

Ram Niwas (dead) through Lrs.

Vs

Smt. Bano & others

Civil Appeal No. 5129 of 1992

(Mr. S.S. Mohammed Quadri and Mr. Shivaraj V Patil)

01.08.2000

### JUDGMENT

**Syed Shah Mohammed Quadri, J.:**— The scope of Section 19(b) of the Specific Relief Act read with Explanation II to Section 3 of the Transfer of Property Act and the provisions of Section 20(2) of the Specific Relief Act, 1963, determine the result of this appeal.

It will be apt to begin our discussion with Section 19(b) of the Specific Relief Act, 1963 which is in the following terms:

**"19. Relief against parties and persons claiming under them by subsequent title** — Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against —

(a) \*\*\*\*\*

(b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who had paid his money in good faith and without notice of the original contract;

(c) to (e) \*\*\*\*\*

Section 19 provides the categories of persons against whom specific performance of a contract may be enforced. Among them is included, under clause (b), any transferee claiming under the vendor by a title arising subsequently to the contract of which, specific performance is sought. However, a transferee for value, who had paid his money in good faith and without notice of the original contract, is excluded from the purview of the said clause. To fall within the excluded class, a transferee must show that : (a) he has purchased for value the property (which is the subject-matter of the suit for specific performance of the contract); (b) he has paid his money to the vendor in good faith; and (c) he had no notice of the earlier contract for sale (specific performance of which is sought to be enforced against him.)

The said provision is based on the principle of English law which fixes priority between a legal right and an equitable right. If 'A' purchases any property from 'B' and thereafter 'B' sells the same to 'C', the sale in favour of 'A', being prior in time, prevails over the sale in favour of 'C' as both 'A' and 'C' acquired legal rights. But where one is a legal right and the other is an equitable right 'a bona fide purchaser for valuable consideration who obtains a legal estate at the time of his purchase without notice of a prior equitable right is entitled to priority in equity as well as at law". [Snell's Equity - Thirtieth Edition - p.48]. This principle is embodied in Section 19(b) of the

Specific Relief Act.

It may be noted here that 'notice' may be (i) actual, (ii) constructive or (iii) imputed.

Section 3 of the Transfer of Property Act defines, inter alia, "a person is said to have notice" of a fact when he actually knows that fact, or when but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it. And Explanation II appended to this definition clause says: "Any person acquiring any immovable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof".

Thus, it is seen that a statutory presumption of 'notice' arises against any person who acquires any immovable property or any share or interest therein of the title, if any, of the person who is for the time being in actual possession thereof.

The principle of constructive notice of any title which a tenant in actual possession may have, was laid down by Lord Eldon in Daniels vs. Davison [(1809) 16 Ves. 249 at P.254]. The learned law Lord observed, "Upon one point in this cause there is considerable authority for the opinion I hold; that, where there is a tenant in possession under a lease or an agreement, a person, purchasing part of the estate, must be bound to inquire, on what terms that person is in possession".

That principle has been followed by various High Courts in India. [See: Faki Ibrahim vs. Faki Gulam Mohidin (AIR 1921 Bombay 459); Mahadeo vs. S.B. Kesarkar (AIR 1972 Bombay 100); Tiloke Chand vs. J.B. Bettie & Co. (AIR 1926 Calcutta 204); Parthasaradhi Iyer vs. Subbaraya Gramani (AIR 1924 Madras 67) and Mummidi Reddi Papannagari Yella Reddy vs. Salla Subbi Reddy & Ors. (AIR 1954 Andhra 20)].

This being the position in law, we shall now advert to the facts of this case.

