

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



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Peer Reviewed

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INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS
ISSN

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RIGHTS OF TRANSFEREE UNDER SECTION 53-A OF THE TRANSFER OF PROPERTY ACT, 1882

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1. INTRODUCTION

1.1. OVERVIEW

The Doctrine of Part-performance is based on the English principle of equity, and is given statutory recognition by Section 53A of the Transfer of Property Act, 1882. Section 53A has been so far, applied by the Indian Courts in cases where the transfer has been effected by a registered deed. According to this doctrine, if a party to the contract has sought to take possession of an immovable property (say, a house), on the grounds of a contract for a sale and the person has either in his capacity performed, or is willing to perform his part of the stipulations in the contract, the person would then be not ejected from having possession of the house for the sole reason that the registered sale deed was yet to be effectuated and that a legal title is yet to be transferred to that person.

The English doctrine of part-performance is based on the maxim Equity looks on that as done which ought to have been done. This equitable doctrine treats the subject matter of a contract of sale as to its effects in the manner as if the condition stipulated in the contract has been duly executed by the transferee, right from the moment the agreement has been made. This is regardless of the fact that the legal formalities involving registration of the contract was yet to be completed. The general premise upon which this doctrine is based is to prevent fraudulent transfers. Where one party to the contract has executed his part of the stipulations stated in the contract in the confidence that the other party would too follow the same, it would be a fraud upon the former party if the latter refuses to abide by the stipulations and lay claim to the property on the ground that a registered sale deed was yet to be effectuated.

The Doctrine of part performance acts as a safeguard to the transferee against the transferor in retaining the possession of the property in question in circumstances where there was no fault on the part of the transferee even when the sale deed was not being registered. Nothing in the provision of Section 53A, alter the rights of the transferee for consideration even if he had no

notice of contract of part performance. The doctrine of part-performance was imported to Indian law by the Amending Act of 1929. Prior to 1929, the Anglo-Indian Courts, though applied this doctrine based on the principle of equity, but it was marred but a lack of uniformity and inconsistency that duly affected the contract for transfer, its consideration and subsequently the rights of the transferee, who is an erstwhile party to the contract. Section 53A, after 1929, as acted as a defense as well as a right that helps to protect the possession of the property in question. It tries to prevent any act of fraud on the mere basis that the evidence of a registered sale deed is ineffective on the given date. Section 53A therefore, does not confer a title of possession or ownership upon the transferee but it duly imposes a statutory bar on the transferor.

2. THE DOCTRINE OF PART PERFORMANCE IN THE INDIAN CONTEXT

Section 53A of the Transfer of Property Act, acts as a safeguard to prospective transferees in a contract of sale of immovable property, and allows them to retain the possession of the same as against the transferors to the contract, who after having executed an incomplete instrument of transfer, fails to comply with the procedure established by law and with no fault on the part of the transferee.¹

In common parlance, there are corresponding rights and duties which are duly imposed by law on both the transferor and the transferee, when there is an execution of a contract between any two parties. It is a duty which is cast upon the transferor to execute the transfer deed in the manner and procedure established by law and to pay the consideration as and when the transferee is required to do so by the transferor.² In matters relating to the transfer deed, the transferor plays an important role. The transferor in his capacity has to sign the deed, his signature should be duly attested by the competent witnesses and it is he at whose behest the deed would have to be registered in the Registrar's Office, by following all the legal requirements.³

On the other hand, the primary duty of the transferee is to pay the due consideration, he can

¹ DR. POONAM PRADHAN SAXENA, PROPERTY LAW, (3ED. LEXIS NEXIS 2019).

² ID.

³ ID.

also be asked to pay the same in advance to the transferor at any time in the manner the later specifies.⁴ In certain situations where the parties to the contract of sale initially agrees for the transfer of a certain property and in furtherance of the written agreement between the parties, the transferee is give the possession of the property by the transferor, this act of the transferor would imply that the intention to act upon the agreement entered by both parties are clear in terms of the condition stipulated.⁵

Under such circumstances, if the transferee has paid the full amount of consideration or is ready to fulfill his part of the contract stipulations, and the transferor does not intend to go ahead with the transfer of the property, then under Section 53A of the Transfer of Property Act 1882, the transferor or any other person claiming under him would be disqualified from claiming back possession of the property in question, for which consideration has already been given by the transferee to the transferor.⁶

According to Section 53A, when there is a contract in writing to transfer any immovable property,⁷ which has been signed by the transferor and from the language of it, the terms, conditions and other stipulations essential to constitute the transfer should be ascertained with a reasonable certainty.

