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as a bar against parties from whom money is claimed on the basis of any other relationship. In my opinion the judgment of the learned Judge in appeal was erroneous. He had accepted the findings of fact of the trial court and on those findings of fact it is obvious that the suits must fail. I would, therefore, reverse the decision of the appellate court and restore the decision of the Munsif and the respondents should pay the costs throughout.

KULWANT SAHAY, J.—I agree.

Appeal allowed.

PRIVY COUNCIL.

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*J. C.
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December,
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[On Appeal from the High Court at Patna.]

Specific Performance—Contract for Sale—Subsequent Transfer by Vendor—Bona-fide Purchaser without Notice—Onus of Proof—Specific Relief Act, 1877 (I of 1877) s. 27(b).

Where the purchaser under a contract for the sale of immovable property claims under section 27(b) of the Specific Relief Act, 1877, a decree for specific performance against a person claiming title from the vendor under a subsequent registered sale-deed, the onus is upon the defendant to prove that he is a *bona fide* purchaser for value without notice of the earlier contract so as to bring himself within the exception provided by the above section.

Himatlal v. Vasudev(1), *Muhammad Sadik Khan v. Masihan Bibi*(2) and other decisions in India to the above effect, approved.

Peerkha Lalkha v. Babu Koshiba Mali(3), disapproved.

* Present: Lord Thankerton, Sir John Wallis, and Sir George Lowndes.

(1) (1912) I. L. R. 36 Bom. 466.

(2) (1929) I. L. R. 9 Pat. 417.

(3) (1928) 25 Bom. L. R. 375.

Official Receiver v. Chettyar Firm(¹) and *Pope v. Official Assignee*(²), distinguished.

Decree of the High Court reversed.

Appeal (no. 1 of 1932) from a decree of the High Court (June 12, 1930) reversing a decree of the Subordinate Judge of Patna (March 31, 1928).

The appellant instituted a suit for specific performance of a contract of November 26, 1926, for the sale to him of certain immovable property, and had obtained a decree against defendants nos. 1, 2, and 3. The present appeal related only to defendant no. 4, (respondent no. 1) the decree against whom had been set aside by the High Court. He claimed title to the property under a registered sale-deed of December 22, 1926; a decree was prayed for against him under section 27(b) of the Specific Relief Act, 1877.

The facts of the case and the terms of the above section, appear from the judgment of the Judicial Committee.

Among the issues framed were—(6) Had defendant no. 4 knowledge of any contract between the plaintiff and defendant no. 1 before execution of the sale-deed in his favour? (7) To what relief, if any, is the plaintiff entitled.

The trial judge made a decree for specific performance against all the defendants. Applying *Muhammad Sadik Khan v. Masihan Bibi*(³) he held that, the plaintiff having proved a prior contract, the onus was upon defendant no. 4 to prove that the transfer to him was *bona fide* for value and without notice, and that he had not adduced satisfactory evidence that he had no notice of the plaintiff's contract, nor that he was a *bona fide* purchaser for consideration.

(1) (1930) I. L. R. 9 Ran. 170; L. R. 58 I. A. 115.

(2) (1933) I. L. R. 12 Ran. 105; L. R. 60 I. A. 362.

(3) (1930) I. L. R. 9 Pat. 417.

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On an appeal by defendant no. 4 to the High Court (Wort and Adami, JJ.) the decree against him was set aside. Wort, J. said with regard to whether defendant no. 4 had notice of the prior contract that there was no evidence apart from that of the plaintiff which had been disbelieved; he would hold that it had not been established that defendant no. 4 had knowledge of the contract. On the question whether defendant no. 4 had paid the money he said there was no evidence. Adami J. agreed with the above reasons for allowing the appeal; he was further of opinion, differing from Wort, J., that by the agreement of November 26, 1926, the vendor sold only his own interest in the property.

