

Concept- Section 52, 53 and 53-A of TPA

SECTION – 52 “DOCTRINE OF LIS-PENDENS”

I. Meaning of Lis Pendens

‘Lis’ means an action or a suit and ‘Pendens’ means pending. Hence, Lis Pendens means during the pendency of a suit. And the doctrine of Lis Pendens may be defined as the jurisdiction or the control that courts have during the pendency of action over the property involved therein. The doctrine is based upon the ground that the decision of the court is not only pending upon the parties to the suit but also on those who derive the title during the pendency of the suit.

The term ‘suit’ indicates a legal action or proceedings initiated by a person invoking the judicial mechanism set up by the state for a peaceful relief of his grievance.

This doctrine is based upon the English common law maxim “ut lite pendente nihil innovator”, it means that during the litigation no new rights should be introduced.

This maxim is a rule which is based upon the necessity for final adjudication and also on the just ground that it will be impossible to bring a suit to a successful culmination if the alienation is allowed/permitted during the pendency of the suit.

II. This doctrine is embodied in Section 52 of the Transfer of Property Act, 1882.

Section 52 provides that : “During the pendency in any court having authority within the limits of India excluding the state of Jammu & Kashmir or established beyond such limits by the Central Government of any suit or proceeding which is not collusive and in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of court and on such terms as it may impose.

Explanation: For the purpose of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by the reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.”

The principle of Section 52 prohibits the transfer or otherwise dealing with property which is in question, during the pendency of the suit.

Judicial Explanations

The principle is explained in *Bellamy v. Sabine*, where Turner, L.S. said, it that doctrine rests upon this foundation that, it would plainly be impossible that any action or suit could be brought to a successful termination if alienations pendente lite were to allowed prevail.

The plaintiff would be liable in every case to be defeated by the defendants, alienating before the judgment or decree and would be driven to commence his proceeding de novo subject again to the same course of the proceeding.”

The doctrine is based upon expediency and it is immaterial whether the transferee pendente lite had or had not notice of the suit. This doctrine had been fully expounded by the Privy Council in **Faiyaz Hussain Khan v. Prag Narain**, where their lordship quote with approval the observations of Lord Justice Turner in *Bellamy's* case.

III. The basic ingredients of the doctrine of Lis Pendens

1. Litigation should be pending in a court of competent jurisdiction.
2. The suit must be relating to the right in a specific immovable property.
3. The suit should not be collusive.
4. Property should not be transferred or otherwise dealt with.
5. By any party to the suit.
6. So as to affect the right of any party thereto.
7. Till the final disposal of the case.

Explanation

1.Litigation should be pending in a court of competent jurisdiction.

The suit commences on the date of filing of the plaint and it is deemed to continue until a final decree or order has been passed determining that matter. That means the suit is considered to be pending even if there is a chance of appeal against the decree determining that suit or the execution of the decree is pending.

Example: A dispute regarding the title of the property X arose between A and B. A was then in the possession of X. The matter was brought before the District court. The District Court passed the decree in favour of A. While the decree was appealable, A sold the property X. The transfer would be considered via Section 52 or the Doctrine of Lis Pendens.

Now in the above-mentioned case the HC passed the decree in favour of A but the Apex court passed the decree in favour of B. When the Apex Court passes a judgement, even then the suit does not come to an end. If the Apex Court passed the decree ordering A to transfer the possession of X to B within 30 days, then during this period of 30 days, the suit would be deemed to be pending.

Court of competent jurisdiction:

The courts in India have been segregated on the basis of territorial, pecuniary jurisdiction or subject matter, etc. Hence, the suit must be pending in the court having the jurisdiction to try the suit. If the suit is presented before a court not having the competent jurisdiction to try it, a transfer during the pendency of such a suit would not be hit by the rule of Lis Pendens.

Illustration: A dispute over property was presented before the court. However, the plaint was returned on the ground that the court before which the plaint was presented did not have the competent jurisdiction to try it. Before it could be filed before the court which had the competent Jurisdiction to try the suit, A who had the possession of the property, executed a gift deed of the same in favour of his wife and son. It was held that on the date when the gift deed was executed, there was no suit pending before the court of competent jurisdiction, and therefore the doctrine of Lis Pendens will not apply to this gift.

