

INTERNATIONAL JOURNAL OF LEGAL SCIENCE AND INNOVATION

[ISSN 2581-9453]

Volume 4 | Issue 1

2022

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The Crystallization of Section 53-A of the Transfer of Property Act and the Role of Laws of Equity in doing so

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ABSTRACT

We often come across sections that cannot be analyzed without looking into the history and purpose of the birth of the section. Section 53-A is one of those sections where the crux of the issue cannot be understood until there is an investigation into the process of its formation. The essay delves deep into the explanation of what Section 53-A entails and the intention of its addition. The section in question was a direct borrow from the colonial masters themselves and would not have existed if it were not for the laws of equity. Section 53-A states that if a person has taken possession of an immovable property on the basis of a contract or agreement of sale and has either performed or is willing to perform his part of the contract then, he would not be ejected from the property on the ground that the sale was unregistered and that a legal title has not been transferred to him. While the section was directly borrowed, it left huge gaps for misinterpretation. Thus, the process of crystallization and concretization of the section would be incomplete without judicial interpretation of the same. Post these interpretations and certain amendments, there were still many speculations about the position of law on certain questions, and these have been effectively tackled in the essay. Thereafter, the essay goes on to discuss the nature of rights provided by the section for the transferee. In India, the equity of par-performance is passive equity: it can be used only as a shield, not as a sword. The essay then explores the reason for this. The concluding remark of the research paper establishes the fact that regardless of all the questions raised, the ultimate goal must be to protect the rights of the vulnerable, in this case being the transferee.

Lord Macaulay once stated, “No country ever stood so much in need of a code of law as India,”² and unfortunately, he was accurate. The colonial masters believed that Indian Property law was an

area that was lacking and that the twins, clarity and rigidity must be injected into the system in order to create a civilized system. The codification of the Transfer of Property Act,

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² Macaulay, T. B. M. B. (1952). *MaCaulay: Prose and poetry*. Rupert Hart-Davis.

1882³ (T.P. Act) was their attempt at curbing judge-made law in India. While the T.P. Act was successful in bringing a lot of order, it remained silent on many concepts, wanting to leave significant areas to the courts and parties to develop. However, this rigidity was proving to be a fly in the ointment and the only way to solve the dilemma was to introduce the laws of equity.

The drafters of the Transfer of Property Act 1882⁴ made the conscious effort to focus more on *transfers of property* rather than just the property itself. This attempt of creating an absolute and comprehensive set of rules proved to be mostly aspirational, as most parts either eventually needed legislative revision or creative judicial interpretation in order to be applicable to the complexity of society.

The contrary judicial systems in England were always at Loggerheads, with the common law system being highly inflexible and unalterable, while the Chancery Courts, which were the Equity Courts, were purposed with relieving the petitioner of any injustice caused by the rigorous application of the common law.⁵ The broader and deeper reality, as well as the complexities barred by the codified writ, such as fraud, mistake, and fiduciary relationships, became the major topics of Chancery jurisdiction. By the twentieth century, the laws of equity promoted by the Conscience Courts had successfully percolated into almost all Federal statutes of Civil Procedure. This same logic was used in India as the need for Macaulay's idea of a rigid code had

reduced, and ideas of freedom, liberty and equality had become new centrifugal forces in the country.

The equity of part-performance was developed in English law by the Chancery Courts in response to the strict limitations imposed by the Statute of Frauds, 1677⁶. Section 4⁷ of this Act stated that all agreements in respect of transfer of lands must be in writing. The transfer of immovable property by oral agreement was illegal under this clause, and thus, the transferee was barred from obtaining any title to the land. Although the Statute of Frauds was meant to prevent fraud in land transfers based on oral agreements, its stringent enforcement caused a significant deal of pain to the transferee. In this fashion, a bona fide transferee who fulfilled his contractual obligations by paying the price in full or in part and taking possession of the land was unable to get title due to a lack of legal procedures; such transferees were helpless and harassed. Equity then stepped in to assist them. Those transferees who possessed land on the basis of oral contracts and had completed their portion of the bargain were thus protected by equity. Since then, the equity of part-performance has evolved and gone through numerous stages in order to defend the interests of transferees who had executed their share in the contract in good faith and were being harassed by the transfer on the basis of a contract technical flaw.

