced a large sum of money to a mortgagor by which the mortgage had been redeemed under circumstances giving the person so advancing the right of subrogation. Such a person has a vested interest because acting upon the law as he understood it and as was laid down by the highest judicial tribunal in the Empire he advanced the money and changed his position. In these circumstances it must be held that such interest deserves protection. With such consequences staring in the face are we necessarily required to give a retrospective meaning to this Act although we not only have no express words capable of such meaning, but we have in the Act itself a clear indication that any right, title, obligation or liability already acquired, accrued or incurred before 1st April 1930 shall remain as if this Act had not been passed ? These words deem to apply to a future judgment upon a future instrument brought for judgment after the passing of the Act.

62. As the result of the amendment of the Transfer of Property Act another Act (Act 21 of 1929) was passed to supplement the Transfer of Property Amendment Act of 1929. This Act received the assent of the Governor-General on 4th October 1929, that is to say, three days after the Act 20 of 1929 received the assent of the Governor-General; but the two Acts came into force on the same day, namely 1st April 1930, and therefore it must be taken that the two Acts are parts of the same enactment. By Section 3 of Act 21 of 1929, Section 27, Specific Relief Act, 1877 was amended and rights have been given to the lessor and the lessee for suing the other for specific performance of the contract to lease immovable property made in writing under certain conditions, but at the end of Section 3 it is stated that this Section applies to contracts to lease executed after 1st April 1930.

63. This Section was necessary because of the provisions of Section 53-A which is to be found in Section 16 of Act 20 of 1929 which again is one of the Sections not enumerated in the opening clause of Section 63. The Legislature has therefore itself given indication that a suit for specific performance of contract to lease can be brought provided the contract to lease is after 1st April 1930 thereby affirming the proposition which I have taken pains to establish that where rights and obligations have already accrued before 1st April 1930, the Amending Act of 1929 was not intended to interfere therewith. By Section 10 of Act 21 of 1929 the provisions of the Registration Act, 1908, have also been amended. By Sub-section (3), sub-Clause (b) of Section 49, Registration Act, has been amended by inserting a proviso that an unregistered document affecting immovable property and required by the Registration Act or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under the Specific Relief Act, or as evidence of part performance of a contract for the purposes of Section 53-A, T.P. Act. Then follows Section 15 which expressly provides that

nothing in this Act shall be deemed to affect the terms or incidents of any transfer or disposition of property made or effected before 1st April 1930.

64. The succeeding Sub-clauses (b), (c), (d) and (e) expressly keep intact the validity, invalidity, effect or consequences of anything already done or suffered before that date. It seems to me very clear from these provisions that the operation of Section 53-A cannot be extended to those transactions which existed before 1st April 1930. It will be noticed that in order to give a person the benefit of Section 53-A he must be able to prove the terms of the contract by which any person has contracted to transfer for consideration any immovable property by any writing signed by him. Section 49 as it stood required such a contract to be registered and the amendment of Section 49 is by the express terms of Section 15 of Act 21 of 1929 not to affect the terms or incidents of any transfer of property made before 1st April 1930 with the result that the terms of that contract upon which the person wishes to found the benefit of Section 53-A cannot be proved. My brother Wort and myself took this view of the operation of Section 53-A in the case already referred to. In *Bustomji Dossabhai Billimoria v. Bai Moti* AIR (1910) Bom 90 Beaumont C.J. noticed this aspect of the matter but suggests that the Legislature has made a slip in the drafting of the amending Acts. With great respect I do not agree with this view.

65. The Legislature has been careful in so amending the Acts that it is made clear that Section 53-A is not retrospective. The learned Chief Justice observes:

As I have pointed out Section 68-A 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 Registration Act, it seems to me clear that Section 53-A would have overridden Section 49, 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 1st April 1980 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 53-A, T.P. Act, 1882. Now, that proviso was added by Section 10, Act 21 of 1929, and Section 15 of that Act is expressed in terms almost identical with those of Section 63 of Act 20, but it applies to the. whole Act and not merely to enumerated Sections.

I am unable to agree that if Section 49, Registration Act, had not been amended Section 53-A would have overridden Section 49, Registration Act. The Legislature itself did not think so and therefore had to amend the Registration Act. The reception of a document embodying contract in evidence affecting immovable property was forbidden by the then Registration Act. The learned Chief Justice then proceeds:

It is argued that as the transfers in this case were made before 1st April 1980 and had not been, registered they could not be relied upon nor used in evidence and that the amendment of Section 49, 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 53-A, T.P. 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. It seems to me that the amendment of Section 49, Registration Act, was only passed exabun dante 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 63-A, T.P. Act, is made re. trospective.