2.The suit must be relating to the right in a specific immovable property.

The doctrine applies in the case of immovable properties only and not where the subject matter is movable property. The litigation must involve a specific right in immovable property, such as a dispute with respect to title, possession or a right of alienation, etc.

The doctrine applies to the sale, specific performance of a contract, mortgage suit, easements, pre-emption, the charge created by Hindu widow on the Hindu Joint Family Property etc. and is not applicable to the suits related to debts, rents, accounts (house tax), etc.

3.The suit should not be collusive.

The term collusive suit depicts ‘the suit filed with conspiracy’. It is a sham suit. Here, the parties to the suit enter into an agreement with the intention to defeat the rights of the transferee. The suit presented or pending must be genuine and not a collusive one.

Example: A was familiar with the fact that the property belonged to Mr B. They entered into an agreement and decided together to go for litigation where A would question the title of B over the property. During the pendency of the suit, A professed to transfer the property to C for money. In this case, the property would go to C and the doctrine of Lis Pendens will not be attracted.

4.Property should not be transferred or otherwise dealt with

The term transfer includes absolute transfer as well as the partial transfer. The doctrine applies to the sale, a grant under the lease, mortgage etc. the transfer here means the transfer covered by Transfer of Property Act, 1882. ‘otherwise dealt with’ includes the cases which are not covered by the Transfer of Property Act, 1882. It includes the cases of partition.

Partition of the Joint Hindu Family property does not amount to a transfer, but is covered under the expression ‘otherwise dealt with’. Hence, a partition of the property which is a subject matter of the suit, affected during the pendency of the suit would be subject to the rule of Lis Pendens.

Any transfer made with the permission of the court and in accordance with the term imposed by it, will not be subject to the rule of Lis Pendens.

5.By any party to the suit

The parties to the suit include the ones who file the plaint or petition i.e. the plaintiffs and the ones against whom the relief is prayed for i.e. the defendants, or their representatives on their demise. The transfer made by a person before he is made a party to the suit is not affected by the doctrine of Lis Pendens.

Example: A is the owner of the property X, which is managed by B with the permission of A. B sells the property to C. A files a suit against B reclaiming the possession of the property X and C is not made the party to the suit. Meanwhile, C sells the property to Y. As C is not the party to the suit, the transfer made by him will not be affected by the doctrine of Lis Pendens.

6. So as to affect the right of any party thereto

Example: A, the landlord filed a plaint against B (tenant), that he hasn't paid the rent for two months. Meanwhile, A transfers the property which is the subject matter of the suit, to C. It does not fall under Section 52 as it does not affect the rights of another party.

The test to determine the applicability of Section 52 is the nature of the claim in the suit and not the property in dispute.

7. Till the final disposal of the case.

It implies that there is no chance of any appeal against the decree of the court in that particular case nor is the execution of the decree pending. Once the case is finally disposed of, the transfer will not attract Section 52 as the main ingredient of the doctrine is the pendency of the suit and the pendency of suit ends as soon as the case is finally disposed of.

IV. Status of the transfer

Section 52 is prohibitive in nature. It uses the phrase 'the property cannot be transferred or otherwise dealt with'. At the same time, the transfer during the pendency of the suit is not void. It is only subject to the outcome of the litigation. Hence, the transfer is voidable at the instance of the affected party, except to the extent that it may conflict with the rights conferred under the decree held to be valid.

The transferee only takes the title of the transferor subject to the result of the pending litigation. Hence, mere pendency of the suit does not prevent one of the parties from dealing with the property that is the subject matter of the suit.

Law simply postulates a condition that the alienation will in no manner affect the rights of the other party under any decree which may be passed in the suit unless the property was alienated with the permission of the court. The transferee cannot deprive the successful plaintiff of the fruits of the decree if he purchased the property during the pendency of the suit and he is bound by the decree as much as the parties to the suit.

IV. NOTICE/ Can the transferee seek the protection under Section 43 of Transfer of Property Act, 1882

Section 52 is based on the rule of expediency and public policy. Hence, no question of good faith or bona fide arises.

