

rival contentions for the purposes of the present case.

Sardha Ram  
v  
Paras Ram

For the reasons given above, this appeal fails and is hereby dismissed. The respondent is entitled to his costs in this Court.

Dua, J.

K.S.K.

APPELLATE CIVIL

Before G. D. Khosla, C.J., and Tek Chand, J.

SARDARI LAL AND OTHERS,—Appellants

versus

SHAKUNTALA DEVI,—Respondent.

Regular First Appeal No. 90 of 1951.

*Transfer of Property Act (IV of 1882)—Section 54—Scope of—Section 53-A—Doctrine of Part Performance Applicability and scope of—Contract Act (IX of 1872)—Section 74—Advance paid towards purchase price—Whether can be forfeited—Damage—Extent of—Fall in price—Judicial notice—Whether can be taken.*

*Held*, that the provisions of section 54 of the Transfer of Property Act, 1882, as to the mode of transfer are exhaustive and do not admit of a sale being effected in any other manner. Thus, title to the land cannot pass by mere admission when the statute requires the execution of a deed. In those parts of the Punjab, where the provisions of this Act are not in force, an oral sale is valid but in the places where the provisions of section 54 of this Act are in force, the title by sale cannot pass to the vendee in the absence of the execution and registration of the deed of sale. If section 54 is applicable, there is no scope for importing the doctrine of equitable ownership of English Law.

*Held*, that section 53-A of the Transfer of Property Act, 1882 has imported the English doctrine of part performance with certain distinctive features. In England the phrase "part performance" is commonly used as a short

1960

Dec., 21st

and convenient statement of the general ground upon which verbal agreements regarding real estate are enforced. The doctrine rests upon the principle of fraud, and proceeds upon the idea that the party has so changed his situation on the faith of the oral agreement that it would be a fraud upon him to permit the other party to defeat the agreement by setting up the statute. The English equitable doctrine of part performance is a partial importation into India, and it is applied not generally, but within the confines of the statute. The important limitation is, that the right conferred by section 53-A is only available to a defendant to protect his possession and does not furnish a basis for cause of action. This right is restrictive in character in so far as it operates as a bar to the plaintiff asserting his title. This section contemplates that the transfer having taken place, the transferor is debarred from enforcing a right other than what is expressly provided by the contract. By applying the provisions of section 53-A a person can protect his possession against a challenge contrary to the terms of the contract. This section confers no title on the transferee but permits its provisions to be used in defence but not for attack.

*Held*, that part-payment of the purchase price cannot be forfeited for the reason that it is not a guarantee for the performance of the contract and, therefore, what is forfeitable is what has been given by way of earnest.

*Held*, that the Court can take judicial notice of a general fall but not of its extent in order to enable it to determine the damages. In order to lay claim to damages the party should prove the specific damages sustained.

*Regular First Appeal from the decree of the Court of Shri Parshotam Sarup, Sub-Judge, 1st Class, Delhi, dated the 18th day of January, 1951, granting the plaintiff a decree for Rs. 28,000 against the defendants but leaving the parties to bear their own costs.*

BHAGWAT DAYAL AND YOGESHWAR DAYAL, ADVOCATES, for the Appellants.

HARDAYAL HARDY, TULSI DAS AND

MAHARAJ KRISHAN CHAWLA,

ADVOCATES, for the Respondents.

## JUDGMENT

TEK CHAND, J.—This is a defendant's appeal from the decree and judgment passed by Sub-Judge 1st Class, Delhi, decreeing the plaintiff's suit for Rs. 28,000 but ordering the parties to bear their own costs. The defendants (appellants) are five in number and they are the sons of Shri Rup Lal, proprietors of the firm of Messrs Ushnak Mal-Mul Chand of Lahore, now carrying on business in Delhi. The suit was instituted by the plaintiff, Shrimati Shakuntala Devi against the defendants for the recovery of Rs. 35,930. The plaintiff's case was that by an agreement, dated 3rd of March, 1947, (Exhibit P. 1), the defendants had agreed to sell to her a house bearing No. 138-C, with land thereunder and attached thereto, measuring 4 kanals, situated at Model Town, Lahore, which they had purchased from one Ishwar Dat. The defendants had entered into an agreement to sell the said house to the plaintiff for Rs. 58,000. A sum of Rs. 5,000 had been received by them on that date as earnest money. After the execution and completion of the sale deed in respect of the house in vendee's favour the defendants undertook to get it registered within three months and they were to receive the balance of the sale money, amounting to Rs. 53,000, at the time of the registration of the sale deed. If the vendee did not get the sale of the house effected within the said period the earnest money would be forfeited and the agreement to sell would be considered as cancelled. In case the defendants failed to get the sale effected in favour of the plaintiff within the stipulated period the plaintiff would have the right to get the sale effected compulsorily through Court. Possession was to be delivered to the vendee at the time of the registration. It was also stipulated that the term regarding three months' time limit would be deemed as vital and of the essence of the contract.

