

1936
EMPEROR
v.
BISHWANATHI

adequate. The case of pistol or revolver stands on a somewhat different footing. It is a dangerous weapon and can easily change hands without detection. The chances of a weapon of that kind falling into the hands of dangerous persons are not very remote. In these circumstances, we think that the learned Assistant Sessions Judge should have passed a severer sentence than one year's rigorous imprisonment. We think that a sentence of two years' rigorous imprisonment will meet the ends of justice. Accordingly we enhance the sentence to that extent.

APPELLATE CIVIL.

*Before Sir Shah Muhammad Sulaiman, Chief Justice
and Mr. Justice Bennet*

1936
September,
18

SHYAM SUNDAR LAL AND ANOTHER (PLAINTIFFS) v. DIN
SHAH AND OTHERS (DEPENDANTS)*

*Transfer of Property Act (IV of 1882), sections 53A, 105—
Transfer of Property (Amendment) Act (XX of 1929), sec-
tion 63(d)—Part performance—Operation of section re trans-
actions prior to its coming into force—Retrospective effect—
Section applicable to leases.*

The provisions of section 53A of the Transfer of Property Act are applicable to a case where the suit is filed after the 1st of April, 1930, the date of coming into operation of that section, although the transaction was effected before that date.

Section 63 of the Transfer of Property (Amendment) Act, 1929, prevented only certain specified sections of the Act from having a retrospective effect; and as regards the other sections the provision amounted to this that where the transaction had taken place before the 1st of April, 1930, and an action in respect of it was actually pending on that date, these sections would not affect the rights of parties in such litigation. It followed that the legislature intended that where no such action was pending on the 1st of April, 1930, the provisions of these sections would be applicable even though the transactions came into existence prior to that date.

*Appeal No. 52 of 1935, under section 10 of the Letters Patent.

Section 53A of the Transfer of Property Act creates a bar against the transferor's enforcing against the transferee any right in respect of the property, when possession has been delivered, on the sole ground that there was no registered document. This bar came into existence by operation of law on the 1st of April, 1930; and, except in cases where a litigation in respect of the transaction was already pending on that date, the transferee in possession acquired on that date an absolute protection under that section and could resist a suit subsequently filed. From this point of view it could be said that, in doing so, he would not be seeking to give the section a retrospective effect but would really be claiming protection under the section with effect from the 1st of April, 1930, the date on which it came into force.

1936
 SHYAM
 SUNDAR
 LAL
 v.
 DIN SHAH

Section 53A of the Transfer of Property Act is applicable to leases as well as to sales. Although section 105 defines a lease as a transfer of a right to enjoy immovable property and does not speak of a transfer of an interest in such property, it is clear from a consideration of other sections of the Act that a lease is treated as a transfer of an interest in immovable property. The transfer of immovable property contemplated by section 53A includes, therefore, a transfer by lease.

Messrs. *Shiva Prasad Sinha and Shankar Sahai Verma*, for the appellants.

Mr. G. S. *Pathak*, for the respondents.

SULAIMAN, C.J., and BENNET, J.:—This is a plaintiffs' appeal arising out of a suit brought for ejectment of the defendants from certain plots. The defendants pleaded that there was a patta or lease of the plots in dispute, with power to the defendants and their heirs to plant grove and construct buildings. The Assistant Collector dismissed the suit. An appeal was preferred to the District Judge, who would have heard the appeal even if the suit had been filed in the Munsif's court, and who was therefore competent under section 269 of the Tenancy Act to dispose of the appeal if the whole matter was before him. He upheld the decree of the trial Court. On appeal a learned Judge of this Court has come to the conclusion that the plaintiffs must fail because of the provisions of section 53A of the Transfer of Property Act which has a retrospective effect.

1935

SHYAM
SUNDAR
LAL
v.
DIN SHAH

Now before the addition of this section it was held by a Full Bench of this Court, in *Ram Gopal v. Tulshi Ram* (1), that the doctrine of part performance, applied in England, had no force in India. Later their Lordships of the Privy Council, in the case of *Pir Bakhsh v. Mahomed Tahar* (2), laid down that the doctrine of part performance would not apply to a case where an action had commenced before the enactment of section 53A. At page 659 their Lordships noted that the view expressed in that case must be understood to be referable to the state of the law before the partial importation into it of the English equitable doctrine of part performance. Obviously section 53A could not affect a pending action. The learned counsel for the appellants has relied on a Full Bench case of the Patna High Court in *Ram Krishna Jha v. Jainandan Jha* (3). But there, too, the action had commenced before the enactment of this new section which was therefore not applicable, and it was on this very ground that the learned Judges distinguished the Privy Council case already quoted above. A number of other cases have been relied upon by the learned counsel for the appellants, but with the exception of one case they are all cases where the suits were pending when the amendment came into force. Accordingly they are not really in point. The solitary case which may be said to support the contention of the appellants is the case of *Cooverjee Plumber v. Vasant Theosophical Co-operative Housing Society* (4). But that was also a case where there was no writing signed by the contracting parties from which the terms of the transfer could be ascertained. Section 53A was therefore not applicable. In the course of the judgment the learned Judges, however, observed that as the amounts were paid prior to the 1st of April, 1930, when section 53A came into operation, the section was not applicable. These were observations which were not necessary for

(1) (1928) I.L.R., 51 All., 79.

(2) (1934) I.L.R., 58 Bom., 650.

