



## S.53A, TRANSFER OF PROPERTY ACT - A SWORD TO ITS OWN SHIELD?

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### ABSTRACT

This paper primarily focuses on the doctrine of part performance and the recent trends regarding protection under S.53A of The Transfer of Property Act, 1882 in India with the question being asked that *“has the protection of S.53A lost its importance after the enactment of Registration and Other Related Laws (Amendment) Act, 2001 (Act No. 48 of 2001) w.e.f. 24-9-2001?”* After the enactment of Act No. 48 of 2001 (w.e.f. 24-9-2001) S. 53A of the Act was amended and the words *“the contract, though required to be registered, has not been registered, or,”* were omitted from the said Section making the registration of deed transfer of an immovable property compulsory. The registration of sale deed was made a must after the amendment. Hence, if there was any other grievance or defect except registration, the help of the doctrine of part-performance and the protection under S.53A of the Act could be taken. However, a document had to be registered if it was made compulsorily registrable under S. 17 of the Registration Act, 1908 or under the Transfer of Property Act, 1882. Some scholars have suggested that after this amendment, the protection of S.53A has lost the importance it had prior to the amendment. The legislative intent behind S.53A is that it is seeking to protect the transferee by allowing him to retain the possession of the property, against the right

of the transferors, who after the execution or completion of an incomplete instrument of transfer has failed to complete it in the manner specified by Law, without any fault of the transferee.<sup>1</sup> Prior to the amendment, the doctrine of part performance provided a safeguard for the transferee against the transferor in retaining the possession of the property in circumstances where there was no fault on his part even when the sale deed was not registered. After the amendment, if the contract of sale is not registered then the Section and with it the safeguard does not have any application whatsoever. This adds another obstacle in getting protection under S.53A as there are already many necessary conditions for the application of S.53A. This paper analyzes the applicability of S.53A of the Act pre-amendment and post-amendment. The paper tries to find out if the amendment has proved to be a hurdle in seeking protection of S.53A, making it lose its importance that it used to hold before the amendment was enacted.

### THE DOCTRINE OF PART PERFORMANCE

The doctrine of part performance was inserted in the Transfer of Property Act, 1882 (from hereby referred to as the TPA, 1882) via Section 53A by the Transfer of Property (Amendment) Act, XX of 1929 and was retrospective in nature. It came into force with effect from April 1, 1930. Prior to this amendment, the application of the English equity of part-performance was not very uniform and certainly not certain. There was a difference in opinion with respect to the application of this Section. In some cases, the doctrine of part performance was applied

<sup>1</sup> Poonam Pradhan Saxena, *Property Law* (2<sup>nd</sup> Edn., 2013, LexisNexis) p.253



while in other cases, this was not the case. For example, in *Mahomed Musa v. Aghore Kumar*,<sup>2</sup> the privy council had applied part-performance as explained in *Maddison v. Alderson*<sup>3</sup> and had held that it could be applied to Indian cases. However, in *Ariff v. Jadunath*,<sup>4</sup> the privy council did not apply the doctrine of part performance. This Section is based mainly on the principle of equity and the legal maxim “*qui aequitatem quaereret, aequitatem agendum est.*” meaning “*He who seeks equity must do equity*”. This maxim’s definition with context to S.53A of the TPA, 1882 is that it requires the one who is seeking the cancellation of an instrument to restore to the defendant the position occupied by the latter before the transaction sought to be nullified.<sup>5</sup>

According to S.53A where any person takes possession of the immovable property in part performance of a written contract, and he has already performed or is willing to perform his part of the contract would mean that the transferor or any person claiming under him would be debarred from enforcing against the transferee (or any person claiming under him) any right in respect of such transferred property other than that provided by the terms of the contract. The Act of part performance must be an act done in the performance of the contract as distinct from those acts which are introductory or ancillary to such performance or merely accommodating and as such referable to some other arrangement.<sup>6</sup> The principle of equity and part performance is

developed under English Law. However, G.M. Sen, in his journal article, points out that the scope of the provisions of section 53A is very much narrower than the corresponding principle of part performance of the English Law.<sup>7</sup>