Tek Chand J.

Sardari Lal  
and others  
v.  
Shakuntla Devi  
Tek Chand, J.

On 29th of March, 1947, Shrimati Shakuntla Devi paid a sum of Rs. 18,000, out of the sale money, and obtained receipt Exhibit P. 2 On 25th of April, 1947, she paid another sum of Rs. 10,000 to the defendants. Thus, in all, she had paid Rs. 33,000, inclusive of the earnest money, to the defendants. On 14th of April, 1948, a registered notice was sent by the plaintiff's lawyer on her behalf stating that in consequence of the communal riots in Lahore on 4th of May, 1947, some of the defendants had left Lahore and, therefore, the transaction of sale could not be completed within the stipulated period although the vendee was, at all times ready and willing to perform her part of the contract. It was alleged that as the bargain had failed she was entitled to a refund of the earnest money besides the refund of the advance amount of Rs. 28,000, i.e., Rs. 33,000 in all, along with interest. On 3rd of May, 1948, reply was sent by the defendants through their counsel. They maintained that it was the plaintiff who left Lahore without leaving any information with the defendants and that it was she who intentionally committed breach of the contract. It was also said that the defendants had always been willing to perform their part of the contract and were even still ready to do so but she had intentionally committed breach of the contract and hence was liable to make good the loss caused to the defendants. It was also maintained that in consequence of the breach committed by Shrimati Shakuntala Devi the defendants had suffered a loss of over Rs. 33,000 which, it was incumbent upon her to make good. It was also stated that the defendants were still ready to execute the sale deed at the plaintiff's cost against payment of the price.

The present suit was instituted on 4th of January, 1949, claiming that the plaintiff was entitled

to the return of Rs. 33,000 paid by her to the defendants. It was pleaded that the defendants had left Lahore and sale was not completed and registered within the period agreed upon despite her always having been ready and willing to pay the balance of the price and to get the sale completed. Alternatively it was said that even on the assumption that the defendants were not at fault the agreement of sale had come to an end on 3rd of June, 1947, and as the plaintiff was not at fault the earnest amount could not be forfeited by the defendants. In any case the amount of Rs. 28,000 having been deposited in trust with the defendants with the specific object of adjusting it towards the balance of the price at the time of registration on 3rd of June, 1947, when the agreement came to an end, she was entitled to the return of the entire sum of Rs. 33,000. She also claims a sum of Rs. 2,970 towards interest.

Sardari Lal  
and others  
v.  
Shakuntla Devi  
—  
Tek Chand, J.

The defendants in their written statement pleaded that the two sums of Rs. 18,000 and Rs. 10,000 were advanced by the plaintiff to the defendants on the latter's request. The plaintiff and her husband had represented to the defendants that as the communal situation in the city of Lahore was deteriorating they were anxious to shift to a place outside the city and they had asked the defendants to give actual possession of the house in Model Town, Lahore, immediately. Though it was inconvenient for the defendants to deliver possession immediately they nevertheless agreed to do so on the condition that the balance of the price was paid to them. The plaintiff paid Rs. 18,000 at once and under-took to pay Rs. 10,000 within a month and the balance on 2nd of June, 1947. It was in these circumstances, the defendants alleged, that they delivered possession of the house to the plaintiff. The receipt of the total amount of Rs. 33,000 is not in dispute. The defendants denied that they had left Lahore in the month of May or

Sardari Lal  
and others  
v.  
Shakuntla Devi  
Tek Chand. J.