The appellant (referred to as 'the tenant') is the unsuccessful plaintiff in the suit giving rise to this appeal. He took on rent a shop situated at Katlara Bazar, Loharawali Gali, Merta City (for short, 'the suit shop') from its owner, respondent No.5 (referred to as, 'the vendor') and on the material date he was paying rent of Rs. 35/- per month. On January 25, 1978, he claims to have entered into an agreement with the vendor to purchase the suit shop (Ext.1) for a sum of Rs. 9200/- and paid a sum of Rs. 3200/- in cash and undertook to pay remaining amount of Rs. 6000/- at the time of execution of sale deed. During the pendency of this appeal, he died and the appellants were substituted as his legal representatives. The tenant and the vendor are said to be closely related - they are brothers as well as brothers-in-law. Respondent Nos. 1 to 4 (referred to as 'the purchasers') purchased the suit shop from the vendor on July 24, 1978 for a sum of Rs. 20,000/- under Exhibit 4. On October 12, 1978 the tenant filed the suit for specific performance of Ext.1 against the vendor and the purchasers and their respective husbands — respondent Nos. 6 to 9. The purchasers contested the suit denying genuineness of Ext.1 and taking the plea that they are bonafide purchasers of the suit shop for value without notice of Ext.1. On the basis of the pleadings, the trial court framed necessary issues. Issue Nos.1 and 10, which are relevant to the present discussion, read as follows:

"1. Had the defendant No.1 agreed to sell the disputed shop to the plaintiff on 25.1.78 on the conditions written in para 2 of the plaint and put the plaintiff in possession as owner after taking Rs. 3200/- in its lieu, and entrusted the tenancy deed (letter) written by him and his father, dated Baisakhi Sudi 9 Samvat 220229, to the plaintiff?"

10. Have the defendants Nos. 22 to 5 purchased the disputed shop after paying full price and had they no knowledge of the alleged agreement to sell?"

On December 15, 1984, after considering the evidence placed before it, the trial court found all the issues in favour of the plaintiff and decreed the suit. Dissatisfied with the judgment and decree of the trial court, the purchasers filed appeal (S.B. Civil First Appeal No. 7/85) in the High Court of judicature for Rajasthan at Jodhpur. By his judgment dated August 4, 1987, a learned Single Judge of the High Court, on reappraisal of the evidence and after referring to Section 19(b) of the Specific Relief Act, held that the contesting respondents were bona fide purchasers of the suit shop and they paid consideration of Rs. 20,000/- without having knowledge of the said agreement (Ex.1). He held that the registered sale deed (Ext.4) in favour of the purchasers could not be cancelled and the relief of specific performance could not be granted in favour of the tenant. The appeal was thus allowed on August 4, 1987. Assailing that judgment of the learned Single Judge, the tenant filed Special Appeal No. 27 of 1987 before the High Court. A Division Bench, having agreed with all the findings recorded by the learned Single Judge, dismissed the appeal on January 29, 1990. The Division Bench, however, held that simply because an enquiry from the tenant had not been made as to his real equitable interest in the property, it could not be taken or presumed that the defendant's vendees had knowledge of the earlier transaction and pointed out that the vendor gave out that the tenant was his brother as well as sister-in-law's husband and the documents were with him, which he would take back and deliver to them so, there was no need to make further enquiry. It also held, "the conduct of the plaintiff has been elaborately dealt with by the learned Judge and on that basis, it has been found that the version which the plaintiff has given is not trustworthy. Besides that we may also state that the relief of specific performance is an equitable relief. It would not be proper exercise of discretion in granting equitable relief of cancellation of the sale deed in the circumstances of the case". Thus, the Division Bench dismissed the appeal on January 29, 1990. From that judgment of the Division Bench arises the present appeal, at the instance of the tenant, by special leave.

Mr. Sanjeev K. Kapoor, the learned counsel appearing for the appellants, invited our attention to Explanation II to Section 3 of the Transfer of Property Act and submitted that both the learned Single Judge as well as the Division Bench erred in not taking note of the said provision while holding that the purchasers are covered by clause (b) of Section 19 of the Specific Relief Act, 1963. There is nothing in the conduct of the tenant, submitted the learned counsel, which would disentitle him to the relief of specific performance of contract for sale.