And the transferee in in part performance of the contract, taken possession of the property or any part of it, or the transferee being already in possession, continues in possession of the property 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,⁸ the transferor or any person claiming under him shall be disqualified from enforcing against the transferee and persons claiming under him any rights in respect of the property of which the transferee has taken or continued in possession.⁹

2.1. POSITION UNDER ENGLISH LAW AND ITS IMPORT IN INDIA

Under English Law, the equitable doctrine of part-performance was developed by the Court of

⁴ AMAN MEHTA, *S.53A, TRANSFER OF PROPERTY ACT- A SWORD TO ITS OWN SHIELD?* SUPREMO AMICUS (VOL.19) <https://supremoamicus.org/wp-content/uploads/2020/07/A1-10.PDF>

⁵ Id.

⁶ SUPRA NOTE 6.

⁷ NIGAMANANDA PATRA V. SARAT CHANDRA PATRA, AIR 1998 ORI 19.

⁸ RAM KUMAR AGARWAL V. THAWAR DAS, (1999) 7 SCC 303.

⁹ SHIVRAM KISAN GUNJAL V. RAMESH VISHWANATH GUNJAL, (2010) 5 MAH LJ 623.

Chancery against the strict provisions of the Statute of Frauds, 1677. Section 4 of the Statute of Frauds provided that, agreements made by parties in respect of land must be made in writing. The provision of this Section stated that the transfer of immovable property on the basis of any oral agreement was deemed illegal and if done so, the transferee would not get the title of possession of that property. In this manner, if a bona fide transferee performed his part of the contract by paying the amount of consideration (fully or in part) and had also taken possession of the property in furtherance of the agreement, could not get the title of possession on the grounds of absence of legal formalities.

The Court of Chancery then held that part performance of the transferee in furtherance of the agreement would be outside the purview of the Statute of Frauds. Lord Selbourne in *Maddison v. Alderson*¹⁰, one of the leading cases on the doctrine, held that if such equities were excluded, against the interest of the defendant in a suit of part performance, it would be a injustice of a kind which even the statute cannot be thought to have had in contemplation.

Not every act which is subsequent to the contract by itself may not be sufficient to establish part performance on the behalf of the transferee.¹¹ The act must be of such a nature which is being one unequivocally referable to the contract and having been performed in furtherance of the contract by the transferee.¹²

The doctrine of part-performance was partially imported under Section 53A of the Transfer of Property Act, 1882 by the Amending Act of 1929. Prior to this amendment, there was no established law on the subject of part-performance in India. The Anglo-Indian courts thus, applied the English equitable doctrine in India, but it was neither certain nor it was uniform in nature. In the case of *Mohammad Musa v. Aghore Kumar Ganguli*¹³, the Privy Council held that the English equitable doctrine can be applied in Indian cases as it was applied under English law in England. In this case, the Privy Council applied the rule in *Maddison*¹⁴, and held that even though the razinama was not registered by the parties but since this was in writing, it was held to be a valid document and hence, the same cannot be repudiated. This opinion was

¹⁰ MADDISON V. ALDERSON, (1883) 8 AC 467.

¹¹ SARDAR GOVINDRAO MAHADIK & ANR V. DEVI SAHAI & ORS, 1982 AIR 989.

¹² ID.

¹³ MOHAMMAD MUSA V. AGHORE KUMAR GANGULI, (1914) 42 CAL. 801.

¹⁴ SUPRA NOTE 9.

soon changed by the Privy Council in the case of *Ariff v. Jadunath*¹⁵, where the Court held that the doctrine could not be applied in India as it over-rides the existing provisions in the Indian Registration Act and subsequently the Transfer of Property Act. This was because, the facts of the case involved an agreement for lease which was made orally and not in written, and the application of the doctrine would violate the existing provision of Section 107 of the Transfer of Property Act.

