

(1979) 07 GAU CK 0005**Gauhati High Court****Case No:** First Appeal No. 53 of 1970

Abdul Mazid

APPELLANT

Vs

Burhanuddin Ahmed and Others

RESPONDENT

Date of Decision: July 25, 1979**Acts Referred:**

- Specific Relief Act, 1963 - Section 19
- Transfer of Property Act, 1882 - Section 3

Citation: AIR 1980 Guw 44**Hon'ble Judges:** K.N. Saikia, J; D. Pathak, J**Bench:** Division Bench**Advocate:** A.K. Bhattacharjee and Anup Kr. Das, for the Appellant; J.K. Barua, for the Respondent**Final Decision:** Dismissed**Judgement**

Saikia, J.

This plaintiff's first appeal is from the judgment and decree dated 12-6-70 and 25-6-70 respectively, of the Assistant District Judge, Nowgong, in Title Suit No. 26 of 1967, partly decreeing the suit against respondent No. 1 and dismissing the suit against respondents Nos, 2 and 3. The facts of the case, in brief, are as follows:

The suit land with structures thereon belonged to late Nasiben Nesa who died in Sept., 1964, leaving the defendant No. 1 her only son and heir. During her lifetime the defendant No. 1 leased out the suit property to the plaintiff on rent of Rs. 40/- per month from 23-6-59 till Aug., 1962. On expiry of the lease the plaintiff remained in possession without paying rent since July, 1963. After the death of Nasiben Nesa in Sept., 1964, on 30-12-64 the defendant No. 1 entered into an agreement in writing with the plaintiff to sell the suit property to the plaintiff for Rs. 9,000/-, received Rs. 5,000/- as advance, and agreed to execute the sale deed within 3 months on receipt of the balance amount, and formally delivered possession of the property; and

further agreed that no rent would be payable from January next. Pursuant to the said agreement, on 13-2-65 the plaintiff and the defendant No. 1 came to Court to execute the deed which was already prepared, but the defendant without executing the same left the place and never came back to execute the same. After repeated demands for execution in vain the plaintiff served a Lawyer's notice on the defendant which was replied to and from the reply the plaintiff learnt that the defendant No. 1 meanwhile sold the suit property to the defendants Nos. 2 and 3. The plaintiff states that the defendants Nos. 2 and 3 knew about the earlier agreement with him, Hence he instituted this suit for specific performance of the contract and for confirmation of possession. The defendants contested the suit filing two written statements, one by the defendant No. 1 and another by defendants Nos. 2 and 3. Defendants Nos. 2 and 3 averred that they did not know anything about the earlier contract with the plaintiff, and that they purchased the property with information to the plaintiff who did not object, and that they were bona fide purchasers of the property for value without notice and as such their purchase could not be affected. The defendant No. 1 averred that he never made any agreement with the plaintiff to sell the property; he never delivered possession to the plaintiff pursuant to any agreement and never received any advance. He stated that he first agreed to sell the property to defendants Nos. 2 and 3 and on receipt of Rs. 2,500/- as advance executed and registered an agreement on 7-1-65 to that effect and thereafter executed his deed of sale on 16-3-65 on receipt of the balance amount and informed the plaintiff by a notice. He further stated that after the sale he delivered possession of the property to the defendants Nos. 2 and 3.

2. Thus while the plaintiff claims specific performance of an agreement dated 30-12-64 to sell the property to him, the defendants Nos. 2 and 3 claimed by a registered deed of purchase dated 16-3-65 pursuant to an agreement to sell dated 7-1-65.

3. On the pleadings the following 9 issues were framed :

- (1) Whether there is any cause of action for the suit ?
- (2) Whether the defendant No. 1 agreed to sell the property to the plaintiff for Rs. 9,000/- ?
- (3) Whether the defendant No. 1 received Rs. 5,000/- as advance and executed the document as alleged in the plaint ?
- (4) Whether the defendant No. 1 failed to fulfil his part of the contract ?
- (5) Whether the suit property is in possession of the plaintiff ?
- (6) Whether the plaintiff is entitled to a decree for specific performance of the contract by sale of the suit property to his name ?

(7) Whether the defendants Nos. 2 and 3 are the bona fide purchasers for value without notice ?

(8) Whether the defendants Nos. 2 and 3 are protected u/s 41 of the T. P. Act ?

(9) To what relief the parties are entitled ?