June, 1947. They denied the plaintiff's assertion that she was ready and willing to pay the balance of the price and get the sale completed. They asserted that they had been always ready and willing to perform their part of the contract and were always and even then prepared to do so. The defendants claimed to be entitled not only to forfeit the earnest money of Rs. 5,000 but also to get damages consequent upon the breach of the contract by the plaintiff. According to the defendants the damages amounted to Rs. 45,000. The defendants claimed that the sum of Rs. 28,000, in addition to the earnest money paid by the plaintiff, was not liable to be refunded under any circumstances owing to the non-performance, by the plaintiff, of her part of the contract.

It was also stated that in view of the plaintiff having obtained possession of the property, in part performance of the contract, she had, thereby, become the owner of the property, and was liable to pay to the defendants a sum of Rs. 25,000 as the balance of the price of the property. The plaintiff in her replication reiterated what she had stated in the plaint. On the pleadings of the parties the trial Court had framed two preliminary issues—the first being as to whether the Court had any jurisdiction to try the suit, and the second related to the liability to pay an additional Court-fee. The issue as to the Court-fee was decided against the defendants and the issue as to the jurisdiction of the Court was given up by the defendants during the course of the arguments. The plea as to want of jurisdiction was not raised in the grounds of appeal before us. During the course of arguments the appellants' learned counsel sought permission to agitate in appeal the issue as to jurisdiction. The plea involved the decision of questions of fact on the strength of which the jurisdiction of the

Courts in Delhi was sought to be avoided. The permission was, therefore, not granted. On the merits the trial Court framed the following issues :—

Sardari Lal  
and others  
v.

Shakuntla Devi

Tek Chand. J.

- (1) Was the plaintiff ready and willing to perform her part of the contract and the breach was made by the defendants?
- (2) If issue No. 1 is proved, is the plaintiff not entitled to the amount claimed ?
- (3) If issue No. 1 is not proved whether the defendants have incurred any damages and if so how much ?
- (4) Are the defendants not entitled to adjust the amount of damages incurred by them towards adjustment from the amount in suit ?
- (5) Can the defendants claim anything beyond earnest money by way of damages even if the breach of contract was committed by the plaintiffs ?
- (6) Is the plaintiff entitled to interest on the amount in suit, if so how much and at what rate ?
- (7) Did the plaintiff's husband not take possession of the premises sold and if the possession was taken what is its effect on the suit ?
- (8) Relief.

On the first issue the trial Court held that the plaintiff was not ready and willing to perform her part of the contract and that the contract was not avoided by the defendants. The breach of the contract was committed by the plaintiff and not by the defendants. Issue No. 2, in view of the finding on the first issue, did not call for a decision. On

**Sardari Lal**  
**and others**  
 v.  
**Shakuntla Devi**  
 \_\_\_\_\_  
**Tek Chand, J.**

the third issue it was held that the defendants had failed to prove the quantum of the damages on the date of the breach of the contract with any reasonable certainty and, therefore, no damages were allowed to them. On the fourth and fifth issues it was held that the defendants were entitled to forfeit the earnest money of Rs. 5,000 but they were liable to refund to the plaintiff Rs. 29,000. The sixth issue was decided against the plaintiff. On the seventh issue the plaintiff admitted delivery of the possession of the house to her by the defendants. It was finally held that the defendants were not entitled to forfeit Rs. 28,000, their right being restricted to rent for the period the house was under plaintiff's occupation. The plaintiff was granted a decree for Rs. 28,000 and the parties were left to bear their own costs.

During the course of the hearing of the appeal on 23rd of November, 1959, before the Bench consisting of Falshaw and Chopra, JJ., it transpired that it was necessary to find out whether the Transfer of Property Act, in particular section 54, was made applicable to the Model Town, Lahore, where the suit property was situated. The Bench framed the following issues and remitted the case to the Senior Subordinate Judge, Delhi, for recording evidence of the parties and for submitting the case with his report :—

- (1) Whether on 3rd of March, 1947, Model Town, Lahore, was included within the area administered by the Corporation of the city of Lahore ?
- (2) Whether the Transfer of Property Act as a whole or section 54 of that Act was extended in its application to the area administered by the Corporation of the City of Lahore, and if so when ?