Section 43 talks about feeding grants by estoppel. One of the main essentials of Section 43 is the good faith of transferee i.e. the transferee at the time of the transfer had no knowledge about the non-competency of the transferor to transfer. But when a suit is pending in which the subject

matter is the property transferred, the transferee cannot contend good faith as a pending suit is a notice in itself.

Example: There is a matter pending before the court of competent jurisdiction between A and B. Property X is the subject matter of the suit. A professes to transfer X to C during the pendency of the suit. The transfer is hit by *Lis pendens*. Later on, the decree is passed in favour of A.

Now C cannot ask A to transfer the property under Section 43 of TPA, 1882. It is immaterial whether C had the knowledge of the pendency of the suit or not, or whether A notified C or not because the doctrine is based on the concept of necessity and not notice.

V. Exception

The section provides that it is open to the court to permit any party to the suit to transfer the property to on terms which it may think fit to impose.

In **Amarnath v. Deputy Director of Consolidation**, it was held that party is said to be a party to the suit if the decision or judgement is likely to affect the share of such a party and the decision would be binding on him too. Thus A,B,C, are brother; C is residing in a distant town while A and B are residing together. A files a suit for partition and does not implead C or his father X.

Though X and C are not parties to the suit, yet the subject matter of the suit is the same, and neither X nor C legally and validly transfers or alienate his share to a third party. In such case the ultimate decree is likely to affect the shares of X and C too. Thus, there may be a case where a party may not be locked in a civil suit or proceeding; yet such a party may be affected by the judgment/decree in such a suit.

In **Fayaz Husain Khan v. Prag Narain**, a mortgagee sued to enforce his mortgage, but before the summons was served, the mortgagor affected a subsequent mortgage. The prior mortgagee continued his suit and obtained a sale order from the court, without making the subsequent mortgagee, a party to the suit. It was held that the sale extinguished the subsequent mortgagee's right to redeem the prior mortgagee.

SECTION 53 -Fraudulent transfer

Introduction : --

The object of the fraudulent transfer is to protect the creditor and subsequent transferee. Fraudulent transfer is voidable at the option of creditor and transferee. S. 53 consists of two parts. The first part is in respect of transfer of immovable property made with intent to defeat or delay the creditors of the transferor and second part is in respect of transfer with intent to defraud a subsequent transferee.

Fraudulent transfer S. 53 --

Every transfer of immoveable property made with intent to defeat or delay creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed,

and every transfer of immovable property made without consideration, with intent to defraud a subsequent transferee, is voidable at the option of such transferee.

Thus, S.53 deals with two types of fraudulent transfers. As far the first rule is concerned, when the consideration for transfer and good faith on the part of transferee are present, the intention of the transferor to defeat or delay his creditor is immaterial. Thus, S.53 has a limited scope restricted to immovable property and not to movable property. Moreover the benefit of this section is not restricted to existing creditors alone, but it extends to subsequent creditors also. This section does not make the transaction void-ab-initio but only voidable and that to only at the option of any person defeated delayed or defrauded.

Under the transfer of property Act a transfer of immovable property by a debtor may be set aside by his creditor :

- A) if the transferee is not a transferee in good faith for the transferor's creditor, and
- B) if the transferee is not a transferee in good faith for consideration.

Exception : -

A transferee from such debtor will be protected -- :

- A) if he acquires property for value in good faith without the knowledge of transferor's intention.
- B) if the himself is a creditor and the transfer is made in satisfaction of his pre-existing debt. If the creditor established that transfer was made with the object of defeating him, the shifts on the transferee to prove -

- 1) that he had paid a fair price, and
- 2) that he was not a party to the fraud.

Every transfer of immovable property by way of sale made with an intention to defeat or delay the creditor of the transferor is voidable at the option of the creditor so defeated or delayed. This is what is stated in Section 53 of the Indian law of Transfer of Property.

If the transferee purchased the property after proper enquiries and in good faith and belief, the transfer is valid and he will not be liable.

However, the creditor can institute a suit against the transferor. If the transfer was made without sufficient consideration or with the intention to defeat or defraud the creditors, the transfer is voidable at the option of the transferee also.

