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of the plaintiff by Parawwa could not possibly have the effect of reviving the coparcenary between Gurbasappa and Irappa which had terminated by the partition; nor could it give the plaintiff, the adopted son, any right to divest either of them of the property which they had taken at the partition. That property ceased to be joint family property from the date of the partition. The facts in this case are, in our opinion, exactly similar to the facts in *Shivappa Jayappa v. Yagappa Shiddappa*⁽¹⁾ and the decision in that case is binding on us. On this view of the case, although Parawwa was legally entitled to adopt, and the plaintiff's adoption is therefore valid, the plaintiff would by the adoption acquire no right to a share in the joint family property which had already been partitioned two months before his adoption. His suit must fail. The appeal will therefore be allowed and the plaintiff's suit dismissed. Appellants Nos. 1 and 2 will get their costs throughout from the first respondent, plaintiff.

Under O. XXXIII, r. 11, of the Civil Procedure Code, we direct that the plaintiff should pay the Court fees in the suit.

Appeal allowed.

Y. V. D.

⁽¹⁾ (1938) F. A. No. 247 of 1935, decided by N. J. Wadia and Sen JJ., on December 16, 1938 (Unrep.).

APPELLATE CIVIL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice Sen.

RUSTOMJI DOSSABHAI BILLIMORIA AND ANOTHER (ORIGINAL DEFENDANTS),
 APPELLANTS v. BAI MOTI, WIDOW OF GANGADAS NAGINDAS (ORIGINAL
 PLAINTIFF), RESPONDENT.*

*Transfer of Property Act (IV of 1882, as amended by Act XX of 1929), s. 53A—
 Section 53A is retrospective in effect.*

Section 53A of the Transfer of Property Act, 1882, as amended by Act XX of 1929, which came into force from April 1, 1930, is retrospective in effect and was intended

* Second Appeal No. 166 of 1938.

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to apply and does apply to transactions which took place before April 1, 1930, where the suit was filed after that date.

Tukaram Ganpatrao v. Atmaram Vinayak,⁽¹⁾ *Wakefield v. Kumar Rani Sayeeda Khatun*,⁽²⁾ *Ashutosh v. Nalinakshya*,⁽³⁾ *Kanjee and Mooljee Bros. v. Shanmugam Pillai*,⁽⁴⁾ *Suleman v. Patell*,⁽⁵⁾ and *Chhaganlal v. Chunilal*,⁽⁶⁾ referred to.

SECOND APPEAL against the decision of M. B. Honavar, Assistant Judge at Thana, reversing the decree passed by D. B. Katpitia, Second Class Subordinate Judge at Andheri.

Suit to recover possession.

The lands in suit originally belonged to plaintiff's husband. He died in 1921 leaving a son Vasant. Vasant died on February 8, 1926, leaving him surviving his mother, Bai Moti (plaintiff). In February and March 1926, Bai Moti executed four unregistered agreements of sale in favour of Dossabhoy (defendant's father), whereby she agreed to convey the suit lands to Dossabhoy and put him in possession after receipt of part of the consideration amount.

On June 20, 1935, Bai Moti filed a suit to recover possession of the plaint lands, alleging that the deceased Dossabhoy and defendant No. 1 took wrongful possession of the same in 1926. She pleaded that the defendants could not rely on the agreements of sale as they were not registered and could not be given in evidence by reason of s. 49 of the Indian Registration Act, 1908.

The defendants contended that they were entitled to continue in possession, by virtue of the agreements of sale, under s. 53A of the Transfer of Property Act, 1882.

The Subordinate Judge held that s. 53A was applicable, i.e., the defendants were entitled to claim the benefit of that section and rely on the agreements of sale though they were not registered; that by virtue of proviso to s. 49 of the Indian Registration Act, the agreements were

⁽¹⁾ [1939] Bom. 71.

⁽²⁾ (1936) 15 Pat. 736.

⁽³⁾ [1937] A.I.R. Cal. 467.

⁽⁴⁾ (1932) 56 Mad. 169.

⁽⁵⁾ (1933) 35 Bom. L. R. 722.

⁽⁶⁾ (1933) 36 Bom. L. R. 277.

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admissible in evidence and that all the requirements of s. 53A had been complied with by the defendants who were entitled to the benefits of its provisions. The suit was, therefore, dismissed.

On appeal, the Assistant Judge, relying on *Kanjeo and Mooljee Bros. v. Shanmugam Pillai*, 56 Mad. 169, and the *ratio decidendi* in *Chhaganlal v. Chunilal*, 36 Bom.L.R. 277, held that s. 53A had no retrospective effect and that s. 63 of the amending Act XX of 1929 had limited its use to rights acquired or liabilities incurred after April 1, 1930. He, therefore, held that the defendants could not rely on s. 53A and that the sale deeds not having been registered, no title passed to them. The appeal was, therefore, allowed and it was decreed that the plaintiff do recover possession of the plaint lands from the defendants.