1933, Nov. 28, 30. *Sir Dawson Miller, K. C.* and *Jinnah* for the appellant. Upon the true construction of the agreement of November 26, 1926, defendant no. 1 as karta agreed to sell to the plaintiff the whole of the family share in the property. Under section 27(b) of the Specific Relief Act, 1877, the appellant was entitled to a decree against respondent no. 1 (defendant no. 4). There have been a series of decisions in India under which the onus was upon him to prove that he was a transferee for value who had paid his money in good faith and without notice of the original contract. [Reference was made to *Himatlal v. Vasudev*⁽¹⁾, and other cases mentioned in the judgment also to *Hem Chandra De Sarkar v. Amiyabala De Sarkar*⁽²⁾]. The above decisions apply the principle laid down by the Board in *Varden Seth Sam v. Luckpathy Royjee Lallah*⁽³⁾, in which the question was analogous to that arising under section 27(b). The trial judge was right in holding that the onus of proof had not been discharged. The High Court treated the onus as being on the plaintiff, as they decided in his favour after finding that there was no satisfactory evidence whether defendant no. 4 had notice, or whether he had paid the price.

(1) (1912) I. L. R. 36 Bom. 446.

(2) (1924) I. L. R. 52 Cal. 121.

(3) (1862) 9 Moo. I. A. 303.

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Dunne, K. C. and *Mockett* for respondent no. 1. By the agreement of November 26, 1926, defendant no. 1 sold only his own interest in the property. The agreement does not purport to be made by him as karta, or on behalf of the family; the necessity to which it refers is not stated to be the legal necessity of the family. Even if the contract of sale was on behalf of the family, the evidence shows that defendant no. 4 was within the exception to section 27 (b) of the Specific Relief Act, whether or not the onus of proof was upon him. In his evidence he stated that the money was paid by him and that he did not then know of the contract now sued on; there was no ground for not accepting his evidence. The plaintiff's evidence was disbelieved by both Courts. The plaintiff did not deny the payment and no specific issue was framed about it. But the onus of proof was upon the plaintiff: *Peerkha Lalkha v. Bapu Koshiba Mali*(¹). That decision is to be preferred to those relied on by the appellant having regard to the decision of the Board in *Official Assignee v. Khoo Saw Cheow*(²), and its application to the Indian Insolvency Acts in *Official Receiver v. P. L. K. M. R. M. Chettyar Firm*(³) and *Pope v. Official Assignee*(⁴). There is no material difference between the language of the sections there in question and that of section 27 (b) of the Specific Relief Act, nor in the position of the parties. Having regard to section 54 of the Transfer of Property Act, 1882, the plaintiff had merely a right in specific performance if he showed that section 27 of the Specific Relief Act gave him that right. Defendant no. 4 on the other hand had a good title under the registered sale-deed subject to the right of the plaintiff under section 27 (b). In *Mohammad*

(1) (1923) 25 Bom. L. Rep. 375.

(2) (1931) A. C. 67.

(3) (1930) I. L. R. 9 Ran. 170; L. R. 58 I. A. 115.

(4) (1933) I. L. R. 12 Ran. 105; L. R. 60 I. A. 362.

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Aslam Khan v. Feroze Shah⁽¹⁾ the Board left open the question of the onus of proof under section 27(b). In any case specific performance should not be granted to the plaintiff, as the sale to defendant no. 4 was more beneficial to the minors: *Chhitar Mal v. Jagan Nath Prasad*⁽²⁾.

Sir Dawson Miller, K.C. in reply. The terms of the sections in the insolvency Acts materially differ from those of section 27(b). They define the circumstances in which a transfer within two years may be set aside; it is for the Official Assignee to prove that these circumstances exist. Under section 27(b) it is for the subsequent purchaser to prove that he is within the exemption.

December 18. The judgment of their Lordships was delivered by

LORD THANKERTON.—The appellant, who is the plaintiff in a suit for specific performance of a contract for sale of certain immovable properties, appeals against a judgment and decree of the High Court of Judicature at Patna, dated the 12th June, 1930, which reversed the judgment and decree of the Subordinate Judge of Patna, dated the 31st March, 1928, and dismissed the suit.

In the suit, which was filed on 27th January, 1927, the appellant seeks specific performance of an agreement dated 26th November, 1926, under which he alleges that defendant no. 1 (now respondent no. 2), as Karta of his joint family, which consisted of himself and his two sons, defendant no. 2 (now represented by respondents nos. 2 and 4) and defendant no. 3 (now respondent no. 4), agreed to sell to him certain property of the joint family at the price of Rs. 13,000. The present respondent no. 1, who was impleaded as defendant no. 4, claimed the property in suit by

(1) (1932) I. L. R. 13 Lah. 687; L. R. 59 I. A. 386.

