

Privy Council Appeal No. 1 of 1932.
Patna Appeal No. 22 of 1930.

Bhup Narain Singh *alias* Shyam Narain Singh - - - *Appellant*

v.

Gokhul Chand Mahton and others - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 18TH DECEMBER, 1933.

Present at the Hearing :

LORD THANKERTON.

SIR JOHN WALLIS.

SIR GEORGE LOWNDES.

[*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 the 27th January, 1927, the appellant seeks specific performance of an agreement dated the 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 virtue of a registered sale-deed, dated the 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 the 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 the 26th November, 1926, was not genuinely made on that date, but was concocted at a date subsequent to the 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, 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 *khudasht* land in *mouza* 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 *mouza* 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. 1, 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 that the *onus* of proof under Section 27 (b) was on the appellant, and not on defendant No. 4, and that there was no 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." 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*, 9 Moore I.A. 303, 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* (1912), I.L.R. 36 Bomb. 446; *Baburam Bag v. Madhab Chandra Pollay* (1913), I.L.R. 40 Cal. 565; *Tiruvenkatachariar v. Venkatachariar* (1914), 26 Mad. L.J. 218; *Naubat Rai v. Dhaunkal Singh* (1916), I.L.R. 38 All. 184, and *Muhammad Sadik Khan v. Masihan Bibi* (1930), I.L.R. 9 Pat. 417. Their Lordships' attention was drawn to only one decision to a contrary effect, vizt., *Peerkha Lalkha v. Bapu Kashiba Mali* (1923) (25 Bombay Law Reporter 375), 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* [1931], A.C. 67, 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.”

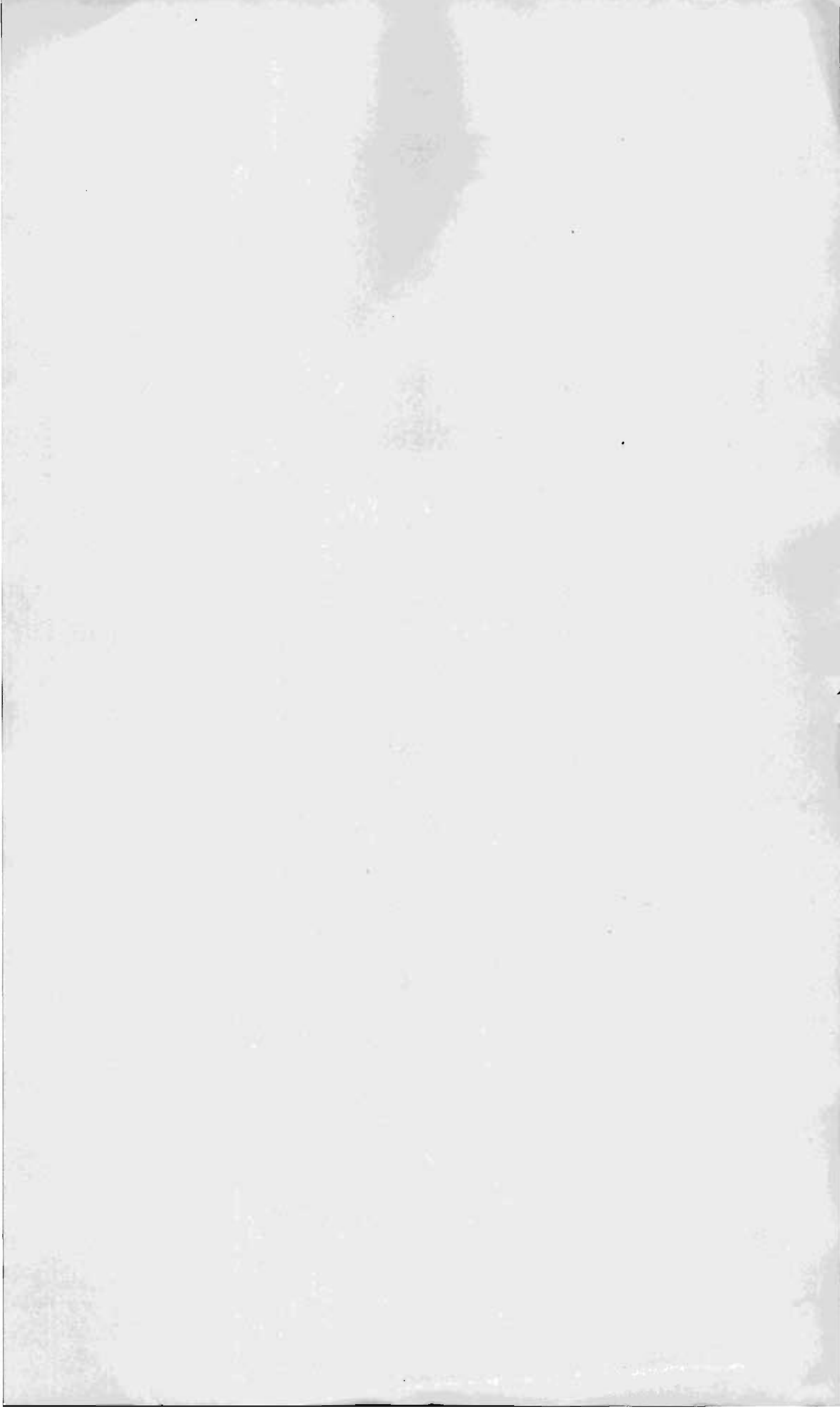
It was held by this Board, upon construction of the section, that the *onus* is upon the official assignee to prove that a conveyance which he is seeking to set aside thereunder was not made in good faith and for valuable consideration. In their Lordships' opinion, that section is not *in pari casu* 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* (1930), 58 Ind. App. 115, which arose under Section 53 of the Provincial Insolvency Act, 1920, and in *Pope v. Official Assignee* (1933), 60 Ind. App. 362, 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. 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) and of the

Presidency-towns Insolvency Act (Section 36), 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 the 12th June, 1930, should be set aside, and that the decree of the Subordinate Judge dated the 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.



In the Privy Council.

BHUP NARAIN SINGH alias SHYAM
NARAIN SINGH

v.

GOKHUL CHAND MAHTON AND OTHERS.

DELIVERED BY LORD THANKERTON.

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