### CONCEPT OF PART PERFORMANCE UNDER THE ENGLISH LAW VIS-À-VIS RULE GIVEN UNDER S.53A

The Juristic concept of ‘part performance’ came to us from English Law. It was developed by the Court of Equity under the equity jurisdiction. The two significant cases that helped develop the doctrine of part performance were *Maddison v. Alderson* (as mentioned above) and *Walsh v. Lansdale*.<sup>8</sup> However, there are key differences between the English Law of part performance and S.53A of the TPA, 1882. The English Law follows a more liberal approach while applying the doctrine of part performance as compared to the rule contained in S.53A. For example, the first key difference between the English doctrine of part performance and S.53A is that the English doctrine of part performance is also applied to oral contracts. In contrast, S.53A only applies to contract those which are in writing and signed by the transferor. The second key difference is that under the English Law both the transferor and the transferee can claim as a plaintiff that the contract be specifically performed, however, as per S.53A only the transferee can invoke this Section, and the transferor or any person

<sup>2</sup> AIR 1914 PC 27 (30): 42 IA 1: ILR 42 Cal 801: 28 IC 930

<sup>3</sup> 8 App Cas 467.

<sup>4</sup> AIR 1929 PC 101

<sup>5</sup> *Ballentine’s Law Dictionary*, Anderson, W.S., 1998

<sup>6</sup> *Sanjiva Row, Transfer of Property Act (9<sup>th</sup> Edn., Vol. I, Universal Law Publishing), p.721*

<sup>7</sup> Sen, G. M. “THE DOCTRINE OF PART PERFORMANCE IN INDIA.” *Journal of the Indian Law Institute*, vol. 11, no. 2, 1969, pp. 224–229. JSTOR, [www.jstor.org/stable/43950022](http://www.jstor.org/stable/43950022). Accessed 12 May 2020.

<sup>8</sup> (1882) 21 Ch D 9.



claiming under him is debarred from enforcing this Section against the transferee. The third key difference is that under English Law the part performance of a contract gives rise only to equity and not to a legal right, in contrast under S.53A, the part-performance gives rise to a statutory right of defence.<sup>9</sup>

### ESSENTIAL CONDITIONS FOR THE APPLICABILITY OF S.53A

In *Kamalabai Laxman Pathak v. Onkar Parsharam Patil*,<sup>10</sup> The Hon'ble Bombay High Court emphasized on the key ingredients of S.53A placing reliance upon the case of *Damodaran v. Shekharan*<sup>11</sup> which laid down the five requirements of S.53A in a layman's language. The ingredients required for the applicability of this Section are:-

- (i) There must be a contract to transfer for consideration any immovable property;
- (ii) The contract must be in writing, signed by the transferor, or by someone on his behalf;
- (iii) The transferee must, in part performance of the contract, take possession of the property or if the transferee is already in possession of the said property then he must continue to be in possession in part performance of the contract;
- (iv) The transferee must have done some act in furtherance of the contract;
- (v) The transferee must have performed, or be willing to perform, his part of the contract.

In order to get protection under S.53A of the TPA, 1882 after one has proved its

applicability, one has to satisfy three aspects, these are:-

- a) There was an agreement for the sale of immovable property in his/her favour,
- b) He/she was put in possession in part performance of the agreement for sale, and
- c) He/she has performed or is ready and willing to perform his/her part of the contract under the agreement.<sup>12</sup>

The most crucial aspect for claiming protection under S.53A is the third and the last aspect. The transferee has to satisfy and prove that he/she had performed or was ready and willing to perform his part of the contract under the agreement. If the transferee does not prove that he did this and is unable to satisfy the Hon'ble court the same, the provision of the doctrine of part performance under S.53A would not be attracted, as observed in *Sohan Singh v. Gulzari*<sup>13</sup>. On the other hand, If *prima facie* all the ingredients required under S.53A are present, then the transferee would be entitled to enforce his rights under this provision.<sup>14</sup>

### S.53A OF THE TPA, 1882 AS A PROTECTIVE SHIELD

S.53A is generally used as a defence and as a protection shield by the transferee in order to protect their possession of the property. It can only be availed as a defence, the transferee cannot take the benefit of this Section and claim possession, nor it confers a right on the basis of which the transferee can claim rights against the transferor.<sup>15</sup> The transferee cannot make an independent claim, i.e., he cannot

<sup>9</sup> *Ram Lal v. Bibi Zohrai*, AIR 1939 Pat 296 at 303: 182 IC 18

<sup>10</sup> AIR 1995 Bom 113, (1994) 96 BOMLR 641

<sup>11</sup> AIR 1993 Ker 242

<sup>12</sup> *Lakshmi v. Karupathal*, AIR 2011 Mad 192 (195).