The law contained in Section 53A of the Transfer of Property Act is same as the what the Privy Council held in the case of *Mohammad Musa*¹⁶, which applies the English equitable doctrine albeit with certain restrictions. The English equity of part-performance crystallized by Section 53A of the Transfer of Property Act, has been only partially imported in India¹⁷ and gives rise to not merely equity but is a passive¹⁸, statutory right which is much more limited than the English equity¹⁹. This is because under the English law, the doctrine of part-performance can be invoked as a safeguard by a person even when there is an oral agreement and not necessarily in writing, which is the case under Indian law²⁰. The doctrine is used both as a defence as well as a weapon because it can also be used by the transferee to enforce the right of possession.

2.2. PROPERTY UNDER SECTION 53A

Under Section 53A, the property for which there has been a contract of transfer refers to immovable property and excludes any kind of movable property²¹. Section 3 of the Transfer of Property Act 1882, defines immovable property to every kind except standing timber, growing crops or grass. For more clarity as to the definition of what constitutes an immovable property, Section 3(26) of the General Clauses Act, 1897 is referred to, which defines immovable property as property which includes land, benefits arising out of land and things attached to the earth. What constitutes immovable property has been further defined in Section 2(8) of the Registration Act 1908, which incorporates land, buildings, hereditary allowances, right to ways, lights, ferries, fisheries or any other benefit to arise out of land, and things attached to Earth, or permanently fastened to anything which is attached to Earth, but not standing timber,

¹⁵ ARIFF V. JADUNATH, AIR 1931 PC 79.

¹⁶ SUPRA NOTE 12.

¹⁷ AMA SULTAN V SEYDA ZOHRA BIBI, AIR 1990 KER 186.

¹⁸ RAMRAO V. PURNANAD, AIR 1940 BOM 282.

¹⁹ KASHINATH MEHROTRA V ROOP NARAYAN CHOUDHARY, AIR 2008 (NOC) 301 (ALL).

²⁰ UN SHARMA V PUTTEGOWDA, AIR 1986 KANT 99.

²¹ RAMCHANDRAPPA V. SATYANARAYANA, AIR 1964 SC 877.

growing crops nor grass as kinds of immovable property.²²

Only those transactions, which complies with the provisions of Section 53A, are considered as transfer under 2(47) (v) of the Income Tax Act, 1961. The main condition is the intention of transfer of property in the contract for the consideration.²³

Handing over the possession of the property in question by the transferor to the transferee in part performance of the contract under Section 53A is necessary, but the transfer should be of legal title and rights to enjoy the property.²⁴

3. ESSENTIAL CONDITIONS FOR APPLICATION OF SECTION 53A BY THE TRANSFEREE

In the case of *Kamalabai Laxman Pathak v. Onkar Parsharam Patil*²⁵, the Bombay High Court emphasized on the following conditions for the application of the doctrine of part-performance.

i) Contract for Transfer of Immovable Property

For the application of the doctrine, there has to be a contract for transfer of an immovable property between two parties. The contract must be a written agreement and not oral, or else Section 53A cannot be applied.²⁶ A simple written contract is not sufficient, it has to be duly registered as per the procedure established by law. It should be signed by the transferor or any other person authorized by him, in the presence of competent witnesses.²⁷ Furthermore, the written contract on the basis of which the property has been possessed by the transferee must clearly suggest the transfer of the property in question. The terms of the contract must be ascertained with reasonable certainty.²⁸ The contract must also be genuine in all respects and enforceable by law under the Indian Contract Act, 1872.

An agreement to sell does not lead to creation of any new interest, title or right to the property

²² ANKITA SINGH, *THE DOCTRINE OF PART PERFORMANCE*, ACADEMIKE (FEB. 14, 2015) <https://www.lawctopus.com/academike/doctrine-of-part-performance/#:~:text=%E2%80%94WHERE%20ANY%20PERSON%20CONTRACTS%20TO,CONTRACT%2C%20TAKEN%20POSSESSION%20OF%20THE>

²³ C.S DEEPAK P. SINGH, *ANALYSIS OF SECTION 53A OF TRANSFER OF PROPERTY ACT, 1882*, TAX GURU, (FEB 26, 2016) <https://taxguru.in/corporate-law/analysis-provisions-section-53a-transfer-property-act-1882.html>

²⁴ ID.

²⁵ KAMALABAI LAXMAN PATHAK V. ONKAR PARSHARAM PATIL, AIR 1995 BOM 113.