In the case of *Maddison v Alderson*⁸, Lord Selborne delivered an absolutely iconic

³ *Transfer of Property Act, 1882.*

⁴ *Ibid*

⁵ F. Maitland, *supra* note 29, at 4-5; S. Milsom, *supra* note 24, at 74-79

⁶ *Statute of Frauds, 1677*

⁷ *Statute of Frauds, 1677, Sec. 4*

⁸ (1883) 8 App. Cas. 467

judgement explaining the importance of the doctrine. The court observed;

“In a suit founded on such part-performance, the defendant is really charged upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the Statute) upon the contract itself. If such equities were excluded, the injustice of a kind which the statute cannot be thought to have had in contemplation would follow.”

The doctrine of part-performance under Section 53-A⁹ is an equitable doctrine. To put it plainly, the section states that if a person has taken possession of an immovable property on the basis of a contract or agreement of sale and has either performed or is willing to perform his part of the contract then, he would not be ejected from the property on the ground that the sale was unregistered and that a legal title has not been transferred to him. However, before 1929, the application of this English equitable doctrine was neither definite nor consistent.

The Privy Council in *Mohammad Musa v Aghore Kumar Ganguli*¹⁰ held that equity of part-performance could be applied to Indian cases just as it was being applied in England. In the instant case, there was a compromise deed in writing but which was not registered. However, the contents of the deed were that there was a division of land among the parties based on the compromise deed and were followed by both parties taking possession of the respective lands. However, it was only after forty years that this deed was

contested by the heirs of the parties on the basis that the deed was not registered. The Privy Council observed that it would be appropriate to apply the doctrine of part-performance in the instant case and held that although the deed was not registered, the fact that it was written proves it to be a valid document and thus, could not be disavowed. A controversy was then born, as this judgement stood in absolute contravention of the provisions of the Indian Registration Act, 1908¹¹, which stated that a document had to be registered in order to be valid.

The Privy Council then reversed its opinion in *Ariff v Jadunath*¹², holding that the doctrine of part-performance could not be used to override the stated provisions of the Indian Registration Act¹³ and the Transfer of Property Act¹⁴ in India (Ex-Post facto law). The instant case was regarding an oral lease, which was not registered. Following the Mohammad Musa decision, the Calcutta High Court had initially delivered its judgement in favour of the defendant, who had already occupied the land. However, the appeal in the Privy Council changed the tables for the plaintiff. The Privy Council stated;

“Whether an English equitable doctrine should, in any case, be applied so to modify the effect of an Indian Statute may well be doubted; but that as English equitable doctrine affecting the provisions of an English Statute (of Frauds) relating to the right to sue upon a contract, should be applied by analogy to such a statute as the Transfer of Property Act and with such a

⁹ *Transfer of Property Act, 1882, Sec. 53-A*

¹⁰ (1914) 42 Cal. 801; 28 IC 930

¹¹ *Indian Registration Act, 1908*

¹² AIR 1931 PC 79; 58 IA 91

¹³ *Indian Registration Act, 1908*

¹⁴ *Transfer of Property Act, 1882,*

result as to create, without any writing, an interest which the statute says can only be created by means of a registered instrument, appears to their Lordships, in the absence of some binding authority to that effect, to be impossible.”

In 1934, in the case of *Mian Pir Bux v Sardar Mohammad Tahir*¹⁵ the defendant had taken possession of the land based on an oral agreement between him and the plaintiff. On being evicted by the plaintiff, he took the defence of part-performance. However, the Privy Council dismissed his plea on the basis that the equity of part-performance was not available in India (Ex-Post facto law) due to its express transgression from the statutory provisions of the Registration Act and Transfer of Property Act.

It is apparent from these interpretations of the Privy Council that the crystallization of the equity of part-performance was a sticky wicket in India, as most of the colonial masters believed in the theory of bringing in order only by the imposition of stringent laws with no space left for evolution. However, in 1927 a Special Committee was constituted, and its legislation, with minor revisions, was enacted in 1929¹⁶. Section 53-A¹⁷ was added to give formal recognition to the old English Equity of Part Performance, i.e., Doctrine of Part Performance.

The section very clearly laid down the provision, with three essential conditions to complete;

Firstly, there must be a written contract for the transfer of immovable property for certain

consideration; secondly, acting in furtherance of this contract, the transferee has taken possession over a part or whole of property; and lastly, such transferee has either performed his part of the contract or is willing to perform it. If these three essentials are complete, then although the contract is unregistered, the transferor cannot dispossess the transferee.

The Amendment in 2001 brought in an important change to the section with it omitting, “the contract though required to be registered, has not been registered.” The main message that was to go through this was that the non-registration of any contract to transfer for consideration is not a relevant factor for the application of part-performance. This only goes to show how the roots of laws of equity were only strengthened in order to make sure absolute fairness to all parties.