<sup>13</sup> AIR 1997 HP 12: (1996) 2 Sim LC 95.

<sup>14</sup> *Balaraja v. Syed Masood Rowther*, 1999 AIHC 112 (Mad)

<sup>15</sup> *Delhi Motor Co. v. U.A. Basurkar*, AIR 1968 SC 794: (1968) 2 SCA 22.



ask for a title on the basis that all the conditions laid down in the Section are fulfilled. The right, which S.53A confers, is available only as a defence to protect possession against the transferor, it imposes a bar on the transferor from enforcing any right other than that expressly provided under the contract (not the case under English Law). This right can only be relied upon as a shield and not a sword, but the protection is available to the transferee both as a plaintiff and as a defendant so long as he uses it as a shield.<sup>16</sup> Thus, it is well settled that S.53A provides for only a 'defence'.

### THE REGISTRATION AND OTHER RELATED LAWS (AMENDMENT) ACT, 2001 (ACT NO.48 OF 2001)

The Registration and Other Related Laws (Amendment) Act, 2001 (Act No.48 of 2001) w.e.f 24-9-2001 amended S.53A of the TPA, 1882 along with other sections of complementary legislations like the Registration Act, 1908 and the Indian Stamp Act, 1899. After the enactment of this amendment, the words "*the contract, though required to be registered, has not been registered, or,*" were omitted from S.53A. This has had a significant legal effect with regard to the protection granted under S.53A. The question that needs to be dealt with and answered is that has the protection of S.53A lost the importance and value it held prior to the enactment of the above-mentioned amendment act (48 of 2001). In the quest of answering this question, it is necessary to delve into the other supplementary legislations to the Transfer of Property Act, 1882. Along with amending S.53A of the TPA, 1882, Act (48 of 2001) also amended

S.49 and S.17 of the Registration Act. It also inserted Item 23A in the schedule I of the Stamp Act requiring 90% of the stamp duty as a conveyance on the contracts for the transfer of immovable property in the nature of part performance under S.53A of the TPA, 1882.

S.49 of the Registration Act talks about "*Effect of non-registration of document required to be registered*", the old, unamended Section is given below:-

*S.49 effect of non-registration of document required to be registered. - No document required by Section 17 [or by any provision of the Transfer of Property Act, 1882 (4 of 1882)], to be registered shall -*

*(a) affect any immovable property comprised therein, or*

*(b) confer any power to adopt, or*  
*(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered:*

*[Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (3 of 1877), or as evidence of part performance of a contract for the purposes of Section 53A of the Transfer of Property Act, 1882, or as evidence of any collateral transaction not required to be affected by registered instrument.]*

The Registration and Other Related Laws (Amendment) Act, 2001 amended S.49 of the Registration Act and the words "*or as evidence of part performance of a contract*

<sup>16</sup> V. Krishnaiah v. Narsimhareddy, AIR 1976 AP 395 (398): (1976) 2 APLJ (HC) 16.



for the purposes of Section 53A of the *Transfer of Property Act, 1882*” (underlined above) were omitted.