4. Issues Nos. 1, 2, 3, 4 and 5 were decided in favour of the plaintiff while Issues Nos. 6, 7 and 8 were decided in favour of the defendants and the suit was dismissed against defendants Nos. 2 and 3 but decreed against defendant No. 1 for Rupees 5,000/- with proportionate cost on contest. Hence this first appeal.

5. Mr. A. K. Bhattacharjee, the learned counsel appearing for the appellant makes only two submissions, namely, (1) that the learned trial Court erred in law in not decreeing his suit for specific performance of the contract for sale of immovable property, after the contract was partly performed by his paying an advance of Rs. 5,000/- and he changed his position by constructing houses and a cowshed on the land; (2) that the learned trial Court erred in law in not imputing notice of his right under the partly performed contract to the defendants Nos. 2 and 3 who subsequently purchased the suit property. The learned counsel submits that the plaintiff having been in possession of the suit property with his structure thereon, it was the duty of the defendants Nos. 2 and 3 to have inquired of him about his title and interest over the suit property and they having failed to do so he is entitled to claim specific performance of his agreement against them as well.

6. Mr. J. K. Barua, the learned counsel appearing for the respondents, in reply contends that the defendants Nos. 2 and 3 are bona fide purchasers for value without notice of alleged prior contract to sell between the plaintiff and defendant No. 1; and they made bona fide inquiries which did not reveal any prior contract and they purchased the suit property with information to the plaintiff and as such the plaintiff is not entitled to specific performance of the alleged contract against them.

7. The precise question required to be determined in this first appeal, therefore, is whether on facts and circumstances of the case the plaintiff-appellant is entitled to a decree of specific performance against defendants Nos. 2 and 3 who claim to be bona fide purchasers for value without notice, in respect of the suit property ?

8. For deciding this question, it is necessary to be acquainted with the relevant provisions of law on "notice", "part performance" and "specific relief. Section 3 of the T. P. Act, defines "notice" as:

"a person is said to have notice" of a fact when he actually knows that fact, or when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it."

"Explanation II. 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."

"53-A. Part performance -- 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, continue 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 therefore by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the 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."

9. Section 19(b) of the Specific Relief Act, 1963 is to the following effect :

"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) 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."

10. In support of his plea that defendants Nos. 2 and 3 had notice Mr. Bhattacharjee relies mainly on the ratio of the decision in *Daniels v. Davison* reported in (1809) 16 Ves 249: 33 ER 978: All Engl Reports Reprint 1803 1813 432 where it was held :

"Possession of land by someone other than the vendor is notice to a purchaser of that person's interest and the purchaser will be bound by that interest whether it be the right to possession under a lease, or a contract of sale, or otherwise."

11. Lord Eldon discussing the above principle observed :

"On one point on 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. If, for instance, he is occupying tenant under a lease for forty five years, the purchaser is bound by the fact that he is entitled to that term if he does not choose to inquire into the nature of his possession, the tenant being in no fault but enjoying according to his title.

Then if in the instance of such term the tenant would be entitled to against a purchaser, why is not his title good for a greater interest? In *Dougals v. Whitlong*, the tenant was not bound to know and did not know, that it was necessary for him to make any communication of the option, which he had by the contract with his landlord to become the purchaser; and Lord Ken-yon held that there was nothing that could affect his conscience in favour of the purchaser, having no communication with him. My opinion, therefore, considering this BE depending upon notice, is that this tenant being in possession under a lease, with an agreement in his pocket to become the purchaser, those circumstances altogether give him an equity, repelling the claim of a subsequent purchaser who made no inquiry as to the nature of his possession. That was the doctrine. laid down by Lord Roselyn in *Taylor v. Stibbert* (1794) 30 ER 713) to which I referred, and think it right."