²⁶ V.R SUDHAKARA RAO V. T.V KAMESWARI, (2007) 6 SCC 650.

²⁷ SUBRAMANYAM V. SUBBA RAO, AIR 1948 PC 95.

²⁸ MOOL CHAND BAKRU V. ROHAN, AIR 2002 SC 812.

in question. Such rights, interest or title is created only when there is a transfer of a property through a registered sale deed.²⁹ Where there was an agreement for a sale of an immovable property along with the delivery of possession, the agreement holder is duly entitled to possession provided that the transferee is willing to perform his part of the contract.³⁰ With the Amending Act of 2001, which amended the provision of Section 17A of the Registration Act and proviso to Section 49, so as to amend Section 53A of the Transfer of Property Act, the scope and application of Section 53A has been limited to a certain extent. With the amendment, recognition is given to transfer deed which have been incomplete, albeit as a written contract is a piece of evidence to recognize that the transferee's possession is unauthorized without the deed being complete. An unregistered contract therefore, has no value for the purposes of Section 53A but can be regarded to have evidentiary value for the existence of certain facts of that particular transaction.³¹

ii) Transfer for Consideration

The contract between the parties must be for a transfer of an immovable property for a valid consideration. The plea of part-performance cannot be taken where the contract clearly does not amount to a document for the transfer of the property. Section 53A clearly does not apply where the transfer is without a valid consideration. Under Section 23 of the Indian Contract Act, an agreement between parties without a consideration is deemed to be void, and if this situation exist, the safeguard of Section 53A cannot be enforced.³²

iii) Possession in furtherance of the Contract

Another essential condition is that the transferee should take possession or continue to take possession in part-performance of the contract, and perform some act in furtherance of the contract. In *Shyam Narayan Prasad v. Krishna Prasad and Ors*³³, the Court held that the party who wish to avail the benefit of the doctrine of part-performance must plead before the court that he has taken possession of the property in question in part-performance of the contract. No relief will be granted to the party, if no pleading to this effect is made.

²⁹ DR. R.K SINHA, THE TRANSFER OF PROPERTY ACT, (DR. SHREEDUTTA ARVIND PANDEY ED. CENTRAL LAW AGENCY 2019).

³⁰ DEVINDER SINGH V. FATEH JUNG SINGH AND ORS, AIR 2018 P&H 70.

³¹ SUPRA NOTE 26.

³² THAKURMAL V. CHAKRADHAR RAO BHOSLE, AIR 2009 CHH. 27.

³³ SHYAM NARAYAN PRASAD V. KRISHNA PRASAD AND ORS, AIR 2018 SC 3152.

The possession of the property must be solely in furtherance of the contract. A plea of adverse possession, otherwise, contrary to the acquisition of possession in a lawful manner by the transferee and is thus, unavailable to the possessor of the property. Setting up a title by adverse possession and readiness and willingness to perform the contract are opposite stands which a party cannot be permitted to take and a relief of specific performance would not be granted in such cases despite the presence of a sale agreement and possession for more than 12 years.³⁴

If the possession is given to a person in furtherance of the contract that is partly performed, this acquisition of possession in itself is sufficient to invoke the doctrine of part performance, but in cases where the transferee already had the possession of the property and retains it after a partly performed contract, he must show that besides the retention of the possession, he has done some act in furtherance of the contract that can show clearly his altered position. Mere continuation of possession by a person already in possession prior to the contract is not sufficient.³⁵

iv) Act done in furtherance of a contract

To invoke the safeguard of Section 53A, it has to be shown that there is a contract to transfer the property in writing, which is signed by the transferor, the document being registered, and the terms essential to constitute the transfer can be ascertained with reasonable certainty. After establishing the aforesaid conditions, it has to be further shown that the transferee, in part performance of the contract, has either taken possession of the property, or the transferee being already in possession has done some act in furtherance of the contract. The act claimed to be in part performance of the contract must unambiguously be ascribable to the pre-existing contract between the parties,³⁶ and the act of part performance must unequivocally point to the direction of the existence of contract. This acts as evidencing the implementation or performance of the existing conditions or stipulations in the contract.³⁷

v) Transferee is willing to perform his part of the contract

The transferee must show his willingness to fulfil his part of the contract in order to take the benefit of part performance.³⁸ A failure to prove willingness will disentitle them to such

³⁴ M JAYA RAO V. M KRISHNA RAO, AIR 2012 AP 34.