With very great respect, the easy solution of the difficulty which presented itself to the learned Chief Justice was to hold that Section 53-A, T.P. Act, was not retrospective. If this view had been adopted, there was no conflict between the two amendments deliberately and necessarily made by the Legislature. In a recent decision of this Court to which my brother Fazl Ali J. was a party a similar view has been taken. That case is reported in Kubad Mia v. Guhi Mia AIR (1940) Pat 92 and dealt with the question as to whether the plaintiff could claim specific performance of an agreement for sale of certain property executed in 1928.

66. The plaintiff had paid a sum of Rs. 200 in part payment and had obtained possession of the land. He had not paid the remaining sum of Rs. 100 though he was willing and ready to do so. In the meantime the defendants had settled the lands with the other defendants. It was held by Agarwala J., who first heard the appeal, that the agreement sought to be specifically enforced could not be put into evidence by reason of the fact that it had not been registered. An appeal was then preferred under the Letters Patent of the Patna High Court. His Lordship the Chief Justice in delivering the judgment with which Pazl Ali J.

agreed, made these observations after quoting the proviso which has been inserted in Section 49 of the amending Act of 1929:

There can be no question that if this latter proviso applied to this case, the agreement, though unregistered, could be adduced in evidence. It has however been contended on behalf of the respondents that this proviso cannot affect the case by reason of the fact that it only came into force in the year 1980. The proviso was added to Section 49, Registration Act, by Section 10, T.P. (Amendment) Supplementary Act, 1929; and Section 15 of that Act expressly provides that nothing in the Act shall be deemed to affect (b) the validity, invalidity, effect or consequences of anything already done or suffered before the Act came into force; and Section 1(2) provides that the Act should come into force on 1st April 1930.

The respondents argue that one of the effects or consequences of non-registration of the agreement in question was that it could not be adduced in evidence and such was undoubtedly the case until this amending Act was passed. If the amending Act applied to transactions which took place before the passing of the Act, then the consequences of non-registration would no longer apply. However as the Act is not to affect the validity, invalidity, effect or consequences of anything already done, it is urged that any document executed before the Act, which could not be adduced in evidence by reason of non-registration, is not affected by the, amending Act. On behalf of the appellant however it is contended that the High Court at Allahabad has taken a different view. It is urged that this proviso relates only to procedure, and there is no reason why the proviso should not be considered to be retrospective. In *Sohan Lal and Others Vs. Atal Nath a. Bench of the Allahabad High Court* held that a document executed before the Amending Act 21 of 1929 could be adduced in evidence after the passing: of that Act though it had not been registered as required by the Registration Act at the time when it was executed. The learned Judges stated that the matter was one relating to procedure, and therefore the amending Act could be regarded as retrospective. It was not brought to the notice of the learned Judges however that Section 15, Amending Act 21 of 1929 makes this provision applicable only to transactions entered into after the passing of the Act and, in the absence of any reference to Section 15, Amending Act, 21 of 1929, this case cannot be considered as any authority in support of the appellant's contention. Rowland J. in *Chariehhan Singh v. Mahabir Singh AIR (1933) Pat 544* held that the amendment of the Transfer of Property Act by the Amending Act 21 of 1929 cannot assist a plaintiff whose suit was commenced before that Act came into force, as such proceedings were expressly saved by Section 15 of the Amending Act. In my view the reasons given by Rowland J. in that Case apply equally to this case. Section 15 of the Amending: Act 21 of 1929 expressly says that any remedy or proceeding or anything done in the course of any proceeding pending in any Court when the Act came into force, was not to be affected by the Act. The same Section also says that the validity, invalidity, effect or consequence of anything already done or suffered before the Act came into force

was not to be affected by the Act. As I have stated, one of the consequences of failure to register this document was that it could not be adduced in evidence. That was a consequence which the Act expressly states-should not be affected. In my view therefore the proviso to Section 49 did not have retrospective effect and therefore cannot affect this agreement which was executed four years before the Amending Act 21 of 1929 came into force.