The following are some of the essential elements of Fraudulent Transfer:

1. A transfer must be made by a debtor to a third person for consideration.
2. The intention behind the transfer was to defeat or defraud the creditors.
3. The transfer is voidable at the option of the creditor.
4. The creditor can file suit on behalf of himself and all other creditors.
5. If the property was purchased by the transferee in good faith, he will not be liable.

Explanation-

1.Transfer

In order to attract this section, there must be a transfer. The transfer must be of immovable property. The transfer must be a real one which creates a vested title in favour of the third party. Fictitious transfers do not attract this section. The fictitious transfer is where the transferor remains the real owner of the property.

Hence, in order to set aside the transfer under section 53, it has to be proved that the transfer was a real one and not a sham one.

Example: X took a loan from Y and kept his property A as security. X then gets the property mutated in favour of his son. The mutation is done without effecting a transfer. As the father is still the owner of the property, what appears to be a transfer is merely a sham and as Y still has the claim over this property, there is no need to move under Section 53 of TPA.

2.Intention to defeat or delay the creditors:

A creditor here is a person to whom the transferor owes the financial liability. In order to apply Section 53 of TPA, it is necessary for a creditor to exist, and it is not necessary for the creditor to be secured. The creditor can be unsecured as well.

Even a subsequent creditor can move under this section. This means that it is not necessary for the transferor to be in debt at the time of the transfer. If the transfer is made prior to the debt transaction, with the intention that the transferor might take a loan in the future and wanted to take the property out of reach of the future creditors, it is equally fraudulent and can be set aside at the option of the creditors. But the mere fact that the loan was taken right after the transfer of property or there was subsequent indebtedness, is not evidence of fraudulent intention towards subsequent creditors.

A Muslim wife in lieu of her dower debt amounts as a creditor.

The basic objective behind this section is to protect the creditors from being delayed or defeated by removing the possible security. In order to attract section 53, it is necessary for the intention to be fraudulent. Hence, the intention behind the transfer must be to defeat or delay the creditors.

The phrase ‘creditors’ doesn’t mean that the intention should be to defeat or delay all the creditors. The intention to defeat some or even just one of the creditors is enough to attract Section 53.

Kanchanbai v. Moti Chand:

Transferor owed the Creditor Rs. 2600. The creditor asked for the money back/recovery of money. When even after being asked for the recovery of money, the transferor didn’t pay back, the creditor threatened to file a suit. After receiving the notice of the same, the transferor executed a gift deed in favour of her daughter in law. Creditor filed a suit under Section 53 of TPA against the transfer.

It was contended by the transferor that Section 53 of TPA was not attracted in the present case as there was just a single creditor.

It was observed by the court that: the phrase creditors would also include a single creditor. The section would be attracted even when a single creditor is defrauded or there was intention just to defraud a single creditor. Here the transfer was done with the intention to defeat and delay the creditor's claim. Hence, section 53 would be applicable.

Mere preference of one creditor over the others is not sufficient to attract this section unless it's shown that it was done with the intent to defraud other creditor's claims.

Example: A mortgaged his property X to C1, C2, and C3. While repaying the loan, he gave preference to C1. Mere this fact won't amount to intention to defraud C2 and C3.

The transfer should be defeat and delay the creditors. If the transferor transfers his property but is willing to pay the creditors back what he owes to them or if just a portion of the property is transferred and there is another property left which is sufficient in value to pay back the creditors then, the Section 53 will not apply.

Example: A took a loan from C and mortgaged the property X as security. After a few days, he sold the property X to B. Now C can question or deny the transfer under Section 53.

But in order to move under Section 53, he has to prove that he is not able to recover the money from A personally. If A is ready to pay back the money to C personally without involving the property, then Section 53 will not be attracted.

The section operates only against fraudulent transfers. There might arise a case where the transfer is done for two considerations one of which is for fraudulent intention, which is separable from each other then, the whole transaction would not be regarded as fraudulent.

Only that portion of the transaction would be regarded as fraudulent for which there was an intention to defraud. And the transfer would be given effect to the extent the transaction can't be regarded as fraudulent. But in cases where the substantial portion of the transaction is fraudulent and the fraudulent and not fraudulent portions cannot be separated, then the whole transaction would become voidable.