12. The principle illustrated by *Daniels v. Davison* was followed in India in a number of cases as in England. In 18 C WN 341, *Babu-ram Beg v. Mohadeb Chandra Pallay*, where on 11-7-06, during the currency of a jalkar lease for seven years executed by the owners in favour of the defendants on 2-3-1901, the plaintiffs took a settlement of the jalkar from the lessor for a term of seven years from 1-5-01 on payment of a sum of Rs. 600/- and on expiry of the defendant's terms sued them for recovery of possession of the jalkar, it was held by Jenkins, C. J. that an agreement for renewal of their lease upon certain conditions, made between the defendants and their lessors on 1-5-01, was specifically enforceable by them against the plaintiffs who claimed title under the lessors and were affected with notice of the agreement of 1-5-01 and that plaintiffs could not consequently recover. In the *National Bank of Australia v. Paul Hamilton Joseph* AIR 1920 PC 274, the principle was applied observing :

"Where a mortgage was effected by deposit of certificates of title and the mortgagor had not actual notice of an agreement under which the mortgagor obtained the title deeds from the original owner who continued to remain in possession of the properties, Lord Buckmaster held, that the fact of possession was in itself notice of the title and of all the facts and circumstances under which possession was retained which any one dealing with the property could not without risk ignore."

13. In *Magoo Brahma v. Balkrishna Das* 18 C WN 657 the suit land originally belonged to Sankar Sarangi. The plaintiff alleged that he acquired title thereto by a registered conveyance executed in his favour by the son of Sankar Sarangi on the 6th of June, 1903. The defendants were admittedly at the time tenants in occupation of the land and would *prima facie* be liable to pay rent. But they contested the claim of the plaintiff on the allegation that on 4th July, 1889 they obtained a usufructuary

mortgage on this land by an unregistered instrument and since then have been in possession as usufructuary mortgagees. On these facts it was argued on behalf of the plaintiff-appellant that he had a preferential title to the land u/s 50 of the Indian Registration Act, which provides that registered documents relating to take effect against unregistered documents be of the same nature as the registered documents or not. In answer to this contention it was argued on behalf of the defendant that Section 50 of the Indian Registration Act has no application where the person who claim title under the subsequent registered document has notice of the title created by the prior unregistered document. Relying on *Alien v. Seckham* (1879) 11 Ch 790 (795) (CAT) it was held :

"That when a person purchases property where a visible state of things exists which could not legally exist unless the property were subject to some burden, he is taken to have notice of the extent and nature of that burden. On this principle it has been ruled that if a person is in possession it is sufficient to put a purchaser on enquiry as to the nature and extent of his interest."

"If a person purchases and takes conveyance of an estate which he knows to be in the occupation of a person other than the vendor, he is bound by all the equities which the person in such occupation may have in the land, for possession is *prima facie* seisin and the purchaser has therefore actual notice of a fact by which the property is affected and he is bound to ascertain the truth."

14. Relying on *Holmes v. Powell* (1856) 8 De GM 572; *Carroll v. Keayes* (1873) 8 Ir R Eq 97, *Reilly v. Garnett* (1872) 7 Ir R Eq 1 in *Ma-goo Brahma v. Balkrishna Das* 18 C WN 657 the Court held that the extreme length to which the doctrine has been carried is illustrated by the decision of Eldon, L. C. in *Daniels v. Davison* (1809) 16 Ves 249: (1811) 17 Ves 433 where it was ruled that the purchaser has constructive notice not merely of the title of the tenant in occupation, but also of a contract into which he had entered for the purchase of the estate.

15. In *Hunt v. Luck* (1902) 1 Ch 428 Vaughan Williams, L. J. stated the law as follows :

"If a purchaser or mortgagee has notice that the vendor or mortgagor is not in possession of the property, he must make enquiries of the person in possession, of the tenant who is in possession, and find out from him what his rights are and if he does not choose to do that, then whatever title he acquires as purchaser or mortgagee, will be subject to the title or right of the tenant in possession."

16. In *Faki Ibrahim Vs. Faki Gulam Mohindin*, where D mortgaged his property with possession to P and agreed to sell the property to him, subsequently executed a registered sale of the property to A who though he knew that P was in possession, made no inquiry as to the circumstances under which P was in possession, Macleod C. J. speaking for the Division Bench held that A having knowledge of P's being in possession, and having made no inquiry why he was in possession, must be taken to have constructive notice of all the equities in favour of P. Fawcett, J. referred to the

then 3rd illustration to Clause (b) of Section 27 of the Specific Relief Act which authoritatively declared the law in accordance with the case of *Daniels v. Davison*. The illustration was (sic)

"A contracts to sell land to B for Rs. 5000/-. B takes possession of the land. Afterwards A sells it to C for Rs. 6000/-. C makes no inquiry of B relating to his interest in the land. B's occupation is sufficient to affect C with notice of his interest, and he may enforce specific performance of the contract against C."