Some evidence on the above issues was recorded by the Senior Sub-Judge, Delhi, and some documents were also filed. The Senior Sub-Judge in his report said that the counsel for the defendants appellants did not contest the proposition that sections 54, 107 and 123 of the Transfer of Property Act had been extended to the area falling within the municipality of Lahore before the Corporation of the City of Lahore was created. On 26th of February, 1946, under notification No. 305-St, it notified that the Governor of Punjab was pleased to extend the provisions of these three sections to such areas included within the area now administered by the Corporation of the City of Lahore as were not included within the Municipality of Lahore on the 27th of April, 1935,—*vide* 1946 L.L.T., Part V, page 36). He found that the whole area administered by the Corporation of the City of Lahore was subject to the provisions of these three sections of the Transfer of Property Act, at the latest on 26th of February, 1946, but he was not in a position to state from the available evidence as to when these sections were extended to the area of Lahore City. He, however, found that the revenue estate of Model Town, Lahore, bearing hadbast No. 185, formed part of the area administered by the Corporation of the City of Lahore but not the entire Model Town locality. He referred to Exhibits R.W. 3/1 and R.W. 4/1. Finally, the Senior Sub-Judge expressed the opinion that the evidence on the record did not justify the conclusion that all or any of the sections of the Transfer of Property Act applied to the house in dispute on 3rd of March, 1947.

Exhibit R.W. 3/1 is Notification No. 5546-C39/43550—published in Punjab Government Gazette, Part I (A)—dated the 19th of December, 1939, by way of corrigendum to the Schedule appended to the previous Punjab Government Notification as

Sardari Lal  
and others  
v.  
Shakuntla Devi  
Tek Chand, J.

Sardari Lal  
and another  
v.  
Shakuntla Devi  
Tek Chand, J.

to the municipal limits of Lahore. The Schedule gives the names of the revenue estates and the corresponding hadbast numbers. This Schedule mentions, among others, the revenue estate of Model Town, hadbast No. 185. The other document Exhibit R.W. 4/1 gives the bearings of the municipal boundary of Lahore, but it does not indicate with sufficient clarity that Model Town was within the municipal limits. However, Notification No. 3935-C-39/27667, dated the 24th of August, 1939, is published along with the Schedule which also shows that the revenue estate of Model Town, hadbast No. 185, is a part of the area included within the municipal limits of Lahore.

The first question which calls for decision is whether section 54 of the Transfer of Property Act has been extended to the area in which this property is situated. Section 54 requires that the transfer of ownership by way of "sale", in the case of tangible movable property of the value of one hundred rupees and upwards, can be made only by a registered instrument. This section also provides that contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties but such a contract does not, of itself, create any interest in or charge on such property. The provisions of section 54 as to the mode of transfer are exhaustive and do not admit of a sale being effected in any other manner. Thus, title to the land cannot pass by mere admission when the statute requires the execution of a deed. In those parts of the Punjab, where the provisions of this Act are not in force, an oral sale is valid. As deed of sale was neither registered nor executed, the question whether Model Town, where this property is situated, was an area to which section 54 of the Transfer of Property Act was made applicable, acquires great

importance. It is clear from R.W. 3/1 that the revenue estate of Model Town, hadbast No. 185, was an area to which section 54 of the Act had been extended. After the boundaries of the revenue estates are marked off each estate is allotted a separate number known as hadbast number. In the Schedule forming part of Exhibit R.W. 3/1, there are enumerated over 70 revenue estates and each one of them has a single hadbast number. There is no convincing proof on the record that Model Town, Lahore, had more than one hadbast numbers. It is also clear from the survey map of Lahore that areas such as Bhekewal, Kot Lakhpat, Amar Sindhu, Charar, Lahore Cantonment, which are admittedly within the municipal limits of the City of Lahore, almost encircled Model Town, suggesting, that no part of Model Town was excluded from the municipal bounds.

Sardari Lal  
and others  
v.  
Shakuntla Devi  
Tek Chand, J.

It is proved on the record that the octroi post on the Ferozepur Road, Lahore, on which the Model Town was situated, was beyond the Model Town, suggesting that this area was within the octroi limits. (*vide* R.W. 1, Faqir Chand and R.W. 2 D. N. Seth). A.W. 1, Shri D. D. Dewan, who was the Secretary of the managing committee of the Co-operative Society, Model Town, Lahore, stated that the water-supply, drainage, sanitation and road management, in Model Town, Lahore, was the concern of the Co-operative Society and the Lahore Corporation did not spend any amount in laying out or developing the roads. From this it was sought to be concluded that Model Town was not within the municipal limits.