3.Framing of Suit

Privity of contract is followed which means only the parties to a contract can sue. Hence, no third party, who is not a party to the suit can sue on the creditor's behalf. The suit is instituted by the creditor on the ground that the transfer has been made with the intention to defeat or delay the creditors of the transferor.

The suit is instituted in the representative category i.e. on behalf of and for the benefit of all the creditors. It is to avoid the multiplicity of suits over the same subject against the same opposite party/parties. Dismissal of the suit of one creditor would be binding on all the creditors.

4.Burden of Proof

There is no presumption in law that the transfer was effected with the intention to defeat or delay the creditors. The existence of fraud would not be presumed by the court, it has to be proved. So, when the transfer of property is challenged on the grounds of fraud then the primary

onus is on the petitioner to show how he was connected to the property and how has the fraud taken place.

Hence, here the primary onus is on the creditors to prove that the transfer was effected with the intention to defeat and delay the creditors. But once it has been proved then the burden shifts on the transferee to prove that he bought the property in good faith and consideration.

5.Proviso

A bona fide transferee who paid the consideration for the transfer has been protected under this section. A bona fide transferee would mean that the transferee is unaware or has no knowledge about the fraudulent intentions of the transferor. The knowledge includes actual and constructive notice. If the transferee has the constructive notice of the fraud then it will be presumed that he had the knowledge about the fraud.

Also, the consideration must be the essence of the transfer. The transferee of a gratuitous transfer would not be protected.

A creditor is a transferee in good faith even where he is aware of the proceedings of another creditor against the transfer as he is protecting his own interest and not defeating other creditor's interests.

Section 53 further provides that this section will not affect any law relating to insolvency, which is in effect for the time being.

DOCTRINE OF PART PERFORMANCE- Section -53 A

The Doctrine of Past Performance, based on principle of equity, developed in England and was subsequently added to the Transfer of Property Act, 1882 via the Amendment Act of 1929. In law of contracts (for e.g., a contract for sale), no rights pass to another till the sale is complete. But if a person after entering into a contract performs his part or does any act in furtherance of the contract, he is entitled to reimbursement or performance in case the other party drags its feet.

Section 53A says that if a person makes an agreement with another and lets the other person act on the behalf of the contract; such a person creates an equity himself that can not be resisted on the mere grounds of absence of formality in the evidence or contract of such a transfer. Thus, if the contract has not been registered or completed in the prescribed manner, the transferor can still not go against the transferee or anyone claiming under him. However, the deed should not be unsigned or unstamped. Nothing in this section affects the rights of a transferee for consideration even if he had no notice of contract of part performance.

Illustration: A contracts with B to sell his plot for X amount of money. A accepts the advance from B towards the sale of the plot and hands over the possession of the said plot to B. After some time, B is ready to pay the remaining sale amount but A refuses to accept the same. Further A asks B to hand over the plot back to him.

Here B is ready to perform his part of the contract but A is not. In such a case, B can bring a case requiring specific performance from A. It does not matter that the sale was not registered.

As per law, a transfer of immovable property valued over Rs.100 has to be registered. But it was believed that strict compliance may lead to extreme hardships especially where one party has already performed his part in the confidence that the other party will honor the agreement. If such registration or other formalities have not taken place, the doctrine of part performance will be applicable. If such a transferee takes possession of the property, he can not be evicted due to an unregistered contract.

The section is a defense as well as a right that helps protect the possession against any challenge. It tries to prevent fraud on the mere basis of ineffective evidence of the transfer. The section does not confer a title upon the transferee in possession but it imposes a statutory bar on the transferor.

Illustration:

A contract to transfer his immovable property to B by way of sale and put B in possession of the property before a regular Sale-Deed is executed. The contract is said to be partly performed and if later on A refuses to execute regular document of sale and files a suit for eviction against B treating B as trespasser. Then B can resist A's claim on the ground that the contract of transfer in his favour has partly been performed and that A should not be allowed to go back upon his own word.

ESSENTIALS OF THE DOCTRINE OF PART PERFORMANCE

- a) There must be a written contract for transfer of an immovable property signed by or on behalf of the transferor. The doctrine can not be applied if there is a void agreement or no agreement.
- b) There must be consideration;
- c) The contracts should give out the terms of the transfer with reasonable certainty;
- d) The transferee must have taken possession as a result of this contract or continued in possession if he was already in possession of the property;
- e) The transferee must have done some act in furtherance of the contract. Acts done prior to the agreement or independent of it can not be deemed to be part performance of the contract; and
- f) The transferee should have performed his part of the deal or be willing to perform it.