17. In *Tiloke Chand Surana and Another Vs. J.B. Beattie and Co.*, it was held by Sanderson C. J. and Rankin, J. that open possession of a tenant is notice of tenancy as well as collateral agreements.

"If there is a tenant upon a property, his open possession is notice, not only of the immediate terms of his tenancy, but collateral agreements as well, in the absence of all enquiry by the transferees."

18. Applying the doctrine illustrated by *Daniels v. Davison* to the facts of the case Rankin J. observed :

"the mortgagees in this case, who made no inquiry, are not entitled to say that they were purchaser for value without notice. Therefore, the transfer of the reversion to them by the equitable mortgage of the 12th of July 1921 is not a transfer free from the rights of the respondent under the agreement of the 7th of June 1920."

19. In AIR 1932 PC 228, *Md. Aslam Khan v. Feroze Shah*, which was a case u/s 27(b) of the Specific Relief Act, it was held :

"Where a transferee has knowledge of such facts which would put him on inquiry which if prosecuted would have disclosed a previous agreement, such transferee is not a transferee without notice of the original contract within the meaning of the exception in Section 27(b) ."

20. In *Harendra Chandra Das and Others Vs. Nanda Lal Roy and Others*, a Division Bench of the Calcutta High Court also held :

"Where a person claims to be a transferee for value without notice of the original contract, the burden lies upon him to prove that he fulfils that character. If he was aware when he purchased the property that negotiations for the sale of the property were already in progress between his vendors and the plaintiff, and purchases the property without making necessary enquiries as to whether any agreement to sell the property had been definite- ly concluded between his vendors and the plaintiff, he cannot claim to be a transferee without notice."

21. It may be observed that the decision cited above were in conformity with the equitable principle of constructive notice and were prior to the Transfer of Property Amendment Act, 1929 (Act 20 of 1929) which substituted the definition of "notice" and added the Explanation II to Section 3 of the Act and also inserted Section 53A to

the Act. That section contains the proviso protecting the transferee for consideration without notice of the contract or of the part performance thereof. This also made the law consistent with Section 27(b) of the Specific Relief Act, It may be noted that even in England the Conveyancing Act has to some extent modified the doctrine in *Daniels v. Davison* introducing statutory provisions. It is, therefore, important to ascertain the trend after the above amendment introducing statutory provisions.

22. Mr. J. K. Barua submits that the applicability of the doctrine in *Daniels v. Davison* is doubtful after the definition of notice given in Section 3 of the Transfer of Property Act; that Section 53A can be pleaded only in defence and not in attack; that after amendment of the Transfer of Property Act in 1929 and of Section 19 of the Specific Relief Act in 1963 the applicability of the doctrine in *Daniels v. Davison* has been doubted; as that under the law no doubt the defendant were required to make enquiries. They did make inquiries and learnt that the property stood in the name of the defendant No. 1's mother and that there was a registered deed of sale which was executed in 1962 and there was nothing to disclose any other interest. Thereafter in good faith defendant Nos. 2 and 3 purchased the property with information to the plaintiff who did not object or protest against the purchase on the basis of his non-disclosed interest. Under the circumstances the learned Counsel submits, there could be no specific performance against them. Relying on Uttar Pradesh Co-operative Federation Ltd. Vs. Sunder Brothers of Delhi, he further submits that the remedy of specific performance, is a discretionary remedy and the trial Court having exercised the discretion according to law this Appellate Court will not substitute its own judgment upon that of the trial Court unless the exercise of discretion by the trial Court is proved to be arbitrary and capricious. We may now deal with these objections. It has also been held that the inquiry under Explanation II to Section 3 is limited to title only. In this view of the matter the plaintiff having no title in the suit property is not entitled to be noticed as a title holder. He will be entitled to defend his possession only. It is clear from the records, and admitted by the plaintiff, that on the date of sale i.e. 16-3-1965 the plaintiff was not a tenant. He claimed to have been in possession of the suit property not as a tenant but as a contractee. Rent was not to be paid since January last, and an advance of Rs. 5000/- was allegedly paid in part performance of the contract. He will, therefore, be entitled to protection of his rights attached to that status and not that of a tenant, even if the defendants Nos. 2 and 3 are found to be negligent in not making proper inquiry. It is an accepted principle that part performance can be argued in defence and not in attack. It can be used as a shield and not as a sword.