Perhaps, the most important amendment came in S.17 of the Registration Act, the amendment made was that it inserted subsection 1(A) which stated that *“the documents containing contract to transfer for consideration, any immovable property for the purpose of Section 53A of Transfer of Property Act, 1882 (4 of 1882) shall be registered if they have been executed on or after the commencement of the Registration and other Related Laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement then, they shall have no effect for the purposes of the said section 53A.”*

#### **POSITION OF LAW AFTER THE AMENDMENT ACT NO. 48 OF 2001**

The legal effect that the above-mentioned amendments had was that now a purchaser of a transferee could not protect the possession he had over the property against the transferor via using S.53A as a shield if the agreement to sell was not registered and duly stamped. The present nature of S.53A is a lot different from what it was prior to the amendment. Prior to the amendment, even an unregistered and not stamped agreement to sell would have been admissible by the courts as evidence. However, reading the amended S.53A of the TPA, 1882 with the amended S.17 and S.49 of the Registration Act and even Item 23A in the schedule I of the Stamp Act, the position of law changes. After the 2001 amendment, now the agreement to sell has to be compulsorily registered and duly stamped (90% of the stamp duty) in order to

be admissible in court and for the transferee to be granted protection under S.53A. However, the 2001 amendment was not retrospective in nature, so the contracts or agreements to sell which had been made prior to the amendment were valid and admissible as far as S.53A was concerned.

#### **JUDGEMENTS UPHOLDING THE STATUTORY EFFECT OF THE AMENDMENT ACT**

Post the amendment there have been various judgements where the court has held the agreement to sell, or any contract which was unregistered or not stamped or both were held to be not admissible in the court of Law as evidence. For example in Para 70 of *Sukhdev Singh v. Income-tax Ward – 6(3), Mohali*<sup>17</sup> it was observed that:-

*“.....Now originally Section 53A of T.P. Act provided that even if “the contract though required to be registered has not been registered”, which means the right of defending the possession was available even if the contract was not registered but by Amendment Act 48 of 2001, the expression “though required to be registered has not been registered” has been omitted which means for the purpose of possession under S.53A of T.P. Act, the agreement referred is required to be registered.”*

Taking another example, The Hon’ble Delhi High Court in *Deewan Arora v. Tara Devi Sen*<sup>18</sup> in Para 6 of its judgement upheld the statutory effect of S.17 of the Registration Act and item 23A in the schedule I of the stamp act via which unregistered documents and documents whose 90% of stamp value was not paid would have no effect for the

<sup>17</sup> IT Appeal No. 1118 (Chd.) of 2011

<sup>18</sup> 163 (2009) DLT 520



purposes of the said section 53A. The court held that the agreement to sell in the particular case was unregistered and 'not so stamped' and that according to the above mentioned amended sections, the agreement to sell would be inadmissible. Praveen Kumar Jain in his Legal article '*Judgement in Deewan Arora v. Tara Devi Sen – A Critical Study*'<sup>19</sup> has very cleverly put that '*Section 17(1A) and item 23 A are exclusive twin pulling horses of its chariot.*'

earlier enjoyed. This proved to be a hurdle for many transferee's as not everyone is aware of the legislative changes that keep on happening, nor many poor people can go the extra mile and register and stamp their papers. This amendment act in question has diluted the defence of S.53A in which the transferee could protect his possession of the property. In my opinion, the Amendment Act no. 48 of 2001 has proven to be a sword to its own shield.

## CONCLUSION

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In light of the above discussion, it has to be said that the enactment of The Registration and Other Related Laws (Amendment) Act, 2001 (Act No.48 of 2001) proves to be a hurdle in seeking protection of S.53A making it lose the importance it held as a protective shield for the transferee prior to the amendment. Prior to the amendment, the position of the Law was more liberal and lenient. Even unregistered documents and documents not so duly stamped could be admissible as evidence in the courts of Law. This made it easier for the transferee to prove and verify their agreement to sell in order to grant protection under S.53A and use it as a protective shield of defence against the transferor asking for possession. In India, majority of the poor and even middle-class people are unaware & handicapped when it comes to paperwork. The Amendment Act of 2001 made it compulsory for a contract to be registered and duly stamped. S.49 was amended in such a way that it withdrew the exemption of registration of a contract filed in evidence under S.53A that the transferee's

<sup>19</sup> Jain, Praveen Kumar. "JUDGMENT IN DEEWAN ARORA v. TARA DEVI SEN – A CRITICAL STUDY." *Journal of the Indian Law Institute*, vol. 51, no. 4, 2009, pp. 531–540. JSTOR,

[www.jstor.org/stable/43953469](http://www.jstor.org/stable/43953469). Accessed 12 May 2020.