(2) (1906) I. L. R. 29 All. 213.

virtue of a registered sale-deed, dated 22nd December, 1926, by defendant no. 1, for himself and as guardian of his two minor sons, defendants nos. 2 and 3, in favour of defendant no. 4, at the price of Rs. 15,000.

Defendant no. 1 did not appear to defend the suit, but defendants nos. 2 and 3 put in a written statement by their guardian *ad litem*, denying the plaintiff's contract, and, alternatively, in the event of the contract being held proved, denying that defendant no. 1 was entitled to alienate their interests, as the sale was not for family necessity or for their benefit. All the defences of defendants nos. 2 and 3 were rejected by the Subordinate Judge, and no appeal was taken against that decision to the High Court. Accordingly, the issue now lies between the plaintiff-appellant and defendant no. 4, now respondent no. 1.

At the trial defendant no. 4 sought to prove that he had concluded an oral agreement with defendant no. 1 for purchase of the property in suit at the price of Rs. 15,000 on 23rd November, 1926, and the appellant sought to establish an even earlier agreement for their purchase at Rs. 13,000. Further, defendant no. 4 sought to prove that the appellant's agreement of 26th November, 1926, was not genuinely made on that date, but was concocted at a date subsequent to 22nd December, 1926, when the sale-deed to defendant no. 4 was executed and registered. But the Subordinate Judge rejected all these contentions, declining to believe the evidence in support of them, and remarking that both parties had adduced a mass of false evidence in support of their respective cases. The learned Judge held that defendant no. 1 had contracted on the 26th November, 1926, to sell the property in suit to the appellant at the price of Rs. 13,000, and that finding is not now disputed.

Two main questions were argued before their Lordships, namely, (a) whether, on a sound construction, the agreement of the 26th November, 1926,

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affected the joint family's right in the property in suit or only the individual interest of defendant no. 1, and (b) whether, in respect of the registered sale-deed dated the 22nd December, 1926, defendant no. 4 was a transferee for value who had paid his money in good faith and without notice of the appellant's prior contract of the 26th November, 1926, with the consequent exclusion of the appellant's claim for specific relief, in view of Section 27(b) of the Specific Relief Act, 1877.

The first question does not appear to have been argued before the Subordinate Judge. In the High Court Wort, J. held that the agreement affected the joint family interest, while Adami, J. expressed a contrary view. In their Lordships' opinion, the agreement clearly affected the joint family interest. The question turns on the construction of the following passage:—

" I, the executant, have got proprietary interest in 13 dams 6 kauris 13 bauris 6 phauris and 13 reoris pukhta share together with *khudkasht* land in *mauza* Benipur Bind, *pargana* Bihar, district Patna, touzi no. 10618, I, the executant, have to sell the said share to meet certain legal necessities. Accordingly with a view to sell it I made negotiation for sale with Bhup Narayan Singh, *alias* Sham Narayan Singh, resident of *mauza* Bind, *pargana* Bihar, district Patna, for Rs. 13,000 (rupees thirteen thousand) (illegible). I heartily agreed to sell and the said vendor. (sic) heartily agreed to purchase the same for that much consideration money."

In their Lordships' opinion, the subject of sale is clearly the share and not merely the individual interest of the executant therein, and the share was joint family property; the addition of the words " to meet certain legal necessities " confirms this view. It is moreover clear that the price agreed upon was the fair value of the whole.

The second question arises under section 27 (b) of the Specific Relief Act. Three questions of fact arise in the case of the later transferee, namely, as to payment of his money, as to his good faith, and as to the absence of notice to him of the original contract.