23. In Annamalai Goundan Vs. Venkatasami Naidu and Others, on similar facts it was observed that, till the contract of sale was entered into, the petitioner only occupied the position of lessee. But, after the date of the contract and after it was performed in part by consideration being paid for the contract and the landlord allowing the tenant to remain in possession by reason of the status created under the contract it

was no longer open to the landlord to contend that the right of possession claimed by the petitioner was referable to the contract of lease. In our instant case the same principle applies, the status of lessee being followed by that of a contract for purchase. What then will be his right as such? In Chinna Thevar Vs. Gnanaprakasi Ammal and Another, it was held Section 53A of the Transfer of Property Act does confer right on the transferee, if the conditions of that section are fully satisfied. If the transferee who has fulfilled the conditions of Section 53A can only rely on the agreement of sale in his favour as a shield in a suit for eviction and can even ask for an injunction to protect his possession as against the transferor, there is no reason why he should not rely on the agreement of sale in similar circumstances as a shield against the landlord in proceedings for eviction instituted under the Tamil Nadu Buildings (Lease and Rent Control) Act. In Achayya v. Venkata Subba Rao AIR 1957 AP 854, Subba Rao C. J. speaking for the Division Bench further analysed the position as follows :

"Section 53A does not either expressly or by necessary implication indicate that the rights conferred on the transferee thereunder can only be invoked as a defendant and not as a plaintiff. Under the section no title passes to a transferee. He cannot file a suit for a declaration of his title to the property or seek to recover possession of the same on the basis of any title conferred to him.

But, if the conditions laid down in the section are complied with, it enables the transferee to defend his possession if the transferor seeks to enforce his rights against the property. This statutory right he can avail himself both as a plaintiff and as defendant provided he is using his right as a shield and not as a sword. Or to put it in other words, he cannot seek to enforce his title but he can resist the attack made by a transferor."

24. After the enactment of Section 53A in the Transfer of Property Act, the rights arising out of part performance shall be determined by the statutory provision, and not by the equitable principle in the abstract As Subba Rao C. J. observed :

"It is not necessary to consider the pre-existing law or part performance as it obtained in India or in England, for after the enactment of Section 53A laying down the limits of the doctrine, we are only governed by the said provisions. The necessary conditions for the application of the Section are (i) there is a contract to transfer immovable property for consideration (ii) the contract is signed by or on behalf of the transferor (iii) the terms can be ascertained with reasonable certainty from the document (iv) the transferee is put in possession or if he has been already in possession continues in possession (v) he has done some act in furtherance of the contract and (vi) the transferee has performed or is willing to perform his part of the contract.

If the aforesaid conditions are fulfilled the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming

under him any right in respect of that property. This Section does not, even if the conditions laid down therein are complied with, convey title to the transferee. Notwithstanding the section, title can be transferred only after the registration of the document. Provision prevents a transferor from enforcing his rights in respect of the property against the transferee but enables him to sue the transferee upon the covenants contained in the document. In short, the mutual covenants will be operative though title does not pass under the document."

25. Thus, part performance creates a defensive equity in favour of the transferee in respect of the property transferred and he can use it as a shield against any attempt on the part of the transferor or anybody claiming through or under him to enforce his right against it. He cannot *stricto sensu* be said to be a holder of title.

26. In *Delhi Motor Co. v. U. A. Basrurkar*, AIR 1968 SC 794 their Lordships of the Supreme Court also held that Section 53A is only meant to bring about a bar against enforcement of rights by a lessor in respect of property of which the lessee had already taken possession, but does not give any right to the lessee to claim possession or to claim any other rights on the basis of an unregistered lease. Section 53A of the Transfer of Property Act is only available as a defence to a lessee and not as conferring a right on the basis of which the lessee can claim rights against the lessor. His right against a subsequent purchaser is protected not by principle of equity as such but by the statutory provision in the proviso in Section 53A, read with the definition of notice and Explanation II in Section 3 of the Transfer of Property Act. u/s 19(b) of the Specific Relief Act, part performance is not required. Under that Section the plaintiff has to depend on notice on the part of the subsequent purchaser as a matter of fact. He has to show that the subsequent purchaser had or ought to have had notice of his prior contract. There is no doubt that the burden of proof lies on the person who claims validity of the subsequent purchase on the ground of being a bona fide purchaser for value without notice. He has to prove it as a fact.