³⁵ SULTAN V ZOHRA BIBI, AIR 1990 KER 186.

³⁶ SUNIL KUMAR V AGHORE BASU, AIR 1989 GAU 39.

³⁷ FGP LTD V SALEH HOOSEINI DOCTOR, (2009) 10 SCC 223.

³⁸ M PONNUSWAMY V M THAMARAIAKANNAN, AIR 2008 (NOC) 506 (KANT).

protection.³⁹ Post induction of the purchaser in possession, payment of complete or even a substantial consideration to transferor by him can lead to a strong presumption of the purchaser's willingness to perform his obligations arising out under the sale agreement and he would therefore be entitled to protection under Section 53A.⁴⁰

Where the possession of the property was handed over in furtherance of an agreement to sell but the transferee was not ready and willing to fulfil his specific obligations under the agreement and part of the bargain, the benefit of Section 53A would not be available to him.⁴¹

4. NATURE OF RIGHTS OF THE TRANSFEE

The nature of the transferee's rights under Section 53A can be analyzed as follows-

i) **No title or interest in the property-**

The safeguard of Section 53A does not confer upon the transferee, any title or interest in relation to the property in which he has taken possession. Section 53A simply provides that if the above conditions are duly fulfilled, the transferor is duty bound to not evict the transferee from the property in which the later has taken possession of. It is only if the transferee is evicted from the property or a suit is filed by the transferor in lieu of the same, the defence of Part-performance can be pleaded in the court of law and the transferor would be given the right to continue with possession if the conditions are fulfilled. Therefore, the transferor in this regard is simply given the right to continue possession and there is no creation of any new title or interest in favor of the transferee.⁴² Section 53A imposes a statutory restriction upon the transferor to not dispossess the transferee from continuing with the possession of the property.⁴³

It is only after the registration of the sale deed that the transferee can get any title over the property. The registration of the sale deed is important for creation of any new title or interest so as to not defeat the provisions of the Registration Act.⁴⁴ Section 53A does not affect in any way, the ownership rights of the transferor over the property in question unless registration of the sale deed is complete.⁴⁵

³⁹ A LEWIS V MT RAMA MURTHY, AIR 2008 SC 493.

⁴⁰ AKK ADALAKHA V AMRISH SEHGAL, AIR 2010 (NOC) 1118 (P&H).

⁴¹ ANDHRA GRAPHITE PVT LTD V JOBING SYNDICATE, AIR 2011 (NOC) 245 (AP).

⁴² SITARAM RAO V. BIBHISANA PRADHAN, AIR 1978 ORI. 222.

⁴³ ID.

⁴⁴ SUPRA NOTE 26.

⁴⁵ STATE OF UP V. DISTRICT JUDGE, AIR 1997 SC 53.

ii) Passive equity; no right of action-

Section 53A does not give the transferee any right of action against the transferor. It is used as a mere right of defence. The transferee can raise the defence of part-performance against being evicted from possession of the property, but he cannot use the provision of Section 53A to restrain the transferor from transferring the property to any other party. That is, the equity of part-performance in India can be used only as a shield and not as a sword, unlike English law, where the equity of part-performance is an active equity; which gives the right to the transferee to proceed against the transferor when being evicted. Therefore, in India, the scope of Section 53A has been limited to just as a right of defence.⁴⁶

In the leading case of *Prabodh Kumar Das v. Dantamara Tea Co. Ltd*⁴⁷, the Privy Council held that the equity of part-performance in India as incorporated by Section 53A is not an active equity as in England and is limited in nature. That is, under an unregistered sale deed, Section 53A does not give any right of action to the transferee, who in furtherance of the stipulations of the contract has taken possession of the property. The safeguard of Section 53A is therefore, available to the transferee only as a right of defence to protect the possession and does not confer upon the transferee any right of action. The case thereby, reiterated the established principle of law of equity of part performance in India as that of a shield and not as a sword.

iii) Transferee- Plaintiff or a Defendant?