The Subordinate Judge did not accept the evidence of the appellant's two witnesses, who spoke to the knowledge of defendant no. 4 of the prior contract, and equally clearly he did not accept the latter's denial of such knowledge, for he states "Defendant no. 4 has not produced satisfactory evidence to show that he had no notice of the plaintiff's contract, neither has he established that he was a *bona fide* purchaser for consideration." Defendant no. 4 had not adduced any other witness than himself on this point. On the question of payment of Rs. 10,500, which was to be paid in cash at the time of registration, defendant no. 4 was the only witness, and the learned Judge states, "He (defendant no. 4) states that he paid Rs. 10,500 to Parshadi Singh at the time when he executed the kabala. Had that been so, defendant no. 4 would have taken the sale-deed from Parshadi at that time and would have himself presented the same before the Registrar for registration. The endorsement on exhibit B shows that this deed was presented for registration by Parshadi himself. That fact clearly goes to show that Rs. 10,500, a portion of the consideration which was to be paid in cash to Parshadi Singh, was not paid." The learned Judge held that the *onus* of proof under section 27 (b) was on defendant no. 4, and, there being no satisfactory evidence that he was without notice, and the Rs. 10,500 not having been paid, the appellant was entitled to specific performance.

In the High Court, both the learned Judges held in effect that the *onus* of proof under section 27 (b) was on the appellant, and not on defendant no. 4, and that there was no sufficient evidence either on the question of notice or the question of payment. On the latter point they disagreed with the inference drawn by the Subordinate Judge from the presentation of the sale-deed for registration by the vendor, and observed, "That reasoning is impossible to understand, as the practice in India is for the vendor to take the deed for registration to the registry."

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Their Lordships are unable to agree with this statement of the practice in India; in such cases as the present, where a cash payment is to be made at the time of registration, the commoner practice is for the vendee, on payment, to present the deed for registration and get the registration receipt. But while, in their Lordships' opinion, the retention of the receipt by the vendor in the present case is suggestive of non-payment of the cash sum, they do not think that it is sufficient proof by itself of non-payment, and they agree with the learned Judges of the High Court that there is no sufficient evidence either on the question of payment or on the question of notice, and that the applicability of section 27 will depend on a decision as to where the burden of proof lies primarily, there being no need to consider in the present case the circumstances under which that burden may shift.

It will be convenient to state the material portions of the section, which are as follows:—

"27. Except as otherwise provided by this chapter, specific performance of a contract may be enforced against—

- (a) Either party thereto;
- (b) Any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract."

In their Lordships' opinion, the section lays down a general rule that the original contract may be specifically enforced against a subsequent transferee, but allows an exception to that general rule, not to the transferor, but to the transferee, and, in their Lordships' opinion, it is clearly for the transferee to establish the circumstances which will allow him to retain the benefit of a transfer which, *prima facie*, he had no right to get. Further, the subsequent transferee is the person within whose knowledge the facts as to whether he has paid and whether he had notice of the original contract lie, and the provisions of sections 103 and 106 of the Indian Evidence Act,

1872, have a bearing on the question. The plaintiff does not necessarily have knowledge of either matter. In a case in 1862 before this Board, *Varden Seth Sam v. Luckpathy Royjee Lallah*(¹), an equitable lien by deposit of title deeds was enforced against a subsequent transferee of the property. In delivering the judgment of this Board, Lord Kingsdown stated:—

“ Though both the third and the last defendants pleaded, in effect, that they were *bona fide* purchasers for value, without notice, yet they did not prove that defence, though the plaintiff charged notice and collusion with the first defendant.”

And, later:—

“ The question to be considered is, whether the third and sixth defendants respectively possessed the land free from that lien, whatever its nature. As one who owns property subject to a charge can, in general, convey no title higher or more free than his own, it lies always on a succeeding owner to make out a case to defeat such prior charge. Let it be conceded that a purchaser for value, *bona fide*, and without notice of this charge, whether legal or equitable, would have had in these Courts an equity superior to that of the plaintiff, still such innocent purchase must be, not merely asserted, but proved in the cause, and this case furnishes no such proof.”

Although under section 54 of the Transfer of Property Act, 1882, the appellant's agreement for sale does not of itself create any interest in or charge on the property, their Lordships are of opinion that the rule of procedure stated by Lord Kingsdown is applicable to the present case under section 27 (b) of the Specific Relief Act. This view under the Specific Relief Act has been taken in a number of cases in India, of which it is sufficient to refer to *Himatlal v. Vasudev*(²); *Baburam Bag v. Madhab Chandra Pollay*(³); *Tiruvencatachariar v. Venkatachariar*(⁴); *Naubat Rai v. Dhaunkal Singh*(⁵) and *Muhammad Sadik Khan v. Masihan Bibi*(⁶). Their Lordships' attention was drawn to only one decision to a contrary

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(1) (1862) 9 Moo. I. A. 308.