27. In *Basruddin Khan and Another Vs. Gurudarshan Das and Others*, it was held :

"Where the defendant purchased the property after contract in favour of plaintiff and the defendants took the plea of bona fide purchase for value without notice of the earlier contract the onus is upon the defendant who has taken a registered sale deed executed after the contract for sale in favour of the plaintiff 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 Section 27(b) of the Specific Relief Act."

28. This view was based on AIR 1934 68 (Privy Council) AIR 1946 97 (Privy Council).

29. Though the right u/s 53A is a passive one it is sufficient to be noticed under Explanation II to Section 3 of the Transfer of Property Act, the transferee being in possession. Part performance may also be an additional justification for specific performance of the contract and may come under notice envisaged in Section 19(b)

of the Specific Relief Act.

30. In *Noor Zabur Mian v. Islam Mian* 1958 BLJR 466 this view was taken :

"It is true that the equitable interest which the transferee has by virtue of Section 53A of T. P. Act may not give him full title to the property, but nevertheless it is an interest which would attract the provisions of Explanation II to Section 3 of the Transfer of Property Act by virtue of the definition of "a person is said to have notice" occurring in that section."

31. It may therefore, be the duty of an intending purchaser to enquire about this right by part performance of contract. If no such inquiry is made the purchaser will not be acting in good faith. Good faith is the essence of the exception u/s 19(b) and of the proviso to Section 53A of the Transfer of Property Act. The purchaser may prove it as a matter of fact.

32. In *Dhadi Dalai Vs. Basudeb Satpathy and Others* , the requirements for being a bona fide purchaser for value without notice were enumerated as follows :

"Under Section 19(b) of the Specific Relief Act 4 things are required to be established (1) that the transfer is for value; (2) that the money has been paid; (3) that the purchase was done in good faith; and (4) that the purchase including payment of money was without the notice of the original contract."

33. Honesty of intention is the essence of good faith. If after honest investigation nothing comes to his knowledge about the pre-existing right, title or contract, and nothing is found to put him to further inquiry, and consequently an honest purchase is made and value paid, law will protect such a purchaser. In *Dhadi Dalai Vs. Basudeb Satpathy and Others*, it was held on facts of that case, which were somewhat similar with the present, that:

"After knowing the fact of possession and after making necessary inquiries from the registration office if he makes no further enquiries about any undisclosed types of encumbrance, which do not strike to his mind, he cannot be said to have acted without honesty. Further the onus of proving that the subsequent purchaser had no notice of a prior claim is ordinarily discharged by denial".

34. In AIR 1957 Pat 224 *Ramchander Singh v. Asghari Begum* it was held that "very little evidence, and in certain circumstances a mere denial, regarding want of knowledge of the plaintiff's contract would discharge this onus and shift the onus on the plaintiff". In AIR 1923 Lah 108 *Kanshi Ram v. Ishwardas*, it was similarly held that where the consideration is paid in full and vendees are ignorant of the original contract, good faith must be presumed in the absence of evidence to the contrary. Similarly in *Durga Prasad and Another Vs. Smt. Lilawati and Another* , it was held that u/s 19(b) of the Specific Relief Act "the initial burden is always on the vendee to show that he had no knowledge of the agreement. But the vendee has only to discharge this burden by leading a negative evidence. The negative can only consist

of his own statement denying the fact that he had knowledge of the same. As soon as the vendee denies knowledge of the notice, the burden is discharged and then the burden shifts on the vendor to prove that the vendee had the notice of the earlier agreement."

35. This enunciation of the law was based on AIR 1957 Pat 224 and [Kirtarath Rai and Others Vs. Sripat Rai and Others](#). Thus, unless there be an overt act on the part of the contractee or the tenant to be conspicuous to the subsequent purchaser, who made an honest and reasonable inquiry suited to the facts and circumstances, his claim of bona fide purchase for value may not be negatived. In such a case, if the lower Court on consideration of the facts has exercised the discretion in a way the Appellate Court may not interfere unless the exercise is found to be arbitrary or capricious.

36. The circumstances under which an Appellate Court should interfere with a discretionary order have been indicated in several decisions. These indications will be applicable to the instant case because specific performance after all is a discretionary remedy.