Ms. Madhurima Tatia, the learned counsel appearing for the purchasers (contesting respondents), argued that both the vendor as well as the tenant were close relations and the latter was in possession as a tenant of the former, and these facts were known to the purchasers, so Explanation II to Section 3 of the Transfer of Property Act would have no application; in view of the close relationship between the vendor and the tenant and the pleas taken by the purchasers, the learned Single Judge ought to have considered the evidence himself and recorded a clear finding on issue No.1 instead of assuming the finding in favour of the appellant and deciding the question of actual knowledge for purposes of Section 19(b) of the Specific Relief Act, 1963. Even otherwise also, she argued, both the learned Single Judge as well as the Division Bench declined to grant the discretionary relief of specific performance having regard to the close relationship between the vendor and the tenant, the price mentioned in Ext.1 and the price paid by the purchasers and the conduct of the tenant so, this court need not interfere in the judgment under appeal.

On the above contentions, the point that falls for consideration is : Whether the appellant (tenant) is

entitled to specific performance of Ext.1?

The purchasers have acquired a legal right under sale deed (Ext.4). The right of the tenant under Ext.1, if it is true and valid, though earlier in time, is only an equitable right and it does not affect the purchasers if they are bona fide purchasers for valuable consideration without notice of that equitable right.

The foundation of the claim of the tenant is the existence of an equitable right under Ext.1. We have referred to the pleadings of the parties, the relevant issues and the findings of the courts on this facet. The trial court found issue No.1 in favour of the plaintiff. The learned Single Judge having noted the plea in the written statement that the purchasers denied execution of any agreement by the vendor in favour of the tenant and stated that any such alleged agreement was forged, observed: "It may be mentioned that I have assumed the original contract because although Smt. Bano and others have challenged it on the ground that it was fictitious and not genuine, the finding of the lower court on this aspect of the case that there was agreement to sell between Ram Narain and Satya Narain calls for no interference." It appears to us that he assumed the finding of the trial court as correct and proceeded to decide the appeal presumably because on issue No.10, he found that the purchasers did not have actual knowledge of Ext.1. In our considered view, the learned Single Judge ought to have considered the evidence and recorded his own positive finding on the question whether Ext.1 was a true and valid agreement. This feature of the case was not adverted to by the Division Bench. Therefore, issue No.1 has to be considered afresh by the learned Single Judge.

Both the learned Single Judge as well as the learned Judges of the Division Bench of the High Court dealt with the question whether the purchasers had actual knowledge of Ext.1, the earlier contract, and on evidence found that the purchasers did not have any knowledge of it. But they failed to notice the provisions of Explanation II to Section 3 of the Transfer of Property Act which is germane on the point of notice. Indeed, issue No.10 was not properly framed. The word 'notice' should have been used in issue No.10 instead of 'knowledge' because Section 19(b) uses the word 'notice'. From the definition of the expression, "a person is said to have notice" in Section 3 of the Transfer Property Act, it is plain that the word 'notice' is of wider import than the word 'knowledge'. A person may not have actual knowledge of a fact but he may have notice of it having regard to the aforementioned definition and Explanation II thereto. If the purchasers have relied upon the assertion of the vendor or on their own knowledge and abstained from making enquiry into the real nature of the possession of the tenant, they cannot escape from the consequences of the deemed notice under Explanation II to Section 3 of the Transfer of Property Act. On this point, in the light of the above discussion, we hold that the purchasers will be deemed to have notice of Ext.1, should it be found to be true and valid.

The last point, whether on the facts and circumstances of this case, it will be just and proper to grant discretionary relief of the specific performance of the contract in favour of the tenant or will it be inequitable to enforce Ext.1 against the purchasers remains to be decided?

The Division Bench in agreement with the learned Single Judge took the view that the plaintiff is not entitled to the relief of specific performance of Ext.1. As on the question of genuineness and validity of Ext.1, we are remanding the case to the learned Single Judge. We do not propose to express any opinion on this point and leave it to be decided afresh with reference to the provisions of Section 20(2) of the Specific Relief Act by the learned Single Judge after recording finding on issue No.1.

For the above reasons, we set aside the judgment and order of the Division Bench confirming the judgment of the learned Single Judge and remand the case of the learned single Judge for his decision on (i) issue No.1 and (ii) whether the plaintiff is entitled to the discretionary relief of specific performance of a contract in the light of Section 20(2) of the Specific Relief Act in accordance with law. The appeal is accordingly allowed but in the circumstances of the case we make no order as to costs.