From the perusal of the evidence it seems clear that the house, in question, was situated in an area to which the provisions of section 54 of the Transfer of Property Act had been extended; and the

Sardari Lal  
and others  
v.  
Shakuntla Devi  
Tek Chand, J.

title by sale, could not pass to the vendee in the absence of the execution and registration of the deed of sale. If section 54 is once held applicable there is no scope for importing the equitable doctrine of English Law. This question had been settled, beyond doubt, by a decision of the Privy Council in *Maung Shwe Goh v. Maung Inn* (1). Lord Buckmaster at pages 140 and 141 observed—

“In the English Courts, a contract for sale of real property makes the purchaser the owner in equity of the estate, and from this principle it follows that, where the rights as to payment of interest on the purchase-money are not regulated by the terms of the contract, the purchaser is deemed to be entitled to the rents and profits of the property, as from the time when he did take, or could safely have taken, possession; and interest on the purchase-money runs in favour of the vendor from that time. It has been pointed out to their Lordships that the underlying principle, upon which this rule depends, has no application to the sale of real estate in Lower Burma, since by section 54 of the Transfer of Property Act, 1882 (a statute made applicable to Lower Burma), it is expressly provided that such a contract creates no interest in or charge upon the land.”

Lord Macmillan in *(Mian) Pir Bux v. Mohomed Tahar* (2), followed the above dictum of Lord Buckmaster and said at page 237—

“As the law of India stood at the date of this Case, it is, in their Lordship’s opinion,

(1) A.I.R. 1916 P.C. 139.

(2) A.I.R. 1934 P.C. 235.

no relevant defence to an action by a landowner for ejection to plead that the plaintiff has agreed to sell to the defendant the land of which the plaintiff seeks to obtain possession. By section 54, T.P. Act, a transfer by sale of tangible immovable property of the value of Rs. 100 and upwards can be made only by a registered instrument. The land in question is admittedly worth more than Rs. 100 and the defendant has no registered instrument of transfer in his favour. The section expressly enacts that a contract for the sale of immovable property 'does not of itself create any interest in or charge on such property. There is, therefore, no room for the application of the English equitable doctrine that 'a contract for sale of real property makes the purchaser the owner in equity of the estate. "The underlying principle upon which this rule depends is inapplicable to the sale of real estate in India in view of the express enactment just quoted."

Sardari Lal  
and others  
v.  
Shakuntla Devi  
Tek Chand, J.

Even if section 54 is not applicable the equitable principles of English law cannot be invoked for treating the transaction as tantamount to transfer of ownership.

This matter was examined by their Lordships of the Privy Council in *Chhatra Kumari Devi v. Mohan Bikram Shah and others* (1), Sir George Lowndes at page 202 said—

"But even assuming that by reason of the contract the properties were impressed

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(1) A.I.R. 1931 P.C. 196.

Sardari Lal  
and others  
v.  
Shakuntla Devi  
Tek Chand, J.

with a continuing trust in favour of the respondent, their Lordships are unable to hold that this would entitle him to sue for possession as owner. The Indian law does not recognise legal and equitable estates: *J.M. Tagore v. G. M. Tagore* (1), and *Webb v. Macpherson* (2). By that law, therefore, there can be but one 'owner', and where the property is vested in a trustee, the 'owner' must, their Lordships think, be the trustee."

The same view was expressed by a Full Bench of the Lahore High Court in *Mohammad Saddiq v. Khasi Ram and others* (3), Achhru Ram, J., after quoting section 54 of the Transfer of Property Act said—

"This paragraph makes a departure from the English law under which the purchaser, by virtue of the contract of sale, becomes in equity the owner of the property from the date of the contract. The principle of English law has been expressly held by the privy Council in *Maung Shwe Goh v. Maung Inn* (4), to be inapplicable to places where the transfer of Property Act is in force. It does not necessarily mean that the distinction between a legal and an equitable estate is recognised in places where the Act is not in force. In fact there is abundant authority that this distinction has never been recognised in this country. Reference may in this con-

(1) 9 Beng. L.R. 377.

(2) L.R. 40 I.A. 238 at 245=I.L.R. 31 Cal. 57.

(3) A.I.R. 1946 Lahore 322 (328).

(4) I.L.R. 44, Cal. 542.