37. . In 1942 AC 130, Charles Osenton and Co. v. Johnston, Viscount Simon L. C. dealing with the question of interference with discretionary orders observed :

"There remains the question whether, assuming that in the circumstances of this case Tucker J. had jurisdiction to make the order of reference, his conclusion must stand on the ground that it was reached in the exercise of his discretion and that the exercise of such discretion should not be interfered with on appeal. So the respondents contend, while the appellants urge that, even if the discretion to make the order existed, it was wrongly exercised in view of the gravity of the charges made against them, of the impossibility of appeal from an official referee's finding of fact, and in view of the practicability of the case being tried before a Judge without a jury. The law as to the reversal by a Court of Appeal of an order made by the Judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified."

38. In Evans v. Bartlam 1937 AC 473 Lord Wright, however, indicated that there might be other circumstances justifying interference,

"It is clear that the Court of Appeal should not interfere with the discretion of a Judge acting within his jurisdiction unless the Court is clearly satisfied that he was wrong. But the Court is not entitled simply to say that if the Judge had jurisdiction and had all the facts before him, the Court of Appeal cannot review his order unless he is shown to have applied a wrong principle. The Court must if necessary examine anew the relevant facts and circumstances in order to exercise a discretion by way of review which may reverse or vary the order. Otherwise in interlocutory matters the judge might be regarded as independent of supervision. Yet an interlocutory order of the judge may often be decisive importance on the final issue of the case, and one which requires a careful examination by the Court of Appeal -- Thus in *Gardner v. Jay* (1885) 29 Ch D 50 Bowen in discharging the discretion of the judge as regards mode of trial says : "That discretion, like other judicial discretions, must be exercised according to commonsense and according to justice if there is miscarriage in the exercise of it it will be reviewed."

39. In [Uttar Pradesh Co-operative Federation Ltd. Vs. Sunder Brothers of Delhi](#) , which was a case under the Arbitration Act, the Supreme Court observed :

"It is well established that there the discretion vested in the Court u/s 34 of the Indian Arbitration Act has been exercised by the Lower Court the Appellate Court should be slow to interfere with the exercise of that discretion. In dealing with the matter raised before it at the appellate stage the Appellate Court would normally not be justified in interfering with the exercise of the discretion under appeal solely on the ground that if it had considered the matter at the trial stage it may have come to a contrary conclusion. If the discretion has been exercised by the trial Court reasonably and in a judicial manner the fact that the Appellate Court would have taken a different view may not justify interference with the trial court's exercise of discretion. As is often said, it is ordinarily not open to the Appellate Court to substitute its own exercise of discretion for that of the trial Judge; but if it appears to the Appellate Court that in exercising its discretion the trial Court has acted unreasonably or capriciously or has ignored relevant facts then it would certainly be open to the Appellate Court to interfere with the trial Court's exercise of discretion. This principle is well established but, as has been observed by Viscount Simon, L. C. in *Charles Osenton and Co. v. Johnston* 1942 AC 130 :

"The law as to the reversal by a Court of Appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case."

40. In [The State of Punjab and Another Vs. Shamlal Murari and Another](#), it was held that discretionary exercise of power by a Court could not be lightly interfered with by a Court of Appeal; and the Supreme Court was loathe, therefore, to upset the order of the High Court declining to condone the delay, there being nothing perverse or irrational in the exercise. However, in [Mahant Bikram Dass Chela Vs. Financial Commissioner, Revenue, Punjab, Chandigarh and Others](#), where a Letters

Patent Appeal though presented within time with only one set of documents while under Rules three sets had to be filed, and those were filed beyond time, and an application u/s 5 of the Limitation Act for condonation of delay was rejected by the High Court. Their Lordships of the Supreme Court interfering with the order observed :

"The objection raised by the respondents on the score of limitation, the adjournment sought by the appellant to file an application u/s 5 of the Limitation Act for condonation of delay and the refusal of the Division Bench to condone the delay are all misplaced, proceeding as they did on an erroneous assumption that the appeal was barred by time on the date on which it was filed and that the requirement of Rule 3 of Chapter 2-C is mandatory in character. We cannot stay our hands on the ground that this Court does not normally interfere with discretionary orders, when the High Court used its discretion on an altogether fallacious supposition that it had to consider the question of condonation of delay in the context of an application filed u/s 5 of the Limitation Act."