Ingredients of Section 53-A

Bombay High Court in **Kamalabai Laxman Pathak v. Onkar Parsharam Patil**, has given emphasis on the ingredients of the Section 53-A which are as follows:

Contract for Transfer of immovable property:

For the application of this section, the first condition is that there must be a contract and the contract must be transfer of immovable property for value.

a) Written contract:

The contract must be written. Section 53 –A is not applicable if the contract for transfer is oral. In *V.R. Sudhakara Rao v. T.V. Kameswari*, it was held that the benefit of section 53-A is not

available to a person who is in possession of property based on oral agreement of sale. Writing alone is not sufficient. The contract must also be duly executed. That is to say, it should be signed by the transferor or by any other person on his behalf.

b) Valid Contract:

It may be noted that Section 53-A is applicable only where contract for the transfer is valid in all respects. It must be an agreement enforceable by law under the Indian Contract Act, 1872.

c) Immovable property:

This section is applicable only in case of transfer of immovable property. It does not apply to an agreement for the transfer of movable property even though supported with consideration. The defense of Part Performance is not available in respect of possession of movables (Hameed v. Jayabharat Credit & Investment Co. Ltd and Ors.)

Transfer for consideration:

The written contract must be for the transfer of an immovable property for consideration. The written contract on the basis of which the property has been possessed, must clearly suggest the transfer of property. If the document is ambiguous or confusing, this section cannot be made applicable. It is one of the necessary ingredients of section 53-A that the terms of written contract must be ascertainable with reasonable certainty (Hamida v. Humer and Ors.).

Possession in furtherance of Contract:

The Transferee has taken possession or continues possession in part performance of the contract or, has done some act in furtherance of the contract (A.M.A Sultan (deceased by LRs) and Ors. v. Seydu Zohra Beevi).

Some Act in furtherance of the contract:

Taking possession is not only the method of part performance of contract. If the transferee is already in possession of the property then, after the contract of transfer, he has to do some further act in part performance of the contract (Nathulal v. Phoolchand).

Transferee is willing to perform his part of contract:

Section 53-A is based on the principle of Equity. Equity says that one who seeks equity must do equity. Therefore, where a person claims protection of his possession over a land under section 53-A, his own conduct must be equitable and just. It is an essential condition for the applicability of this section that the transferee must be willing to perform his part of contract (Sardar Govindrao Mahadik and Anr. vs. Devi Sahai and Ors Govind)

Scope of Doctrine of Part Performance

The Doctrine of Part Performance is applicable to only written and valid contract. It is not applicable to oral or void agreement. The contract must be in writing and signed by the transferor. The transferee has taken possession of the property as a part performance of a contract and transferee must be ready and willing to perform his part of promise. This section is applicable not only to the contract of sale but it is applicable to all such contracts of transfer for consideration. It has been held in (Jacobs Private Limited vs. Thomas Jacob [8]) that the doctrine is intended to be used as a shield, not a sword.

Related case law

In **Vasanthi v. Venugopal**, the Supreme Court restated the essential conditions necessary for application of this section:

a. A written contract for the transfer of an immovable property.

The most important limb of Section 53A is the pre-existence of the contract.

In **Ranchoddas v. Davaji** lays down that there should be a contract and;

It must be for consideration;

It must be in writing and signed by the transferor;

The terms necessary to constitute the transfer can be ascertained with reasonable certainty.

b. The transferee takes possession of the property under this contract.

The transferee should have taken the possession of the property; or

the transferee in possession already should continue in possession and should have done some act in furtherance of the contract.

Related case law: In **Arun Kumar Gupta v. Santosh Kumar**, the agreement contained no provision about transfer of possession, nor possession was handed over in fact, protection of the section was held to be not available.

c. The transferee has either performed his part of contract or is willing to perform the same. It is an essential condition that the transferee must be willing to perform his part of contract.

Related case law: In **Jacob Private Ltd v. Thomas Jacob**, the Kerala High Court held that willingness in the context of Section 53A must be absolute and unconditional.