67. I respectfully agree with these observations. It is then argued that if the provisions of the Amending Act (20 of 1929) are-examined they show that important changes were made in the existing Act. These have been enumerated in the judgment of my learned brother Fazl Ali J., and it is argued that all the Sections which effect these amendments, excepting Sections 16 and 47, have-been specifically referred to as being not-retrospective. Section 16 gives effect to the doctrine-of part performance by inserting Section 53-A,. and Section 47 deals with the question of subrogation by inserting Section 92. It is therefore contended that the exclusion of these two last named Sections was deliberate and was designed to show that these two Sections shall have retrospective operation. But instances are found in numerous cases where the Legislature has inserted a provision *ex abundante cautela*, and it may be that the Legislature was very careful in stating that these 22 Sections, though they may appear to have retrospective operation, are not to have retrospective operation and that the Courts were left to decide if Sections 53-A and 92 should at all be applied to out into existing rights. The General Clauses Act (10 of 1897) itself embodies this well known rule of construction in Section 6. I now proceed to examine some of the cases decided by other High Courts. In *Tota Ram and Others Vs. Ram Lal and Others* the Court when considering the argument of Mr. Panna Lal that Section 92 had no application to the case before the Court because of the provision contained in Section 63 of Act 20 of 1929 observed:

These Sections (that is to say, Sections 92 and 101) are to have retrospective effect except in so far as they are not to have that effect according to the rule laid down. Now is there anything in this case, which has already been done before 1st April 1930, in any proceeding pending in a Court on that date? Then again, is there any remedy and any such proceeding as is referred to in Act 20 of 1929 which is being affected by the new provisions of Sections 92 and 101? We do not find that such is the case. Indeed, Mr. Panna Lal has not been able to point out to us what has been done in this case before 1st April 1930, which is being undone by the new rule of law and what is the remedy or proceeding which is being affected by the new provisions of Sections 92 and 101. All that has been done is to lay down a rule of subrogation which was not contained in the unamended Act. The rule was based on general ideas of equity, and it cannot be said that the new Act is going to affect any remedy or any proceeding which was lawful under the old Act. In our opinion, therefore, Sections 92 and 101 of the amending Act have retrospective effect.

68. With great respect, these observations do not even attempt to deal with the

situation which I have endeavoured to point out above. If the provisions of Section 92 of the amending Act are held to have retrospective effect, it undoubtedly affects the remedy of subrogation which was available to the person in the position of a subsequent mortgagee. The learned Judges, it may be pointed out respectfully, failed to consider that they were applying the provisions of Section 92 to a case which had already commenced before the Act was passed, as I find at the bottom of p. 897 that the second appeal was filed in the High Court in 1930 from a decree of the Subordinate Judge which was dated 27th March 1930 and which had confirmed the decree of the first Munsif bearing date 5th April 1929. It seems to me, therefore, that the learned Judges applied the provisions of the Act even against the express provisions of the second part of the con-, eluding portion of Sub-clause (d) of Section 63.

69. The case which is more direct to the point is the later Full Bench case of the Allahabad High Court, Hira Singh and Others Vs. Jai Singh and Others . In that case Sir Shah Muhammad Sulaiman C.J., considered the identical question at p. 897 and appears to doubt the opinion expressed by the Full Bench in Tota Ram and Others Vs. Ram Lal and Others that the fact that the suit was already pending did not exclude the applicability of Section 92, and pointed , out that Mukerji J. who delivered the judgment in that Full Bench case Tota Ram and Others Vs. Ram Lal and Others decided in Gauri Shankar Vs. Gopal Das and Others that Section 53-A, T.P. Act, was not retrospective in its operation, although the reasoning in Hira Singh and Others Vs. Jai Singh and Others applied with equal force to Section 53-A just as much as to Section 92. The learned Chief Justice while examining the provisions of the amending Act thought that if Section 63 had not included the words "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" it might well have been argued that the Legislature was merely inserting ex majore cautela a provision in the opening words of Section 63 about the 22 Sections but concluded from this addition that the other provisions of the Act were made inapplicable only When anything had already been done before 1st April 1930 in any proceeding pending in a Court on that date and that the Legislature obviously intended that if there was no proceeding pending in a Court on 1st April 1930 ,the retrospective character of the other provisions of the Act should not be excluded and observed:

No doubt the ordinary rule of interpretation of a statute is that it should not be considered to have a retrospective effect so far as substantive rights are concerned unless it expressly says so. In India there is the provision in the General Clauses Act, Section 6, to a similar effect. But in this amending Act there is much more than a mere omission. There is an express reference to certain specified Sections which are not to be retrospective and there is an express reference to all the other provisions of the Act which are not to be retrospective in a certain contingency. It seems to follow that barring that contingency the other provisions of the Act were intended to have a retrospective effect. The

reason is not far to seek. The Legislature had apparently thought that these other Sections are merely explanatory in their character and declare the law which had existed prior to this amendment. Whether the Legislature was right or wrong in this assumption is not a matter for us to consider. We must give effect to the language of the Act as it stands and hold that the Sections of the Transfer of Property Act not dealt with in the Sections enumerated in Section 63 have a retrospective effect, at least where no action was pending on 1st April 1980.

70. With the utmost respect I do not agree with this reasoning. If it is possible from the language of the Act to get the other view which I have ventured to express, I do not see any reason why the Court should necessarily adopt the construction that the Legislature has intended to take away the existing rights. If the Legislature was merely declaring the law which existed prior to the amendment there would be no controversy at all, but the Legislature has not declared the law which existed before the amendment. The Legislature is presumed to know the law which existed before the amendment and the very language adopted by it in Section 92 shows that it is so aware and there fore is now declaring the law which should exist as to future transactions after 1st April 1930. The language of the Section, as already pointed out states that the right conferred by this Section is called the right of subrogation and applies where an agreement is evidenced by a registered document. In *Pichaiyappa Chetti v. Govindaraju Mudaly* AIR (1931) Mad 110. Sundaram Chetty J. merely observed:

It is clear that Section 74, T.P. Act, has no application to the present case, as it deals only with the right of subrogation, declared in favour of a subsequent mortgagee, by his discharging a prior mortgage. The plaintiff has therefore no statutory right of subrogation. Section 92, T.P. Act, (as amended by Act 20 of 1929) has no retrospective effect, and cannot govern the present case.

71. But no reasons are given for this opinion. In 56 Mad 169," Cornish J., in delivering the judgment of the Bench held that Section 53-A has no application to an agreement to transfer immovable property which was made prior to 1st April 1930, the date on which Section 53-A is expressed as coming into force and observed:

The Transfer of Property (Amendment) Act (20 of 1929), which introduced Section 53-A into the Transfer of Property Act, says that the Act, viz. the amending Act, shall come into force on 1st April 1980, and the language of Section 53-A itself does not indicate an intention that it should come into force on any other date. But it has been contended, in view of the provisions in Section 63 of the Act, that certain specified Sections (which do not include Section 58-A) shall not affect the terms and incidents of transfers of property made prior to 1st April 1930, and that the inference is that Section 53-A was intended to have retrospective effect on transfers of property. Their Lordships of the Judicial Committee in *Young v. Adams* (1898) AC 469 have stated that retrospective effect ought not to be given to a statute unless an intention to that effect is expressed in plain and unambiguous language. Judged by that test, the Transfer

of Property (Amendment) Act (20 of 1929), in our opinion, fails to disclose an intention that Section 58-A was to have a retrospective effect. In support of the contention reference has been made to Act 21 of 1929, which is entitled "An Act to supplement the Transfer of Property (Amendment) Act (20 of 1929)." This Act is likewise expressed to come into force on 1st April 1930. It does not amend the Transfer of Property (Amendment) Act (20 of 1929) but it amends Section 49, Registration Act, by enabling an unregistered document to be received as evidence of part performance of a contract for the purposes of Section 58-A, T.P. Act. The Act to supplement the Transfer of Property (Amendment) Act 20 of 1929 (Act 21 of 1929) is supplementary of the Transfer of Property (Amendment) Act (20 of 1929) and its provisions must be construed accordingly. And if, as we think, Section 58-A is applicable only to transfers of immovable property made after 1st April 1930, it must follow that the operation of the amendment made by Act 21 to Section 49, Registration Act, should be similarly restricted.