(nection be made to the judgment of their Lordships of the Judicial Committee in *Jatindra Mohan Tagore v. Sardari Lal and others v. Shakuntla Devi* Ganedra Mohan Tagore (1); *Webb v. Macpherson* (2); and *Chhatra Kumari Devi v. Mohan Bikram Shah* (3). In *Webb v. Macpherson* (2), their Lordships made the following observations :

‘The law of India, speaking broadly, knows nothing of the distinction between legal and equitable property in the sense in which that was understood when equity was administered by the Court of Chancery in England.’

In the judgment in the Patna case the following observations are to be found :—

‘The Indian Law does not recognize legal and equitable estates. By that law, therefore, there can be but one owner and where the property is vested in a trustee, the owner must, their Lordships think, be the trustee.’

In *Mt. Shankri v. Milkha Singh* (4), Becket, J., in delivering the judgment of a Full Bench of this Court said—

‘In England the purchaser under a contract of sale is sometimes described as the equitable owner of the land, though only against any other party to the contract.’

(1) 9 Beng. L.R. 377.

(2) I.L.R., 31 Cal., 57—L.R., 40 I.A., 238.

(3) A.I.R. 1931 P.C. 196.

(4) I.L.R. 1941 Lah. 79.

Sardari Lal  
and others  
v.  
Shakuntla Devi  
Tek Chand, J.

“In India, however, the law recognizes no distinction between legal and equitable estates in this sense.”

Achhru Ram, J., then proceeded to observe—

“The word ‘trust’ appears to have been used for the purpose of making an equitable adjustment of the respective claims of the parties. In place of rent claimed by the seller from the purchaser, who, prior to the execution of the agreement for sale, was in occupation of the premises as a tenant under the seller, for the period between the date of the agreement and date of the actual sale, decree was passed in his favour not for the rent for that period at the stipulated rate, but for interest on the sale price for the same period. Even if the seller is to be regarded as a trustee for the purchaser of the property the former has contracted to sell to the latter, during the period intervening between the execution of the agreement to sell and the completion of the sale, it cannot be said that the purchaser becomes the equitable owner of the property with effect from the date of the agreement, because in case of the trust in this country the entire title vests in the trustee and it has never been held that the equitable title in the subject-matter of the trust vests in the *cestui que trust*.”

The equitable doctrine is not without limitation even in English law. In *Re A Contract Between the Corporation of Watford and Ware* (1), Simonds, J., said—

“I know of no equitable principle which enables a vendor, independently of any

(1) 1(943) 1 A.E.R. 54(56).



statutory provision or contractual right, to recover from a purchaser, even if he has gone into possession, a payment which he, the vendor, has made under a statutory liability arising before the time fixed for completion.”

Sardari Lal  
and others  
v.  
Shakuntla Devi  
Tek Chand, J.

The learned counsel for the vendors—defendants also placed reliance upon the doctrine of part performance as contained in section 53A of the Transfer of Property Act. Section 53A runs as under :—

“Where any person contracts to transfer for consideration any immovable 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

Sardari Lal  
and others  
v.  
Shakuntla Devi

—  
Tek Chand, J.

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 above section has imported the English doctrine of part performance with certain distinctive features. In England the phrase "part performance" is commonly used as a short and convenient statement of the general ground upon which verbal agreements regarding real estate are enforced. The doctrine rests upon the principle of fraud, and proceeds upon the idea that the party has so changed his situation on the faith of the oral agreement that it would be a fraud upon him to permit the other party to defeat the agreement by setting up the statute. The English equitable doctrine of part performance is a partial importation into India, and it is applied not generally, but within the confines of the statute. The important limitation is, that the right conferred by section 53A is only available to a defendant to protect his possession and does not furnish a basis for cause of action. This right is restrictive in character in so far as it operates as a bar to the plaintiff asserting his title. This section contemplates that the transfer having taken place, the transferor is debarred from enforcing a right other than what is expressly provided by the contract. By applying the provisions of section 53A a person can protect his possession against a challenge contrary to the terms of the contract.