If these requirements are fulfilled, the transferee is entitled to claim, under this section, that he should not be evicted/dispossessed from the property.

Exception to Section 53A

The rule laid down in this section has no application/or affect the right of a subsequent transferee for consideration who has no notice of the contract or of the part performance thereof.

Nature of transferee's rights under section 53A

1. No title or interest in property:

Section 53A does not affect the ownership rights of the proposed transferor who remains full owner of the lands till they are legally conveyed by sale-deed to the transferee.

2. Passive equity; no right of action:

Section 53A merely provides a right of defence, it can be used only as a shield not as a sword. The scope of this section is therefore ,limited because no right of action is available to transferee.

Leading case law dealing with the nature of rights of transferee:

Prabodh Kumar Das v. Dantamara Tea Co. Ltd, The Privy Council held that in India the equity of part-performance was not an active equity. It does not give any right of action to the transferee who is in possession of property under an unregistered contract of sale.

Amendment of Section 53A Transfer of Property Act and other enactments

An amendment has been made in Section 53A of the Transfer of Property Act by the Registration and other Related Laws Act (48 of 2001) This Amending Act (48 of 2001) has made following amendments relating to Section 53A :

1. In Section 53A, para 4 of the Transfer of Property Act the words “the contract, though required to be registered, has not been registered, or,” Omitted.

2. In Section 17 of the Registration Act, (a) after sub-section (1), the following subsection shall be inserted :

“(1A) The documents containing contracts to transfer for consideration, any immovable property for the purpose of Section 53A of the Transfer of Property Act, 1882 shall be registered if it has been executed on or after the commencement of the Registration and Other Related Laws 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.”

3. In Section 49 of the Registration Act, in the proviso ; the words, figures and letter “or as evidence of part performance of a contract for the purposes of Section 53A of the Transfer of Property Act, 1882 ,” shall be omitted.

4. The provisions of this Amending Act (Act 48 of 2001) came into force with effect from 24.9.2001. This Amendment Act is not retrospective.

Illustrations

1. (General) There is a contract of sale of a piece of Land between Ram and Shyam. The contract is in writing, stamped, attested and duly executed but not registered by Ram who is the seller. Shyam, who is the purchaser, has paid the price or is willing to pay the same. On the basis of such contract Shyam takes possession of land. Now, Ram sells the land to Mohan through a registered deed. Mohan having legal title of the land, attempts to eject Shyam. At this stage, since Shyam has no legal title, law may not protect his possession but, equity shall help him from being dispossessed.

2. (Suit for possession) A entered into a written contract with B to take B’s house on rent for 2 years at Rs.1000 per month. A gave Rs.12000 to B as one year’s advance rent and took possession of only one room as B promised to hand over the possession of the remaining portion after his son’s wedding which was to take place after 3 days. After the wedding, B did not give possession of the remaining portion of the house to A. Thus, A is entitled to maintain possession of one room which he received from the transferor. But he cannot use Sec. 53A to obtain possession of remaining portion of the house which was never given to him.

3. (Exception) A contracts to sell land to B for Rs. 50,000. B paid Rs. 40,000 to A, took possession of land and promised to pay the balance at the time of registration. Afterwards A sold the same to C for Rs.75.000 by means of a registered sale-deed in favor of C. Thereupon C called upon B to vacate the land ,according to the exception to Sec. 53A, the doctrine of part

performance cannot affect the right of a subsequent transferee for the value without notice of the previous contract or of its part-performance. Thus, as B is in possession of land, he can claim benefit of Sec. 53A, against C.

Legal Effect of the Amending Act (48 of 2001) in Section 53-A:

In Section 53-A of T.P. Act, the words the contract, though required to be registered, has not been registered has now been omitted. This may mean to suggest that non registration of any contract to transfer for consideration is not any relevant factor (i.e. not necessary) for the application of part performance under this section; and, the defense of part performance is available also on the basis of an unregistered document.

But this is not the case. The same Amending Act (48 of 2001) has simultaneously amended section 17 and Section 49 of Registration Act. Therefore, the amendment in section 53-A should be read with amendments in section 17 and section 49 of Registration Act.