In *Lakshmi Amma v. Sankara Narayana Menon* AIR 1986 Mad 171 Varadachariar J. held that in the view he took of the construction of Section 92, it was not necessary to come to a decision on the question of its retrospective operation but made these important observations:

It is true that in *Tota Ram and Others Vs. Ram Lal and Others* a Full Bench of the Allahabad High Court held that the provision had retrospective effect but a contrary opinion has been expressed by a Bench of this Court in *Kanjeo and Mooljee Brothers v. Shanmugam Pillai* AIR (1982) Mad 784. I would only add that, in deciding how far an inference in favour of "retrospective operation" is to be drawn from the fact that Section 63 of Act 20 of 1929 expressly excludes retrospective operation in respect of certain specified Sections, the remarks of Lord Hatherley in *James Gardner v. Edward A. Lucas*, (1878) AC 582 might have to be borne in mind, viz., that it may well be a provision inserted ex majore cautela. With reference to the concluding words of Section 63 of Act 20 of 1929, the learned Judges of the Allahabad High Court observed that in that case nothing had already been done before 1st April 1930 in any pending proceeding and no remedy or proceeding was being affected, by the new provisions. I beg leave to doubt the correctness of this statement. If the learned Judges were right in their view that the law was the same even prior to Act 20 of 1929, or that Act 20 of 1929 must only be understood as having declared the previous law (with a view to set conflicting decisions at rest), no exception could be taken to their relying on Act 20 of 1929, because there will then be no question of "retrospective operation" at all. If, on the other hand, Act 20 of 1929 must be held to have changed the law prevailing prior thereto, it is difficult to agree that the learned Judges were giving full effect to the concluding words of Section 68 of Act 20 of 1929, because in that case the suit was undoubtedly pending when the Act of 1929 came into force and. that Section not merely provides that the Act shall not affect "anything already done" in any pending proceeding but goes on to say that such proceeding may be continued "as if this Act had not been passed.

73. I have independently arrived at the same conclusion and with respect I agree with these observations. In *Srinivasulu Naidu v. Damodaraswami Naidu* AIR 1938 Mad 779 Venkatasubba Rao J., who delivered the judgment of the Bench, examined the question as to the applicability of Section 92, T.P. Act, in a suit which was instituted on 11th November 1931 to enforce a mortgage of 1922 where the mortgagor had on 24th May 1925 sold a portion of the property to the defendant and the purchaser was directed to retain the sale price with himself and apply it to paying off in part the amount due on the earlier mortgage of 1918. While considering the argument based upon Section 63 of the Amending Act, 20 of 1929, he pointed out that the general rule is that

the portions of a statute which are silent in that regard, are to be taken *prima facie* as clearly indicating prospective intention, and prospective intention only, acting from the time the Act comes into operation : (Per Lord Hatherley in *James Gardner v. Edward A. Lucas*, (1878) AC 582 citing Lord Granworth

and drew attention to the observations of Lord Cairns that

any Court will be slow to construe an enactment as retrospective, and thereby as disturbing existing rights, unless Parliament has said that the enactment is to be construed retrospectively.

74. He then deals with the argument which was advanced before us on behalf of the respondents based upon the words of Clause (d) in Section 63 and observed:

There was a similar provision in the statute then under discussion, in the case before the House of Lords already adverted to, and referring to it Lord Hatherley observes that it should be deemed to have been put in, in the language of conveyancing, *ex majore cautela*. Lord Blackburn groups the Sections of the statute, which was being considered, under three headings : (a) Some expressed in terms that left no doubt that they were intended to be retrospective; (b) Some as to which it was equally clear, that they were not intended to be retrospective; (c) Others expressed in ambiguous terms Referring to group (c), his Lordship says that the general rule of every civilized nation is, in the absence of express words to the contrary, that any new law that is made, affects future transactions, not past ones; the opposite rule applies in regard to procedure and possibly in matters of evidence, and then referred to observations of Lord Watson in *Young v. Adams* (1898) AC 469:

It may be true that the enactments are declaratory in form; but it does not necessarily follow that they are therefore retrospective in their operation, and were meant to apply to acts: which had been completed or to interests which had vested before they became law.

After referring to the observations of Earle C.J., in (1861) 10 CB MC 179 that it manifestly shocks one's sense of justice that an act legal at the time of doing it should be made unlawful by some new enactment, he came to the conclusion that he must reject the "contention that Section 92-is retrospective. In my

opinion, this is the correct view, if I may say so with respect. In *Isap Bapuji v. Umarji Abraham* AIR (1988) Bom 115 Wadia J. in delivering the judgment of the Bench took the view that upon the language of Section 63 of the amending Act it would appear that Section 92 has retrospective effect and agreed with the opinion expressed in *Gauri Shankar Vs. Gopal Das and Others* in the same terms, namely that even if that view was not correct the principle underlying Section 92 should be accepted as a guide in deciding what the equitable doctrine with regard to subrogation prior to the introduction of Section 92 was. This case therefore is not a clear authority in favour of the opposite view. In the same volume, *Subraya Kuppa Joshi v. Timmanna Subraya Bhatta* AIR (1988) Bom 508 another Bench of the Bombay High Court had to deal with the identical question. In that case the transactions in question were all prior to the coming in force of the amending Act 20 of 1929 and in considering the argument advanced that in view of the language of Section 63 of the amending Act the new Section 92 should be regarded as retrospective, Broomfield J. observed:

Although we consider that there is considerable difficulty in construing Section 68, we are on the whole in agreement with the view taken by the Allahabad High Court in *Tota Ram and Others Vs. Ram Lal and Others* and *Hira Singh and Others Vs. Jai Singh and Others* both Full Bench decisions, and the Calcutta High Court in *Sk. Mahammed Hushen Vs. Jamini Nath Bhattacharji*, that Section 92 is to be regarded as retrospective, as against the view taken by the High Courts of Madras, Patna and Rangoon : 66 Mad 169, *Lakshmi Amma v. Sankara Narayana Menon* AIR (1986) Mad 171 *Jagdeo Sahu v. Mahabir Prasad* AIR (1934) Pat 127 and *Ko Po Kun v. C.A.M.A.L. Firm* AIR (1982) Rang 197 but went on to observe that the learned Judges did not propose to discuss the point in detail because in their opinion Section 92, even if it was retrospective, did not help the appellants in the case before them. In, *Sk. Mahammed Hushen Vs. Jamini Nath Bhattacharji*, which was referred to in the Bombay case just cited, the question for decision was whether Section 53-A, T.P. Act, would apply, to a suit commenced after 1st April 1930, even though the transaction itself was earlier in point of time. Nasim Ali J. took the view that the necessary implication of the words employed in Section 63 was that the provisions of Section 53-A would apply to transactions completed before 1st April 1930 even though the action was brought after that date. Mukherjea J. reluctantly agreed with this conclusion because he observes that 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.

76. The cases decided by this High Court are not of much assistance. In *Jagdeo Sahu v. Mahabir Prasad*, AIR (1934) Pat 127 Wort J. merely observed:

In this Case however we are not bound by Section 92 as this Section came into force in April 1930. All such rights as the defendant had were already vested before that date. The matter therefore depended upon the law as it stood before Section 92 was enacted.

It may be observed that the suit had been instituted on 5th April 1928. In *Ramdayal Sen v. Chakrapani Nandi* AIR (1936) Pat 60 Luby J. was inclined to take the view that the language of Section 63 of the Amending Act 20 of 1929 seemed to suggest that Section 92 could be applied retrospectively but felt it really unnecessary to decide this point. In *Bansidhar Dhandhanania v. Kalroo Mandar* AIR (1938) Pat 532 the right of subrogation was claimed by the transferee from the mortgagor of the year 1930 and it was accepted by both the parties before the Bench that the transaction was governed by Section 92, T.P. Act, as amended in 1929. A review of all these authorities indicates the difficulty which arises in construing Section 63 of the amending Act. The truth of the matter is, as observed by Bowen, L.J. in *Reid v. Reid* (1836) 31 Ch D 402:

We are dealing, it is true, with an Act which is in some sense and to some extent retrospective, and with a Section that is to some degree retrospective. The Section applies to and affects marriages contracted before the commencement of the Act....Now the particular rule of construction which has been referred to, but which is valuable only when the words of an Act of Parliament are not plain, is embodied in the well-known trite maxim *omnis nova constitutio futuris formam imponere debet non praeteritis*, that is, that except in special cases the new law ought to be construed so as to interfere as little as possible with vested rights. It seems to me: that even in construing an Act, which is to a certain extent retrospective, and in construing a Section which is to a certain extent retrospective, we ought nevertheless to bear in mind that maxim as applicable whenever we reach the line at which the words of the Section cease to be plain. That is a necessary and logical corollary of the general proposition that you ought not to give a larger retrospective power to a Section, even in an Act which is to some extent intended to be retrospective, than you can plainly see the Legislature meant.

77. I am therefore constrained to hold that the Section does not apply to transactions which were concluded before 1st April 1930 irrespective of the fact whether they were or were not the subject of any pending action on 1st April 1930. For these reasons I would answer the second question in the negative. For the reasons given by Fazl Ali J. I agree to the answer proposed to the first question.