

APPELLATE CIVIL.

Before Courtney Terrell, C.J. and James, J.

WAKEFIELD)

v.

KUMAR RANI SAYEEDA KHATUN.*

1936.

September,
9, 10.

Transfer of Property Act, 1882 (Act IV of 1882), section 53A, whether retrospective—Transfer of Property (Amendment) Act, 1929 (Act XX of 1929), section 63, effect of.

Section 53 of the Transfer of Property Act, 1882, is retrospective and applies to contracts made before the passing of Act XX of 1929. The effect of section 63 of the amending Act is only to remove from the operation of the new section 53A those irregular part-performed contracts which on the 1st of April, 1930, already formed the subject of pending litigation.

Benarsi Das v. Ali Muhammad(1), followed.

Kanji and Moolji Bros. v. T. Shunmugam Pillai(2),
Gauri Shankar v. Gopal Das(3), dissented from.

Appeal by the defendant.

The facts of the case material to this report are set out in the judgment of James, J.

K. N. Moitra, for the appellant.

Manohar Lall (with him *Syed Ali Khan* and *G. P. Sahi*), for the respondent.

JAMES, J.—The defendant in 1923 obtained a farming lease from the Maharaj Kumar of Tikari of seven villages for a term of twenty years. On the 7th of March, 1925, the Maharaj Kumar executed a mukarrari deed, which made the lease permanent in respect of four villages, and granted certain other villages to the defendant. At the same time he executed a deed of gift whereby the proprietary right

* Appeal from Original Decree no. 56 of 1933, from a decision of Maulavi S. M. Ibrahim, Subordinate Judge of Gaya, dated the 23rd December, 1932.

(1) (1936) A. I. R. (Lah.) 5. (2) (1932) A. I. R. (Mad.) 734.

(3) (1934) A. I. R. (All.) 701.

in the other three villages of the lease of 1923 was transferred to the plaintiff. The plaintiff in 1930 demanded rent from the defendant on account of the farming lease of the three villages at the rate of Rs. 773-3-6 a year, which was duly paid though the plaintiff's claim for interest was not satisfied. In 1931 the plaintiff instituted the suit out of which this appeal arises, describing the defendant as a trespasser, and claiming compensation by way of mesne profits, or in the alternative rent at the rate of Rs. 912 a year. The defendant contested the suit denying that he was a trespasser and claiming that he held as a tenant under the lease of 1923 which had been recognized by the plaintiff.

At the trial of the suit the question arose of whether the performance by the defendant of his part of the contract of 1923 had the effect of putting him into the position which he would have enjoyed if he had obtained a regular lease. The Subordinate Judge, considering himself bound by the decision of the Judicial Committee of the Privy Council in *Ariff v. Jadrnath Majumdar*(1) found that the defendant could base no claim to be a lessee on the strength of the unregistered document of 1923. He did not consider the question of whether the provisions of section 53A of the Transfer of Property Act enacted by Act XX of 1929 would govern this contract; nor did he consider the effect of the acceptance of rent by the plaintiff in recognition of the contract. He found that the defendant was a trespasser and he assessed compensation by way of mesne profits at Rs. 1,500 a year. The defendant has appealed from that decision.

In the trial Court the defendant had taken the objection that he was entitled to complete suspension of rent, owing to the fact that he had been forcibly ejected from his tenure by the plaintiff; but the point

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was not pressed before the Subordinate Judge, and although it is mentioned in the memorandum of appeal, it must be treated for practical purposes as abandoned by the appellant, who by his memorandum of appeal admits liability for three years of arrears of rent at the rate of Rs. 773 odd.

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Arguments have been addressed from both parties to this Court at some length, on the question of whether the provisions of section 53A of the Transfer of Property Act would apply to the agreement of the 4th August, 1923. On the whole, I think that the provisions of this section would apply to this contract, and that the effect of section 63 of Act XX of 1929 is only to remove from the operation of the new section 53A those irregular part-performed contracts which on the 1st of April, 1930, already formed the subject of pending litigation; but in the form which this appeal has ultimately taken, this question, strictly speaking, does not arise. It is manifest, in the first place, that the occupation of the defendant-appellant during the years in suit cannot be treated as that of a trespasser liable to pay damages or mesne profits. Rent had been demanded from him up to the end of 1335 Es. which was duly paid. A demand was made for rent for the years 1336 and 1337 which was not satisfied. It is clear that he was a tenant, but it is not necessary for the purposes of this appeal to decide what may have been the terms of his tenancy.

Mr. Manohar Lal suggested that the rent payable by the defendant ought to be ascertained by deducting the rent assigned for the other villages of the farming lease when the permanent tenure was created in 1925 which would leave a balance of Rs. 912 payable annually; but this argument would involve the admissibility in evidence of the unregistered contract of 1923; and this document would only be admissible in evidence under Act XX of 1929 if the provisions of section 53A of the Transfer of Property Act applied to it.