Crystallization is a process through which a vague concept becomes definite, clear and metamorphosizes into something concrete. This exact analogy can be utilized here, where Section 53-A¹⁸ became concrete only with the help of extensive judicial interpretation of the provisions. Many attempts were made to give clarity on the unanswered questions created by the Amendment. However, this uncertainty was only put to ease after the judicial bodies in the country decided to address the issues and give definite answers to them. While the section made it clear that the transaction must involve an immovable property, it did not elaborate on the topic of consideration. The court in *Ashok*

¹⁵ AIR 1934 PC 235
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¹⁷ *Transfer of Property Act, 1882, Sec. 53-A*

¹⁸ *Transfer of Property Act, 1882, Sec. 53-A*

*Indoria v Vidyawati*¹⁹ found that the validity of the written agreement could not be doubted only on the basis of confusion on the aspect of consideration, especially when the agreement was admittedly signed by the transferor and his witnesses.

The most important clause provided in the provision talks about the necessity for a written contract. Indian Courts in multiple judgements like *Leprosy Mission v N. V. V. Satyanarayana Reddy*²⁰, *S. Veerabadra Naiker v Sambanda Naiker*²¹, *V. R. Sudhakara Rao v T. V. Kameswari*²², have held that if the agreement is oral or if there is a failure to produce enough evidence of the agreement being written the party may not claim protection under Section 53-A.

Additionally, in the case of *Mool Chand Bakhru v Rohan*²³, the Supreme Court found that the applicability of the equitable doctrine of part-performance demands a written agreement for the transfer, which is absolutely unambiguous in nature. In the instant case, there was an exchange of letters between the plaintiff and the defendant. However, the Supreme Court held that the letters written by the vendor could not be treated as an agreement to sell. The court made it clear that an agreement has to be one of the transfers of a certain immovable property, without which no party can take the defence of the doctrine of part-performance.

As previously stated, it is absolutely necessary that the transferee must have taken possession of the immovable property under the terms of the contract or an incomplete deed of transfer. It was determined that the defendant could not claim advantage of Section 53-A²⁴ since the plaintiff had entrusted his property to the defendant for management by obtaining a power of attorney, and it could not be proven that the defendant got possession and in furtherance of the contract of sale.²⁵ In the very important case of *Durga Prasad v Kanhiya Lal*²⁶, the court clarified that the transferee need not be in complete possession of the property mentioned in the contract in order to seek the remedy of this section.

It is essential to note that taking possession is not the only method of part-performance. For instance, if the transferee is already in possession of the property, then, after signing the contract, he must do some 'further act' in order to prove his loyalty towards the maintenance of the contract. In the case of *D. S. Marvathamma v A. Srinivasan*²⁷, the tenant claimed himself to be in continued possession of the house, thus claiming part-performance. However, the suit for specific performance was dismissed. The Supreme Court held that the application of Section 53-A²⁸ would not be appropriate since the tenant did not show any act done in furtherance of the agreement.

'One who seeks equity must do equity; this principle thus requires the transferee to act in an

¹⁹ AIR 1915 Del 5.

²⁰ AIR 1998 AP 285

²¹ AIR 2003 Mad 19

²² (2007) 6 SCC 650

²³ AIR 2002 SC 812

²⁴ *Transfer of Property Act, 1882, Sec. 53-A*

²⁵ *A.M.A. Sultan v Seydu Zohra Beevi*, AIR 1990 Ker. 187

²⁶ AIR 1979 Raj. 200

²⁷ AIR 2003 SC 3542

²⁸ *Transfer of Property Act, 1882, Sec. 53-A*

equally responsible manner, with them willing to perform their part of the contract. In the case of *Becharadas v Ahmedabad Municipality*²⁹, the transferee who has taken possession of the property cannot protect his possession under the doctrine of part-performance if he is not willing to perform his part of the agreement³⁰. Further, in *Jacob Private Ltd v Thomas Jacob*³¹, the Kerala High Court held that the willingness shown must be absolute and completely unconditional. However, the question of delayed payments has always been a grey area, with different courts passing contradictory judgements. In *Teja Singh v Ram Prakash Talwar*³², the court held that delayed payment would not cause the transferee to lose his benefit under Section 53-A³³. Contrary to this, the Karnataka High Court³⁴ in the very same year passed a judgement stating that mere readiness to pay the consideration cannot be seen as a willingness to adhere to the contract. The court further observes that the failure to carry out the specific performance demanded in the stipulated time will show his unwillingness to perform his part of the contract.