In *Probodh Kumar Das and others v. Dantmara Tea Co., Ltd., and others* (1), Lord Macmillan said—

**Sardari Lal  
and others  
v.  
Shakuntla Devi**  

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**Tek Chand, J.**

“In their Lordships’ opinion, the amendment of the law effected by the enactment of Section 53-A conferred no right of action on a transferee in possession under an unregistered contract of sale. Their Lordships agree with the view expressed by Mitter, J., in the High Court that ‘the right conferred by Section 53-A is a right available only to the defendant to protect his possession.’ They note that this was also the view of their late distinguished colleague Sir Dinshah Mulla, as stated in Edn. 2 of his treatise on the Transfer of Property Act at p. 262. The Section is so framed as to impose a Statutory bar on the transferor ; it confers no active title on the transferee. Indeed, any other reading of it would make a serious inroad on the whole scheme of the Transfer of Property Act.”

It will thus be seen that section 53A confers no title on the transferee but permits this provision to be used in defence and not for attack.

Reference may also be made to *New Delhi Municipal Committee v. H. S. Rikhy* (2), for the view that section 53A merely protects the defendant and does not confer any legal right. The right which is conferred by section 53A is in the nature of a passive equity available only to the defendant for protection of his possession without conferring upon him any active title and on its basis the law in India does not permit him to sue. In a suit like the present the doctrine of part performance cannot be availed of.

(1) A.J.R. 1940 P.C. 1, at page 2.

(2) A.I.R. 1956 Punjab 181(185).

Sardari Lal  
and others  
v.  
Shakuntla Devi  
Tek Chand, J.

The next question is whether the defendants were entitled to forfeit any amount in excess of Rs. 5,000 which was received as earnest money. The other amount of Rs. 28,000 was paid by way of an advance. Law does not permit the defendants to forfeit payments made by way of an advance. Part payment of the purchase price cannot be forfeited for the reason that it is not a guarantee for the performance of the contract and, therefore, what is forfeitable is what has been given by way of earnest,—(*vide Madan Mohan v. Jawala Parshad* (1), and *Puran Chand v. The Official Liquidator, Simla Banking and Industrial Co., Ltd., Simla and another* (2)).

The language of the receipt Exhibit P. 2 also leaves no room for doubt that what was forfeitable was Rs. 5,000, which had been paid as earnest money. The rest being paid as part of the price could not be forfeited. In my view the learned trial court came to a correct conclusion in holding that a sum of Rs. 28,000 could not be forfeited.

Lastly, the contention of the defendants in this case is that they were entitled to retain the sum of Rs. 28,000 on account of damages suffered by them but, in order to lay claim to damages the defendants should have led proof of the specific damages sustained. The evidence placed on the record suffers from vagueness. All that is said is that on account of disturbed conditions the property of the Hindus fell in value. D.W. 3, Kharati Ram, expressed the opinion that in the months of May and June, 1947, the value of property fell to annas three in a rupee. There is no doubt that on account of disturbed conditions the property recorded fall but in the absence of proof of even a single transaction,

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(1) (1950) 52 P.L.R. 201.  
(2) A.I.R. 1960 Punj. 51.

from which the extent of the fall could be determined, this Court cannot award damages to the defendants except on conjectures and surmise which cannot have any factual basis. The Court can take judicial notice of a general fall but not of its extent in order to enable it to determine the damages. In that view of the matter I feel that the defendants cannot be allowed to retain any amount by way of damages except, of course, the sum of Rs. 5,000 which had been paid by way of earnest, which amount is forfeitable on a different basis altogether. As a result of the above findings the appeal of the defendants must fail and it is dismissed. The decree granted by the trial Court in favour of the plaintiff for Rs. 28,000 must stand. The parties are left to bear their own costs.

Sardari Lal  
and others  
v.  
Shakuntla Devi  
Tek Chand, J.

G. D. KHOSLA, C.J.—I agree.

G. D. Khosla,  
C. J.

B.R.T.

#### CIVIL MISCELLANEOUS

Before G. D. Khosla, C.J., and Tek Chand, J.

BALDEV SINGH.—Appellant.

*versus*

THE COMMISSIONER OF INCOME-TAX,  
DELHI,—Respondent.

*Income-tax Act (XI of 1922).—Sections 23-A and 34—Whether ultra vires articles 14, 19(1)(g) and 31 of the Constitution—Section 34(1)(b)—Period of four years—Whether to be counted from the end of the accounting year or assessment year—Item of income not included in the return of income filed—Whether a case of escaped income or under assessment.*

1960  
Dec., 22nd