

1938
 NGA MYO
 v.
 THE KING,
 BAGULEY, J.

must, of course, be remembered that these decisions completely rule out the discretion which is given by section 133 of the Evidence Act which says that a conviction is not illegal because it depends solely on the uncorroborated evidence of an approver.

With regard to the present appeal I am satisfied that the evidence of the approver Nga Sint coupled with the two confessions made by the co-accused are sufficient to justify the finding that the appellant Maung Myo did take part in this dacoity. He was armed at the time and the sentence is the minimum allowed by Law.

I therefore dismiss this appeal.

APPELLATE CIVIL.

Before Mr. Justice Mya Bu, and Mr. Justice Mackney.

KO PO MO AND ANOTHER

v.

MAUNG LU KHIN.*

Transfer of Property Act, s. 53A—Contract executed and possession given prior to amending Act coming into force—Suit filed after the amending Act in force—Applicability of section—Retrospective effect.

The provisions of s. 53A of the Transfer of Property Act have effect in a case where the contract was executed and the transferee had taken possession before the date the section came into operation (1st April 1930) provided the suit in which the section is set up as a defence was filed after it came into force. It is not the making of the contract that brings this provision of the Act into operation, but the filing of the suit by the transferor. The new enactment enables the defendant to set up a defence in certain circumstances, and in considering such circumstances it is the date of the suit that is relevant, and not the date of the agreement.

Durgapada v. N. N. Chaudhuri, I.L.R. 62 Cal. 492 ; *Pir Baksh v. Mahomed Tahar*, I.L.R. 58 Bom. 650 (P.C.); *Ramakrishna Jha v. Jainandan Jha*, I.L.R. 14 Pat. 672 ; *Suleman v. Patel*, 35 Bom. L.R. 722, referred to.

* Civil Second Appeal No. 196 of 1936 from the judgment of the District Court of Myaungmya in Civil Appeal No. 6 of 1936.

Kanjee Bros v. Pillai, I.L.R. 56 Mad. 169, dissented from.

The section is not retrospective in effect in the sense that it cannot be pleaded in a suit brought before the date the amending Act came into force.

Khan for the appellants.

K. C. Sanyal for the respondent.

MACKNEY, J.—In the Subdivisional Court of Maubin the plaintiff-respondent, Maung Lu Khin, sued the defendants-appellants Ko Po Mo and Ma Mo Thu, together with two other persons for possession of a certain piece of land. Maung Lu Khin composed his differences with the other defendants, and in this appeal we are not concerned with them.

The allegation in the plaint is that the plaintiff purchased the suit property, together with 14 head of cattle, from Ko Po Mo for Rs. 1,500 by a registered deed of sale dated the 20th July 1927, and that although he had repeatedly demanded possession of these properties, he had never succeeded in obtaining possession. The suit was filed on the 7th June, 1935. Ko Po Mo admitted that he had sold the properties as alleged in the plaint, but he claimed that on the 23rd July, 1927, the plaintiff and his father, U Maung Gyi, entered into an agreement with Ko Po Mo and Ma Mo Thu to re-sell the cattle and the suit land to them on payment of Rs. 1,500 within two years, and that it was further agreed that the defendants should remain in possession of the suit land, pay Government revenue therefor, and also pay interest to the plaintiff for the two years on Rs. 1,500 at the rate of Rs. 2-8 *per cent per mensem*. It was further alleged that it was in pursuance of the said agreement that the defendants were allowed to remain in possession of the properties. It is claimed that interest was paid to the plaintiff and that the revenue demands were met, and that on or about the 2nd April, 1929, the sum of Rs. 1,500 was paid to the plaintiff as

1937

KO PO MO
v.
MAUNG
LU KHIN.

1937
 Ko Po Mo
 v.
 MAUNG
 LU KHIN.
 MACEEY, J

the price of the properties. It was in virtue of this agreement that the defendants claim to have remained in possession of the land. Thus, the defendants relied on section 53A of the Transfer of Property Act.