The defendants preferred a second appeal to the High Court.

R. W. Desai, with *R. R. Desai*, for the appellants.

S. T. Desai, with *R. M. Gandhi*, for the respondent.

BEAUMONT C. J. This is a second appeal from the Assistant Judge of Thana. It raises a point of law which has given rise to a certain amount of difference of opinion amongst the High Courts in India, the question being whether s. 53A of the Transfer of Property Act, which came into operation on April 1, 1930, applies to transactions which took place before that date.

In the present case the plaintiff transferred to the defendant certain immoveable property in February and March, 1926, and the purchaser was let into possession, but the documents of transfer were not registered. This suit was filed on June 20, 1935, and by it the plaintiff, i.e. the vendor, seeks to recover possession of the property, her case being that the defendant cannot rely on the transfers to himself because they are not registered and cannot be given in evidence by reason of s. 49 of the Indian Registration Act. The answer of the defendant is that he is

entitled to give his transfers in evidence under s. 53A of the Transfer of Property Act. The learned trial Judge held that the defendant was entitled to rely on s. 53A of the Transfer of Property Act, but in appeal the learned Assistant Judge held that s. 53A could not operate upon a transaction which took place before that section was introduced by the legislature. It is conceded on this appeal that the transfers in question are such as to fall within the operation of s. 53A, if applicable and the only question is whether the section has any retrospective effect.

There have been a lot of cases in India on the question and, I think, the preponderating view of most of the High Courts, including this High Court, is that s. 53A does apply to a transaction which took place before April 1, 1930, provided that the suit in which the question arises was commenced after April 1, 1930. But curiously enough none of the cases in which that view has been accepted deal with one argument which Mr. S. T. Desai has urged for the respondent, which is, I am disposed to think, the strongest argument in his favour, and therefore I will deal with the question more fully than otherwise I might have thought if necessary to do.

Section 53A of the Transfer of Property Act came to be enacted in these circumstances:—There were cases in India in which the doctrine of part performance, which is a doctrine invented by Courts of Equity in England in order to mitigate hardships resulting from the application of the Statute of Frauds which requires certain contracts to be in writing, had been applied in India in order to mitigate what was considered the hardship resulting from a strict application of the Indian Registration Act. But doubts existed as to whether those cases were rightly decided and ultimately in January 1931 in *Ariff v. Jadunath Majumdar*⁽¹⁾ the Privy Council held that those cases were wrongly decided, and that there was no justification for introducing the English

⁽¹⁾ (1931) L. R. 58 I. A. 91, s. c. 58 Cal. 1235, s. c. 33 Bom. L. R. 913, p. c.

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equitable doctrine of part performance into India for the purpose of defeating the plain terms of an Indian statute. In that atmosphere the Legislature passed as from April 1, 1930, s. 53A of the Transfer of Property Act, the effect of which is to introduce in certain cases the doctrine of part performance as an answer to non-registration under the Indian Registration Act. 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 s. 53A without any pre-conceived idea that in all probability the legislature did not intend it to have any retrospective operation.

. Now, what the section provides is that "where any person contracts to transfer for consideration any immoveable property" and the transfer contains the provisions specified in the section, "then, notwithstanding that the contract, though required to be registered, has not been registered, 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". The section in the opening words "where any person contracts" uses the present tense. It does not say "shall have contracted" or "shall hereafter contract", and I think the use of the present tense denotes that the question whether the section is to operate or not should be answered at the time when it arises, that is when the suit is filed. The section in effect provides that where there is a contract of

a certain nature, then certain results are to follow. That seems to me to be the natural meaning of the language, and that is the meaning which has been accepted by this Court in *Tukaram Ganpatrao v. Atmaram Vinayak*⁽¹⁾ by the High Court of Patna in *Wakefield v. Kumar Rani Sayeeda Khatun*,⁽²⁾ and by the High Court of Calcutta in *Ashutosh v. Nalinakshya*,⁽³⁾ to mention only some of the cases. The High Court of Madras in *Kanjeo and Mooljee Bros. v. Shanmugam Pillai*⁽⁴⁾ has taken a different view, and has held that s. 53A in its terms has no retrospective effect. I am unable to agree with that view. I prefer the view taken by the other High Courts.

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But the matter does not rest there. Reliance is placed on s. 63 of Act XX of 1929, which is the Act, by which the Transfer of Property Act was amended. The addition to the Transfer of Property Act of s. 53A was introduced by s. 16 of the amending Act. Section 63 of the amending Act provides in effect that nothing in any of the sections enumerated shall be deemed in any way to affect transactions which took place before April 1, 1930. Now; s. 16 is not amongst the sections enumerated, but s. 63 (d) deals with the sections which are not so enumerated and provides 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, 1930, 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.”