When all of the foregoing elements are met, the transferee is entitled to Section 53-A³⁵ protection. But what exactly is this shield? The law on this subject is in flux, with different High Courts taking conflicting positions on the subject. Therefore, it is essential to understand

the scope of protection provided under the section, to realize the extent of the role of equity. The section is very explicit about the fact that it does not confer any title of interest to the transferee with respect to the property in question. The section prevents the transferor from evicting the transferee unfairly and only allows for the continuation of possession. However, the scope of this section ends there and does not further offer any benefits to the transferee.³⁶ In multiple cases, including *State of U.P v District Judge*³⁷, and *Technicians Studio Ltd. v. Lila Ghosh*³⁸, the courts have clarified that transferee can get the title of the property only after its registration. In the case of *Achayya v Venkata Subba Rao*³⁹ the court observed the following;

“It is settled law that under Section 53-A of the Transfer Property Act, no title passes to a transferee. He cannot file a suit for the declaration of his title to the property or seek to recover possession of the same on the basis of any title conferred on him.”

The case of *Prabodh Kumar Das v Dantamara Tea Co. Ltd*⁴⁰. was a landmark decision on the nature of transferee rights under Section 53-A. The court observes;

“In their Lordships' opinion, the Amendment of the law affected by the enactment of sec. 53A conferred no right of action on a transferee in

²⁹ AIR 1941 Bom. 346

³⁰ *Tongani Tea Co. Ltd. v Rossell India Ltd.*, AIR 2014 Gau 41.

³¹ AIR 1995 Ker. 249

³² AIR 1984 P&H 95

³³ *Transfer of Property Act, 1882, Sec. 53-A*

³⁴ *M. Mariappa v A.K. Satyanarayana*, AIR 1984 Kant 50.

³⁵ *Transfer of Property Act, 1882, Sec. 53-A*

³⁶ *Delhi Motor Co. v U. A. Basurekar*, AIR 1969 SC 794; *Sitaram Rao v Bibhisana Pradhan*, AIR 1978 Ori. 222

³⁷ AIR 1997 SC 53

³⁸ AIR 1979 SC 2425

³⁹ AIR 1957 Andh. Pra . 854

⁴⁰ AIR 1940 PC 1

possession under an unregistered contract of sale. Their Lordships agree with the view expressed by Mr Justice Mitter in the High Court that “the right conferred by sec. 53A is a right available only to the defendant to protect his possession.” They note that this was also the view of their late distinguished colleague, Sir Dinshah Mulla, as stated in the second edition of his treatise on the Transfer of Property Act at p. 262. The section is so framed as to impose a statutory bar on the transferor; it confers no active title on the transferee. Indeed, any other reading of it would make a serious inroad on the whole scheme of the Transfer of Property Act.”

The above observation makes it apparent that the section does not give the transferee any right of action and confers only a right of defence. In India, the equity of par-performance is passive equity: it can be used only as a shield, not as a sword.⁴¹ As a result, the scope of Section 53-A is limited because the transferee has no right of action. The Prabodh Kumar Das case played a huge role in determining the scope of the section, which only led to its concretization. The Privy Council held that the doctrine utilized in India was not active equity.

The section is direct about the fact that the transferee has the right to ‘defend’ themselves when they are being evicted. However, this statement brings in another dilemma as the question of whether the transferee must always be the ‘defendant’ or can he also be the ‘plaintiff’ if needed for defending his possession? The Courts in India have delivered such contradictory

judgements that it has become almost impossible to answer the question. However, the Supreme Court in *Delhi Motor Co. v U. A. Basrurkar*⁴² expressly left the question open. Justice Bhargava observed;

“On the question whether a person, who sues as a plaintiff, may still be regarded as defending the rights sought to be conferred upon him by an unregistered deed, we need express no opinion.”

Francis Bennion, in his commentaries, rightly states;

“An enactment of former days is thus to be read today, in the light of dynamic processing received over the years, with such modification of the current meaning of its language as will now give effect to the original legislative intention. The reality and effect of dynamic processing provide the gradual adjustment. It is constituted by judicial interpretation, year in and year out. It also comprises processing by executive officials.”⁴³

It is essential to analyze this section in the light of the above statement, as while the language of the section may be stringent, the ultimate goal of the provision is to defend the right of the transferee. Thus, the capacity in which this right is demanded should be irrelevant. As A. K Srivastava rightly concludes, “The transferee, even if he appears in a court as the plaintiff can get the protection of Section 53-A provided, of course, he uses it as a shield and not a sword.”

⁴¹ *Chaliagulla Ramachandrayya v Boppana Satyanarayana*, AIR 1964 SC 877

⁴² AIR 1969 SC 794

⁴³ 2nd ed p 617

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