41. Thus it may safely be concluded that if there were jurisdiction to make the order, but the making of it was not a legitimate exercise of discretion, it would not be disturbed on appeal, but if it was a wrongful exercise of the discretion, it is the duty of the Appellate Court to correct. What will amount to a wrongful exercise will depend on the facts of the case. In Mysore State Road Transport Corporation Vs. Mirja Khasim Ali Beg and Another, it was held that it is only if the discretion is not exercised by the lower Court in the spirit of the statute or fairly or honestly or according to the rules of reason and justice, that the order passed by the lower Court can be reversed by the superior Court.

42. Applying the above principles to the facts and circumstances of the instant case we find that the plaintiff at the time of the defendants Nos. 2 and 3 purchased the suit property was not a tenant but a contractee, the contract being partly performed, and he being put in possession. His right as such was to be noticed by the subsequent purchasers. The evidence is that the defendants Nos. 2 and 3 made inquiries but did not find anything to put them to further inquiry or to bring the plaintiff's status to their notice. The construction of houses and cowshed having stood for some time since the period of tenancy which terminated by that time, was not enough to lead to any conclusion of the plaintiff's right under the partly performed contract which was not registered. Again it is defendant's case that they purchased the property with information to the plaintiff who did not object to or protest against the same, The purchase was made on 16-3-1965 while the plaint to Title Suit No. 26 of 1967 was dated 11-12-67 and the first order passed on 13-12-67. The parties were not distant residents. The sale to defendants Nos. 2 and 3 was by a registered sale deed. The claim of delivery of possession to plaintiff is doubtful. The plaintiff deposed that no outsider was called on the day when he was given possession. Chandra Hazarika, Sohan Singh and Ayub Ali saw by chance and Ayub

Ali and Chandra Kanta are his neighbours. The plaintiff deposed about the eviction case filed against him in which an injunction was granted and vacated permitting him to construct house at his own responsibility. He constructed the houses newly on the land in 1965 in the month of January and he does not remember who were the labourers. He denied the suggestion that he constructed the house after vacation of the injunction issued by the Munsiff. The fact that he had not appointed witnesses to the delivery of possession and that only chance witness happened to see, creates reasonable doubts as to the delivery of possession. He admits having received notice from Borhan on 25-3-65 but the plaint of the suit is dated 11-12-67. The defendants Nos. 2 and 3 deposed that the plaintiff was at home when the land was shown to them. Sohan Singh told the plaintiff where Borhan was showing the land and house, that Borhan intended to sell the land and house to them. The plaintiff said that he had no objection. The lapse of 2 1/2 years before filing the suit lends credence to this statement. Before purchasing the land and the house the defendants inquired who was the owner of the same. In the registration office these were found to be Borhan's. After execution of the deed Borhan showed the boundary and gave possession. Later where they went to take possession the plaintiff did not give it. The trial Court while deciding the issues Nos. 6 and 7 observed :

"The learned Lawyer for the plaintiff argues that when the plaintiff was seen in occupation of the property it was the duty of defendants 2 and 3 to inquire from him whether there was anything as to the property. To me this argument is meaningless. A person interested to purchase, is not bound to go from door to door to know whether the property was true. It would be sufficient if he knew about the property from the record. In the instant case there was never any inspectable record. As such there was never any lach on the part of the defendants as argued by the learned Lawyer for the plaintiff. From all the facts and circumstances proved in the case it is held that defendants 2 and 3 were bona fide purchasers for value without notice and as such their interest is protected. In view of the above findings the plaintiff cannot get a decree for specific performance of the contract and the issues are accordingly decided against the plaintiff."

43. Considered in light of the above principles, though the inquiry need not always be confined to the records, as stated by the trial Court, we do not find that the trial Court has acted capriciously or arbitrarily under the facts and circumstances of the case so as to merit interference by this Appellate Court. The concept of notice as envisaged in Section 3, Explanation II, T. P. Act shall have to be applied; in determining the same u/s 19(b) of the Specific Relief Act. Applying this connotation also we do not find that such notice could be imputed to the defendants 2 and 3. Besides the fact that the plaintiff came to Court after more than 2 1/2 years of his knowledge of the purchase shows that he had no objection at the time of purchase by defendants 2 and 3. He has not also shown any special value or importance of the suit property to him, or that it is not substitutable by any other land, apart from the presumption in case of immovable property.

In the result, this appeal is found to be without merit and hence dismissed, The parties are to bear their own costs.

D. Pathak, J.

44. I agree.