(3) (1935) I.L.R., 14 Pat., 672.

(4) A.I.R., 1935 Bom., 91.

the purposes of the case, and section 63 of Act XX of 1929 was apparently not brought to their notice.

The case of *Gauri Shankar v. Gopal Das* (1), decided by MUKERJI, J., was also a case where the suit had been filed in 1929 before the coming into force of section 53A. On the other hand the case of *Gajadhar Misir v. Bechan Chamar* (2), decided by one of us, is a case directly in point where the suit had been filed after the coming into operation of section 53A, and it was held that the provisions of the section governed the case, although the transaction had arisen before the coming into force of the section.

In the case of *Tota Ram v. Ram Lal* (3), decided by a Full Bench of which one of us was a member, the point was made clear that section 63 of Act XX of 1929 had prevented only certain specified sections from having a retrospective effect, and therefore by implication it was intended that the other sections should have such an effect. As regards the other sections not specified, the provision in clause (d) of the section is to the following effect: "and nothing in any other provision of this Act shall render invalid or in any way affect anything already done before the first day of April, 1930, in any proceeding pending in a court on that date." The provision quoted clearly means that so far as the sections other than those specified in this section 63 are concerned, nothing in them shall render invalid or in any way affect anything already done before the first day of April, 1930, when any action is pending on that date; that is to say, where the transaction had taken place before the 1st of April, 1930, and an action in respect of it is actually pending on that date, the new sections would not affect the rights of parties in such litigation. It follows that the legislature intended that where no such action was pending on the 1st of April, 1930, then the provisions of these sections would be applicable even though the transactions came into existence prior to that date

1936

 SHYAM
SUNDAR
LAL
v.
DIN SHAH

(1) A.I.R., 1934 All., 701.

(2) A.I.R., 1934 All., 768.

(3) (1932) I.L.R., 54 All. 897.

1936

SHYAM
SUNDAR
LAL
v.
DIN SHAH

Now section 53A merely creates a bar against the transferor from enforcing against the transferee any right in respect of the property, when possession has been delivered, on the sole ground that there was no registered document. There is no reason why this bar should not come into existence by operation of law on the 1st of April, 1930, when no litigation in respect of it was pending and the defendant was in possession. Thereafter the defendant had an absolute protection under this section and he can resist a suit subsequently filed, on the ground of having acquired an absolute right under this section on the 1st of April, 1930. From this point of view it may even be said that he is not seeking to give a retrospective effect to section 53A, but is really claiming protection under that section with effect from the 1st of April, 1930, the date on which it came into effect.

The only point that remains for consideration is whether section 53A is applicable to leases also. No doubt section 105 defines a lease as a transfer of a right to enjoy such property and does not speak of a transfer of an interest in such property. But section 108(j) speaks of the lessee transferring the whole or any part of his interest in the property. Similarly section 111(d) and (e) refer to the interest of the lessee and the lessee yielding up his interest. It is also to be noted that section 53A has been added in chapter II of the Transfer of Property Act which contains a general provision governing all transfers. Indeed section 117 which makes the provisions of chapter V not applicable to leases for agricultural purposes would not take out even such leases from the operation of the provisions in chapter II. Several sections in this chapter show that the legislature intended that a lease should be treated as a transfer of property. Section 6(i) prevents a lessee of an estate under the management of a Court of Wards from being authorised to assign his interest as such lessee. Section 10 specifically mentions a lease as being one of the kinds of transfer contemplated in that section. Similarly section 12 implies that lease is a transfer of property.

Illustration (a) to section 25 is of a lease of a farm, and so is also the illustration to section 42. If a lease of property were not to be regarded as a transfer of property within the meaning of chapter II, a considerable difficulty would be caused by not applying provisions like those in sections 43, 52, etc., to such a transfer. We must therefore hold that the transfer of immovable property contemplated by section 53A includes a transfer by lease.

We accordingly dismiss this appeal with costs.

FULL BENCH

*Before Sir Shah Muhammad Sulaiman, Chief Justice,
Mr. Justice Iqbal Ahmad and Mr. Justice Harries*

MARIAM BIBI AND ANOTHER (DEFENDANTS) *v.* AMNA BIBI
(PLAINTIFF) AND SHARIF AHMAD AND ANOTHER
(DEFENDANTS)*

1936
Septem 21

Civil Procedure Code, order XXXII, rule 7; schedule II, paragraph 1—Reference to arbitration—Agreement to refer by guardian ad litem of minor—Leave not expressly obtained and recorded—Reference invalid—Jurisdiction—Award voidable by minor—Remedy of minor, procedure—Civil Procedure Code, schedule II, paragraph 15(c)—“Otherwise invalid”—Objection to validity of reference to arbitration—Objection overruled and decree passed in accordance with award—Finality, to what extent—Civil Procedure Code, section 115—Revision—Decree passed on award—Inherent jurisdiction.

Paragraph 1 of the second schedule to the Civil Procedure Code is subject to the provisions of order XXXII, rule 7. Accordingly, where the next friend or guardian *ad litem* of a minor party agrees to join in a reference to arbitration, the leave of the court to do so on behalf of the minor must be obtained and expressly recorded in the proceedings, in compliance with order XXXII, rule 7.

Such leave must be obtained before the application for an order of reference is made; the leave cannot be granted by the court after the award has been delivered.

The omission of a next friend or guardian *ad litem* of a minor party to a suit to obtain such leave of the court renders