In nutshell, the amendments of section 17 and section 49 of Registration Act has now incorporated the law which fulfills the real purpose of amending Section 53-A of the T.P. Act. The object or the real purpose of these amendments (Amending Act 48 of 2001) is that there should not be any perpetual possession of an immovable evading the law of registration. Accordingly, section 53-A of the T.P. Act now insists upon proof of some acts having being done in furtherance of contract. There must be real nexus between 'contract' and the 'acts done in pursuance or furtherance thereof'.

“Equity looks to the intent rather than to the form”

WALSH vs. LONGSDALE and MADDISON vs. ALDERSON are two of the major cases that have helped develop the doctrine of part performance in England. In India, this doctrine has been enacted with a few modifications.

MADDISON vs. ALDERSON 1888

B was A's servant. A had promised B a certain property as life estate, meaning B could enjoy the property during his life time. B served A for years upon this promised life estate. The will bequeathing such interest and property to B failed due to want for proper attestation. After A died, one of his heirs brought action to recover the property from B.

It was held that the act of part performance could not be proof of the contract since the performance was a condition precedent to the contract. The heir of A was able to recover the said property.

WALSH vs. LONGSDALE 1882

Walsh took a cotton mill on lease for 7 years from Longsdale, the owner of the mill. The agreement was prepared but not signed. In the meantime, rent arrears started to accumulate as Walsh could not keep up with the quarterly payments of rent. An advance of one year's rent could be demanded by Longsdale as per the contract. Longsdale demanded the advance rent for one year and seized some goods of Walsh when he defaulted. Walsh sued for damages.

The House of Lords decided in favor of Lonsdale stating that by running the mill, Walsh had admitted he was a lessee and evidence of his consent to the unsigned lease deed.

The rule laid down in Walsh vs. Longsdale is not applicable in India – as it did not constitute the doctrine of part performance.

Prior to the enactment of the Transfer of Property Act, 1882, the English law of Part Performance was applied. Before Section 53A was inserted in the Transfer of Property Act, 1882, there were different views upon such application. After the Transfer of Property Act, 1882 came into force, some thought that Sections 54 and 59 which required registered documents were necessary for sale of immovable property or regarding mortgage respectively. While others argued that requiring strict compliance would be detrimental to the rights of the impoverished masses of India who could be duped by scrupulous individuals taking advantage of the law.

The Privy Council in **MOHD MUSA vs. AGHOR KUMAR GANGULI AIR 1914 PC 27** held that doctrine of part performance is applicable in India. There were divergent views a few years later stating that doctrine can not be used to override statutory provisions. Finally in 1929, the Transfer of Property Act was amended and the English law of part performance became a part of Indian Laws though a little modified.

Equity on that as done as which ought to have been done.

Section 53A of the Transfer of Property Act, 1882

Part Performance – 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 where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefore 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.

The proviso is an exception of sorts stating that the interests and rights of a subsequent transferee for consideration will be protected as long as he had no notice of the contract leading to the part performance due or the part performance thereof.

In India, the doctrine is used only as a shield and not to enforce rights as laid down by the Supreme Court in Delhi Motors case. But it must be noted that the aggrieved party can either be the plaintiff or the defendant in a suit as the case maybe.

ENGLISH AND INDIAN LAW

The English Law of Part Performance

1) The contract need not be written or signed by the transferor

- 2) The right under the doctrine is an equitable right
- 3) It can be used for enforcing the right as well as defending the right; and
- 4) It creates a title in the transferee.

The Indian Law of Part Performance

- 1) Section 53A deals with the Doctrine and states that the contract has to be written as well as signed by the transferor
- 2) It is a statutory right;
- 3) It can only be used to defend the possession of the transferee; and
- 4) It does not create a title in the transferee.

After 2001 amendment to Section 53A, the application of the section has seen dilution – it no longer serves as a ‘substitute’ for registration. It should still hold good for defects other than registration. But, registration of sale of immovable property is compulsory and Section 53A has been amended to incorporate the same.

Conclusion:

Thus, the doctrine of part performance is an equitable doctrine. It is incorporated to prevent fraud from taking advantage on account of non-registration of the document. It is based on the doctrine: Equity looks at the intention rather than form.