The opinion of the Courts in India, whether the transferee is a defendant or can also be a plaintiff to defend the possession of the property is divided. As per Allahabad, Andhra Pradesh and Bombay High Courts, the transferee under Section 53A can also be a plaintiff, if the situation demands that the transferee has to protect his possession.⁴⁸ Contrary to this opinion, the Rajasthan, Orissa and Madras High Courts observed that transferee is a defendant, as he has to protect his possession.⁴⁹

However, it would be correct to say that the transferee can avail the safeguard of Section 53A, both as a defendant and as a plaintiff, only if used as a right of defence.⁵⁰

⁴⁶ SUPRA NOTE 26.

⁴⁷ PRABODH KUMAR DAS V. DANTAMARA TEA CO. LTD, AIR 1940 PC 1.

⁴⁸ RAM CHANDRA V. MAHARAJ KUMAR, AIR 1939 ALL. 611; ACHAYYA V. VENKATA SUBBARAO, AIR 1957 AP 854; DHARMAJI V. JAGANNATH SHANKAR JADHAV, AIR 1994 BOM. 254.

⁴⁹ MOTILAL V. JASWANT SINGH, AIR 1964 RAJ. 11; PADMALABHA V. APPALA NARSAMMA, AIR 1952 ORI. 143; ALSO AIR 1981 MAD. 310.

⁵⁰ A.K SRIVASTAVA, BAL KRISHNA, *NATURE OF RIGHT UNDER SECTION 53A OF THE TRANSFER OF PROPERTY ACT 1882*, INDIAN LAW INSTITUTE (1973).

4.1. RIGHTS OF SUBSEQUENT TRANSFEREE FOR VALUE

Proviso to Section 53A states that the interests of a subsequent transferee for value without prior notice of the previous transferee's rights of the doctrine of part-performance is protected. Section 53A in any way, does not affect the right of the subsequent transferee for consideration who has no notice of the contract of sale or of part-performance.⁵¹ Any rights which the transferee under Section 53A may have against the transferor would not be of any avail against a bona fide transferee for value having no notice of the transaction.⁵²

4.2. LEGAL EFFECTS OF THE AMENDING ACT OF 2001

After the Amending Act of 2001, the non-registration of the contract has been made an irrelevant factor for the application of the doctrine of part-performance under Section 53A and the defence can also be invoked on a registered sale deed. However, the same Amendment has to be read with amendments made to Section 17 and Section 49 of the Registration Act. Reading Section 53A with Section 17A of the Registration Act makes Section 53A inapplicable and the defence of part-performance worthless unless the sale deed has been duly registered. Therefore, in case of transfer of an immovable property and to invoke protection under Section 53A, the contract has to be registered.⁵³

The amended proviso to Section 49 of the Registration Act can now be interpreted in a manner that would mean that an unregistered document carries an evidentiary value in the court of law for proving any collateral transaction or of that of possession of the property in question. Hence, the object of the amendments to the Transfer of Property Act and the Registration Act is to prevent evasion of the law of registration.⁵⁴

5. CONCLUSION

The doctrine of part-performance is not a total import of the English equitable doctrine. On the question of the rights of the transferee, courts in India have interpreted this doctrine as a passive equity, that is, protection under Section 53A can be invoked only as a right of defence. It can be used as a shield and not as a weapon of attack as the against the transferor or any person claiming under him. This, in the opinion of the researcher, is something that the Courts must look into while interpreting the doctrine. The benefit of Section 53A for the transferee as just

⁵¹ SUPRA NOTE 26.

⁵² ID.

⁵³ ID.

⁵⁴ ID.

passive equity devoids the transferee the right to action, which can be against his case in certain instances and this could be clearly seen in the *Prabodh Kumar Das case*⁵⁵.

Also, in the opinion of the researcher, the fact that under Indian law, only written agreement is valid can also act as a negative for the transferee, as not everyone has the clarity of the legal language, given the condition of literacy in a country like India. Indian law should permit both written as well as oral agreements, as things stand under English law. But any oral agreement must be, sooner or later be in the form of a written agreement, for it to be admissible in the court of law.

Lastly, the researcher feels that the Amending Act of 2001 was a much-needed step by the legislature, because prior to it, there was a great deal of confusion as to the cause of action when there is a unregistered sale deed. With the position being clear after the Amendment, the real purpose and object of the doctrine of part-performance comes into fruition, which was previously marred with uncertainty.

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⁵⁵ SUPRA NOTE 46.