(2) (1912) I. L. R. 36 Bom. 446.

(3) (1913) I. L. R. 44 Cal. 565.

(4) (1914) 26 Mad. L. J. 218.

(5) (1916) I. L. R. 38 All. 184.

(6) (1930) I. L. R. 9 Pat. 417.

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effect, viz., *Peerkha Lalkha v. Bapu Kashiba Mali*(¹), but their Lordships prefer the earlier Bombay decision in *Himatlal's* case.

Counsel for defendant no. 4 prayed in aid certain decisions on the somewhat analogous provisions of the insolvency statutes. The first of these was *Official Assignee v. Khoo Saw Cheow*(²), a case under section 50 (1) of the Bankruptcy Ordinance of the Straits Settlements, which, so far as material, provides:—

“ Any settlement of property, not being.....a settlement made in favour of a purchaser.....in good faith and for valuable consideration.....shall, if the settlor becomes bankrupt within two years after the date of the settlement, be absolutely void as against the official assignee.”

It was held by this Board, upon construction of the section, that the *onus* is upon the official assignee to prove that a conveyance which he is seeking to set aside thereunder was not made in good faith and for valuable consideration. In their Lordships' opinion, that section is not *in pari casu* with the section of the Specific Relief Act in several respects. In the first place, the structure of that section is different, in that it does not provide a general rule with a permitted exception, but defines the area of avoidance, and the prior settlements that are outside that area are expressly excluded from invalidation by section 52 of the Ordinance. In the second place, the operation of the section is the opposite of the operation of section 27 of the Specific Relief Act, in that it renders void an earlier right in favour of a later one. That decision was followed in *Official Receiver v. P. L. K. M. R. M. Chettyar Firm*(³), which arose under section 53 of the Provincial Insolvency Act, 1920, and in *Pope v. Official Assignee*(⁴) which arose under section 55 of the Presidency-towns Insolvency Act, 1909. The provisions of these two Acts are similar to those of the Straits Settlements Ordinance.

(1) (1923) 25 Bom. L. Rep. 375.

(2) (1931) A. C. 67.

(3) (1930) I. L. R. 9 Ran. 170; L. R. 58 I. A. 115.

(4) (1933) I. L. R. 12 Ban. 105; L. R. 60 I. A. 382.

It may further be observed that, before deciding to file a suit, the official assignee or receiver has available any information to be obtained from the insolvent, and, in the case of the Straits Settlements Ordinance (section 31), of the Presidency-towns Insolvency Act (section 36), and of the Provincial Insolvency Act (section 59A) he has the power, through the Court, of obtaining full information.

Their Lordships accordingly agree with the view of the Subordinate Judge that the *onus* is upon defendant no. 4 to bring himself within the exception in section 27 of the Specific Relief Act, and, as already indicated, their Lordships agree with the learned Judges of the High Court that there is no sufficient evidence either on the question of payment or on the question of notice. The appellant is therefore entitled to the relief sought by him.

Their Lordships should refer to another argument that was submitted on behalf of defendant no. 4. to the effect that the Court should consider which of the two contracts was most beneficial to the minors and prefer the one so selected. But in view of the decision of the Subordinate Judge on the minors' case, against which no appeal has been taken, their Lordships think that this contention is not open.

Their Lordships are accordingly of opinion that the appellant is entitled to the specific relief that he claims, and they will humbly advise His Majesty that the appeal should be allowed, that the decree of the High Court dated 12th June, 1930, should be set aside, and that the decree of the Subordinate Judge dated 31st March, 1928, should be restored: the appellant to have the costs of this appeal and of the appeal in the High Court paid by respondent no. 1 (defendant no. 4). This will leave open any questions of restitution as between the parties to be dealt with by the Court below.

Solicitors for appellant: *Watkins and Hunter.*

Solicitors for respondent no. 1: *W. W. Box and Co.*

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