The learned Subdivisional Judge framed certain issues in the suit, two of which were treated as preliminary issues. We need here refer to only one, issue No. 2 (c) :

“ If so (*i.e.*, if there were an agreement to re-sell as alleged in paragraph 6 of the written statement of defendant No. 1), is the deed of agreement marked 1 admissible in evidence ? ”

The learned Judge held that the document in question was in fact an agreement for redemption, and that that, together with the sale deed of the 20th July, 1927, had constituted a mortgage by conditional sale. He held, therefore, that the document marked 1 was not admissible in evidence as it was not registered. In consequence of this finding the defendants were entirely precluded from raising the defence which they wished to raise under section 53A of the Transfer of Property Act, and ultimately the suit was decreed against them. On appeal to the District Court of Myaungmya, the learned District Judge agreed that in the circumstances of the case the two documents constituted a mortgage by conditional sale, and that as document No. 1 was unregistered it was not admissible in evidence. He further held that section 53A of the Transfer of Property Act, which was introduced by the Amending Act XX of 1929 and which came into force on the 1st April, 1930, had no retrospective effect.

Against these decisions the defendants-appellants have now appealed to this Court.

The deed of sale dated the 20th July, 1927, is purely and simply a deed of sale. It contains no reference to any other matter than the sale of the land by

Ko Po Mo to Ko Lu Khin. The document No. 1 is worded as follows :

“ On the 10th waning of *Wazo* 1289 B.E., corresponding to the 23rd July 1927, at Khattiya village, the vendors Ko Po Mo and Ma Mo Thu, residing at Talaing-Kayinzu village, say to the vendee U Maung Gyi and Maung Lu Khin, residing at Khattiya village, ‘ (We) have sold (to you) under a registered outright (sale-deed) for a price of Rs. 1,500 the two pieces of paddy and garden land, plants and trees and 14 head of bullocks and cows, mentioned below in a list. Please let us—the vendors—work and keep them. We will pay the annual revenue taxes in full satisfaction, will pay in full satisfaction also the amount of interest due on the cost price of Rs. 1,500 at the rate of 2-8 *per cent per mensem* once a year from the date hereof and also the cost price of Rs. 1,500 in full satisfaction within 2 years. If we are able to do so, you—the vendees—shall make a resale document, mutation of names and (re)convey the properties, aforesaid, and shall stand the office expenses also. If we default in paying in full satisfaction the revenue taxes or the amount of interest due once a year or the principal, the registered deed of sale and conveyance executed on 20-7-27 shall stand. Please take over and (we) will make over (the properties) then.’ The vendees, agreeing to the said undertaking made by the vendors, sign personally hereunder on this deed of agreement under which they (vendees) undertake to return (the properties) under a registered (re)sale-deed, if (the vendors) do not break the undertaking made above.”

It is signed by U Maung Gyi and Maung Lu Khin.

I am unable to agree with the learned Judges of the lower Courts that these two transactions together constituted a mortgage by conditional sale. Without a debt there can be no mortgage. There is nothing to show in either of the documents that Ko Po Mo and Ma Mo Thu were in any sense of the word debtors of Maung Lu Khin and U Maung Gyi. The agreement to transfer the land to Ko Po Mo and Ma Mo Thu on their fulfilling certain requirements was not in any way a condition of their sale of the land to Maung Lu Khin. The two transactions were, so far as appears from the deeds and the circumstances of the case, entirely

1937

Ko Po Mo
v.MAUNG
LU KHIN.

MACKNEY, J.

1937

KO PO MO

T.

MAUNG
LU KHIN.

MACKNEY, J.

independent. In fact, the plaintiff-respondent, in answer to the question, "Since your purchase why up to date have you not taken possession of the suit land but have allowed the defendant to remain in possession?" replied, "Because there was a verbal agreement to re-sell the land to him if he could pay Rs. 1,500." Neither party alleges that the transaction was a mortgage. I hold, therefore that it was not a mortgage by conditional sale, and that exhibit 1 is merely an agreement to sell the land and certain cattle.

The question then arises whether the appellants are entitled to make use of the provisions of section 53A of the Transfer of Property Act. Section 53A of the Transfer of Property Act reads as follows :

" Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract :

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

The force of the section is contained in the words

" the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract."

1937
KO PO MO
 v.
MAUNG
LU KHIN.
 MACKNEY, J.

Now, it is only in a Court of law by a suit that the transferor can enforce his rights to possession. The section therefore comes into operation only when a suit is filed by the transferor to enforce such rights, and it is provided that if the transferee can show that he has complied with the conditions laid down in the section, the transferor shall not succeed in his suit save as is provided by the terms of the contract. It is not the making of the contract that brings this provision of the Act into operation, but the filing of the suit, and in considering whether this section has retrospective effect or not it seems to me that we have to consider that question only in reference to the circumstances which bring the provisions thereof into effect, that is to say, to the filing of the suit.