It seems to me that that section, though not very happily worded, amounts to this that in the case of the enumerated sections; which do not include s. 16, their provisions have no retrospective effect and do not apply to any transaction which took place before April 1, 1930; and the provisions of the other sections of the Act, which include s. 16, do not

⁽¹⁾ [1939] Bom. 71.

⁽²⁾ (1936) 15 Pat. 786.

⁽³⁾ [1937] A.I.B. Cal. 467.

⁽⁴⁾ (1932) 56 Mad. 169.

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affect anything which took place before April 1, 1930, in a suit pending in a Court on that date, and I think the final words of sub-s. (d) are merely consequential and enact positively that remedies and proceedings which have been saved by the earlier part of the section can be enforced as if the section had not been passed.

It was held by this Court in *Suleman v. Patell*,⁽¹⁾ and the view has been accepted by other High Courts, that the omission from s. 63 of s. 16 amongst the enumerated sections is a clear indication of the intention of the legislature that that section should apply in the case of transactions which took place before April 1, 1930, and I think that there is a great deal of force in that contention.

The learned Assistant Judge relied on a judgment of Mr. Justice Tyabji in *Chhaganlal v. Chumilal*⁽²⁾ in which he analyses the terms of s. 63. But in that case the suit had been filed before April 1, 1930, so that the question with which we have to deal did not arise. There is no doubt that s. 53A would not apply to a suit filed before the date when the section came into operation. It seems to me that so far as s. 63 is concerned it does not in terms cover this case; but it does undoubtedly indicate that the legislature intended s. 53A to apply to transactions which took place before April 1, 1930, where the suit was filed after that date.

But then we have to consider the effect of s. 15 of Act XXI of 1929, which deals with the Indian Registration Act, and I do not find that that section has been referred to in any of the cases, except the Madras case which I have mentioned. As I have pointed out s. 53A 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 Indian Registration Act, it seems to me clear that s. 53A would have overridden s. 49 of the Indian Registration Act in

⁽¹⁾(1933) 35 Bom. L. R. 722.

⁽²⁾ (1933) 36 Bom. L. R. 277.

respect of contracts falling within the former section. But, I suppose, from excess of caution, the legislature thought it desirable to amend s. 49, and accordingly a proviso was added to that section as from April 1, 1930, which so far as material enacts that an unregistered document affecting immoveable property and required by this Act to be registered may be received as evidence of part performance of a contract for the purposes of s. 53A of the Transfer of Property Act, 1882.

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Now, that proviso was added by s. 10 of Act XXI of 1929, and s. 15 of that Act is expressed in terms almost identical with those of s. 63 of Act XX, but it applies to the whole Act, and not merely to enumerated sections. It provides—

“ Save as provided in sub-s. (2) nothing in this Act shall be deemed to affect—

(a) the terms or incidents of any transfer or dispositions 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.”

It is argued that as the transfers in this case were made before April 1, 1930, and had not been registered, they could not be relied upon nor used in evidence, and that the amendment of s. 49 of the Indian 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 s. 53A of the Transfer of Property 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 s. 49 of the Indian Registration Act was only passed *ex abundante cautela* and was not necessary, and the fact that that amendment was

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not made retrospective cannot, I think, have any great weight in considering whether s. 53A of the Transfer of Property Act is made retrospective. For the reasons which I have already given which are based, first, on the language of s. 53A, and, secondly, on the omission of s. 16 from the enumerated sections in s. 63 of Act XX of 1929, I am of opinion that s. 53A was intended to apply and does apply to transactions which took place before April 1, 1930. In my opinion, therefore, the decision of the trial Judge was right, and this appeal must be allowed and the plaintiff's suit must be dismissed with costs throughout.

SEN J. I agree.

Appeal allowed.

J. G. R.

ORIGINAL CIVIL.

SPECIAL BENCH.

*Before Sir John Beaumont, Chief Justice, Mr. Justice Broomfield
and Mr. Justice Kanau.*

SIR BYRAMJEE JEEJEEBHOY, KT., PLAINTIFF v. THE PROVINCE OF
BOMBAY AND ANOTHER, DEFENDANTS.*

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Government of India Act, 1935 (26 Geo. V, ch. II), ss. 100, 226 and Sch. VII—Central legislative list—Items 54 and 55—Provincial legislative list—Item 42—Bombay Finance Act (II of 1932), ss. 20 to 29—Whether ultra vires the provincial legislature—Urban, immovable property tax based on ratable value—Whether a tax on lands and buildings or a tax on income or capital value—Power of Municipality to collect tax—High Court—Jurisdiction to hear suit concerning revenue—Construction of Statute—Legislative practice.

If a tax is not legal its imposition does not concern the revenue and s. 226 of the Government of India Act does not take away the jurisdiction of the High Court in a suit challenging the legality of the tax.

*O. C. J. Suit No. 1056 of 1939.