Mr. Manohar Lal has completely taken the wind out of the sails of the defendant by abandoning his claim to rent at Rs. 912, and by asking for rent only at the rate which the defendant admits to be due. The decree of the learned Subordinate Judge cannot be defended. The defendant is not a trespasser; and there is an end of that question. And if the argument of the learned Advocate for the appellant should prevail, he would by consequence be liable for arrears of rent at a higher rate than he has admitted, because if the unregistered lease of 1923 is to be treated as a valid contract, the annual rent payable for the farming lease of these three villages is clearly Rs. 912. On that question also there is no doubt.

We are thus in the anomalous position that if the appellant should be successful he would have to pay more; and if he should fail he would have to pay less.

The decree of the Subordinate Judge must be set aside. The plaintiff is entitled to a decree for rent at the rate of Rs. 773-3-6 a year for the years 1336 to 1338 F's. with interest at $12\frac{1}{2}$ per cent. from the end of the agricultural year in which the rent fell due up to the date of the decree. She is entitled in addition to interest at $12\frac{1}{2}$ per cent. for one year on the sum of Rs. 2,029-11-6. This is the interest which accrued during 1335 F's. to which must be added simple interest at the same rate up to the 7th Bhado, 1336, when payment of the principal was made. This interest is a fixed sum which does not accumulate. It is the interest due on the 28th of August, 1929, which itself bears no interest up to the date of the decree. The decretal amount will bear interest at six per cent. from the date of the decree. The appellant is entitled to his costs in this Court proportionate to his success. The plaint was framed in such a manner as to make it difficult for the defendant to satisfy the claim; he was compelled to defend the suit: and the plaintiff will be held entitled to no costs of the suit.

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COURTNEY TERRELL, C. J.—I entirely agree with the judgment of my brother James just delivered.

Although by reason of the course which the case has taken the question of the retrospective nature of section 53A of the Transfer of Property Act is no longer of importance in this particular case, I think it necessary by reason of its general importance to explain the reason for my concurrence with the view expressed by my brother James that in circumstances such as those which are found in this case, the section is applicable. Properly speaking, the question of the retrospective nature of section 53A arises not with respect to the contract which is in question but in respect to the enforcement of the right against the transferee. In this case the contract in question was undoubtedly long before the suit and long before the passing of the amending Act; but the suit was begun after the amending Act had come into force and had added section 53A to the Transfer of Property Act. Its effect may be stated broadly as the establishment in favour of the transferee of the doctrine of part-performance, and in effect the section states that from and after the passing of this Act, if the contract in question was in writing and signed and if its terms can be ascertained with reasonable certainty and if the contract, though required to be registered, has not been registered, then the transferor is to be debarred from enforcing against the transferee, by any means, any right in respect of the property which the transferee has taken or continued in possession other than a right expressly provided by the terms of the contract. In other words, according to my construction of the section no question of retrospection arises with regard to the contract in question. The only question of retrospection which can be considered to arise is with regard to the suit in which the rights are in controversy. If the suit has been instituted after the passing of the Act, then it is clear, in my opinion, that the Act applies to that suit. If, on the other hand, the suit was instituted before the passing of

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the Act, then under the provisions of the Act which have been mentioned, the suit is to proceed as though the Act had not been passed. In other words, the Act is not retrospective with regard to suits begun prior to the Act. Nor is it a question of there being any retrospective effect with regard to contracts made before the passing of the Act because the operative part of the section refers to "debarred from enforcing" and not to the date of the contract. It was argued that the opening words of the section "Where any person contracts to transfer" indicate that the section can apply only to contracts made after the passing of the Act. If the words were to be construed in that grammatical sense, then it would be necessary to alter the wording of the remainder of the Act, for example, in the second paragraph the words should in that case read "and the transferee *shall have*, in part-performance of the contract, taken possession". Similarly the third paragraph should be "and the transferee *shall have performed*" instead of the words as they at present appear in the Act. The rights under a contract arise immediately after the execution and do not arise in consequence of registration. The effect of non-registration is to prevent the enforcement of those rights in a court of law inasmuch as the contract cannot be received in evidence unless registered. The rights do not arise upon registration. Therefore, in my opinion, the opening words of the section apply to contracts made whether before or after the passing of the Act and no question of retrospection arises with respect to the date of the contract. For this reason I respectfully disagree with the decision in *Kanji and Moolji Bros. v. T. Shunmugam Pillai*⁽¹⁾ and in those cases which have followed it, for example, *Gauri Shankar v. Gopal Das*⁽²⁾ and I agree with the view of the learned Judge who decided the case of *Banarasi Das v. Ali Muhammad*⁽³⁾.

Appeal allowed in part.

(1) (1932) A. I. R. (Mad.) 734.

(2) (1934) A. I. R. (All.) 701.

(3) (1936) A. I. R. (Lah.) 5.