The right,—if it can so be called,—not to be troubled with a particular defence and the right to bring such defence accrue only when the suit is brought. Consequently, if it were to be held that section 53A of the Transfer of Property Act had retrospective effect, this would mean that a defendant could raise the defence therein provided even where a suit had been brought before the bringing into force of Act XX of 1929, *i.e.*, before the 1st April, 1930, and was pending at the date of its enforcement. To do so would clearly be to contravene the principle that, in the absence of definite provisions to that effect, no new enactment shall interfere with rights which have accrued to parties. This matter was referred to by their

1937

KO PO MO

v.

MAUNG

LU KHIN.

MACKNEY, J.

Lordships of the Privy Council in *Pir Baksh v. Mahomed Tahar* (1). In this case it was held that in a suit for ejectment instituted in 1921 it is not a relevant defence that the plaintiff has agreed to sell the land in suit to the defendant, even if it is alleged that the defendant is in possession under the contract. Their Lordships remarked,

“As the law stood at the date of this case, it is, in their Lordships' opinion, no relevant defence to an action by a landowner for ejectment to plead that the plaintiff has agreed to sell to the defendant the land of which the plaintiff seeks to obtain possession The English doctrine of part performance, as Lord Russell of Killowen explained in *Ariff v. Jadunath Majumdar* (2), is not available in India by way of defence to an action of ejectment (apart from the subsequent statutory alteration of the law mentioned hereafter) It remains to take note of the fact that since the present suit was brought the law in India has been altered by the Transfer of Property (Amendment) Act XX of 1929, which has inserted a new section 53A in the principal Act, whereby a defendant in an action of ejectment may, in certain circumstances, effectively plead possession under an unregistered contract of sale in defence to the action. Their Lordships' views, as expressed in the present case, must therefore be understood to be referable to the state of the law before this partial importation into India of the English equitable doctrine of part performance.”

Now, it is clear that their Lordships were refusing to apply section 53A of the Transfer of Property Act, not because the agreement in question was entered into before the new Act came into force (although in fact this was the case), but because at the time that the suit was instituted the new Act was not in force. This case was referred to in *Durgapada Karmakar v. Nrishinghachandra Nandi Chaudhuri* (3), where it was held that even if it be assumed that by necessary

(1) [1934] I.L.R. 58, Bom. 650. (2) [1931] I.L.R. 58 Cal. 1235.

(3) [1934] I.L.R. 62 Cal. 492.

intendment section 53A is to be applied to transactions completed before the 1st April, 1930, the provisions of that section cannot be applied to pending actions.

Certain cases have been cited before us in which it has been held that section 53A of the Transfer of Property Act does not have retrospective effect in the sense that it shall not affect the terms and incidents of transfers of property made prior to 1st April, 1930. [See for instance, *Kanjee and Mooljee Brothers v. T. Shanmugam Pillai* (1).] But with great respect to the learned Judges who decided this and the other cases, it does not appear to me that sufficient consideration has been given to the wording and effect of section 53A of the Transfer of Property Act. It has in effect been assumed that to apply section 53A of the Transfer of Property Act in cases where the contract had been entered into prior to the 1st April, 1930, would be to give this section retrospective effect. For the reasons which I have already set out I cannot, with the greatest respect, agree to such an interpretation. The new enactment affects the defence which litigants may bring in certain circumstances in answer to a suit brought against them, and in considering whether they are entitled to bring such a defence the date on which the agreement or contract was entered into is irrelevant. What is relevant is the date on which the suit was filed.

On this view it is not necessary to refer to the argument of the learned counsel for the appellants that as section 16 of the Amending Act XX of 1929 which adds section 53A to the Transfer of Property Act is not mentioned in section 63 of the said Act (XX of 1929) which lays down that certain amendments made by that Act shall not be deemed to affect the terms or incidents of any transfer of property before April, 1930, therefore, by implication section 53A can be said to

1937

Ko Po Mo

S.

MAUNG
LU KHIN.

MACKNEY, J.

1937

K^O P^O M^O

v.

MAUNG
LU KHIN.

MACKNEY, J.

have retrospective effect. [See *Suleman Haji Ahmed Umar v. P. N. Patell* (1).]

I consider that the reasons which I have set forth for holding that in this case section 53A of the Transfer of Property Act is applicable would also justify our holding that section 49 of the Indian Registration Act of 1908, as amended by Act XXI of 1929, is applicable. In the present case, however, the document in question, being only an agreement to sell, was not in any case one which need be registered. I therefore am of the opinion that in this case the defendants-appellants were entitled to rely on the provisions of section 53A of the Transfer of Property Act, and that they must be allowed to prove their allegations in regard to their being in possession of the suit properties in virtue of an agreement to sell, the conditions of which have been fulfilled. Therefore, as the case has in reality been decided against the defendants on a preliminary point, inasmuch as they were, in virtue of the decision thereon, precluded from raising the defence which they wished to raise, it will be necessary, on setting aside the decrees of the District Court of Myaungmya and the Subdivisional Court of Maubin, to remand the case to the Subdivisional Court of Maubin with the direction that all the issues framed in the case shall be tried and the suit determined thereon. The parties will, of course, be permitted to adduce such further evidence as they may find necessary. The costs of this appeal shall abide the final decision in the suit. The appellants are entitled, under section 13 of the Court-fees Act, to a refund of the court-fees paid on their appeal. A certificate to that effect shall be issued.

MYA BU, J.—I concur in the conclusions arrived at and the order proposed by my learned brother.

The allegations made in the written statement, if established, would bring the case within the purview of section 53A of the Transfer of Property Act. These allegations are to the effect that the plaintiff had, on the 23rd July, 1927, contracted, by writing, to transfer for consideration the immoveable property which is the subject-matter of the suit, and that the defendant, having performed his part of the contract by payment of the consideration by April, 1929, continued in possession of the property in part performance of the contract.

Section 53A of the Transfer of Property Act is a new section which was inserted by the Transfer of Property (Amendment) Act XX of 1929, and came into force on the 1st April, 1930. Thus, this case involves an interesting point of law, about which there has been some conflict of judicial opinion, e.g., *Kanjeo and Mooljee Brothers v. T. Shanmugam Pillai* (1) and *Suleman Haji Ahmed Umar v. P. N. Patell* (2). In the former of these cases it is held that the section is applicable only to transfers of immoveable property made after the 1st April, 1930, while in the latter it is held that the section is retrospective as well as prospective. The words of the section, however, bear no indication of any distinction between transfers made before and those made after the date of the commencement of its operation. What the section purports to do is to debar the transferor and any person claiming under him from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract. It is no doubt an importation, in a somewhat restricted form, of the equitable doctrine of part performance explained in the case of

1937

Ko Po Mo

2,

MAUNG
LU KHIN.

MYA BU, J.

(1) (1932) I.L.R. 56 Mad. 169.

(2) 35 Bom. L.R. 722.

1937

Ko Po Mo
v.
MAUNG
LU KHON.
MYA BU, J.

Maddison v. Alderson (1) and applied by the Privy Council in *Mahomed Musav. Aghore Kumar Ganguli* (2).

In *Pir Baksh v. Mahomed Tahar* (3), arising out of a suit for ejectment instituted in 1921, it was pointed out by their Lordships of the Privy Council that as the law stood at the date of that case it was not a relevant defence to an action for ejectment to plead that the plaintiff had agreed to sell to the defendant the land of which the plaintiff seeks to obtain possession, but observed that since that suit was brought the law in India had been altered by the insertion of a new section (53A), whereby a defendant in an action of ejectment might in certain circumstances effectively plead possession under an unregistered contract of sale in defence to the action. In that case, as pointed out by my learned brother, their Lordships were refusing to apply section 53A of the Transfer of Property Act, not by reason of the fact that the agreement in question was entered into before that section came into force, but because at the time that the suit was instituted the section was not in force. Accordingly, in *Ramakrishna Jha v. Jainandan Jha* (4) a Full Bench of the Patna High Court ruled that section 53A had no retrospective effect, apparently only in the sense that the section does not affect any suit or proceeding instituted before the 1st day of April, 1930.

The language of the section is not only plain but admits of but one meaning, and that is the meaning which my learned brother has put upon it. The section bars a suit or action instituted since the commencement of its operation in the circumstances detailed therein. It matters not whether the transaction took place before or since, but the suit must be one filed since it came into force.

(1) (1883) 8 App. Cas. 467.

(2) (1914) 42 I.A. 1.

(3) (1934) I.L.R. 58 Bom. 650.

(4) (1935) I.L.R. 14 Pat. 672.