

(1916) 04 CAL CK 0002
In the Calcutta High Court

Kali Dassee Dassee and Others

APPELLANT

Vs

Nobokumari Dassee and Others

RESPONDENT

Date of Decision : 06-04-1916

Acts Referred:

Citation : 36 Ind. Cas. 655

Hon'ble Judges : Lancelot Sanderson, C.J.; John Woodroffe, J.; Asutosh Mookerjee, J

Bench : Full Bench

Judgement

Lancelot Sanderson, C.J.—This is an appeal by the plaintiffs, who are the executrix and executors of the estate of one Bhuvan Chunder Bhur deceased, and the claim is in respect of an agreement for sale dated the 23rd of January 1910, which was made between the first and the second defendants and Bhuvan. CImnder Bhur, which related to the shares of those defendants in certain premises known as Nos. 10, 12 and 13 Darmabatta street. The defendants, other than the first and the second, who may be called the Nandi defendants, were the purchasers of the shares of the first and the second defendants in the premises, under circumstances to which I will refer later in more detail.

2. The claim is for specific performance, and, in the alternative, damages.

3. The first defendant is the widow of Hari Charan Sett, and the second defendant is the widow of Sattya Charan Sett. These two men were the owners in equal shares of premises No. 10, and between them they owned a share in Nos. 12 and 13, which is said to have been about 5/6ths. In I 904 Hari Charan Sett died intestate, and the first defendant, his widow, is his heiress. In 1908 Sattya Charan Sett died, leaving behind him his widow, the second defendant, and his son Panchanon Sett who shortly afterwards died while an infant, and, therefore, the mother, the second defendant, succeeded to the estate of her late husband.

4. It appears that Bhuvan Chunder Bhur and the Nandi defendants were rival

traders carrying on their business in different parts of the premises in. question which were leased to them, and it appears that when the property came into the market, Bimban Chunder Bhur and his sons negotiated the transactions to which I shall make reference directly. Both the plaintiffs and the Nandis were anxious to buy the premises. Bhuban Chunder Bhur got into communication with the first and the second defendants through two men who are called Gajendra Kundu and Tulsi Charan Kundu, who had been acting as agents for the first and the second defendants for the purpose of collecting rents of their property: and it appears that on the 11th of January 1910, the draft agreement was settled. Then arose a question about an agreement which, it was alleged, the two deceased men, Hari Charan Sett and Satya Charan Sett, had entered into with a man called Ham Lai Pachasia, with regard to the lease of these premises, and it was stated that the ladies desired some provision being inserted in the agreements with reference to this matter. It was discussed and the decision was postponed until the date which apparently had been fixed for the completion of the contract, namely, the 23rd of January 1910. Before I deal with the agreement of the 23rd of January 1910, it is necessary for me to refer to one or two other dates of the 15th of January, four days after the draft agreement had been settled or partially settled, a contract was made between the Nundis and a lady whose name was Barodamoyi and who owned 1/6th share of Nos. 12 and 13; and, by that agreement the Nundis agreed to buy the 1/6th share of Barodamoyi, and the price which was agreed worked out at about Rs. 9,000 per cottak. On the 23rd January, as I have already mentioned, the agreement in question was executed. I shall have to refer to the terms of it directly. On the 5th of February the conveyance of the share of Barodamoyi to the Nundis was executed. In the meantime, on the 2nd of February, another contract had been entered into by the Nundis with a lady called Aghoremoni who alleged that she was the owner of 1/9th share of premises Nos. 12 and 13. It is perhaps right to remark in passing that the plaintiffs alleged that this lady had no share in the property. But I do not think that it is material to consider whether that allegation was made out or not. On the 7th of February the conveyance in pursuance of the contract of the 2nd of February by Aghoremoni to the Nundis was executed. On the 5th of February a suit was instituted by Ram Lal Pachasia against the first and the second defendants claiming specific performance of his agreement with the two deceased men for a lease of the premises. On the 7th of February an event occurred which had a material effect upon the subsequent history of this case. On that date a suit was brought by Norendra Nath Samanta, who was the son-in-law of the first defendant, on behalf of three infant daughters of the first defendant against the first defendant to restrain her from making an absolute alienation of the premises, alleging that first of all there was no legal necessity for her to sell the property, and secondly, that the price which was mentioned in the contract of the 23rd of January 1910 was a gross undervalue: and on the same date a letter was written (to be found at page 64 of the paper-book) by Messrs. Fox and Mandal, Solicitors acting on behalf of the plaintiff in that suit, to Bhuban Chunder Bhur to this effect:

We are instructed by Babu Norendra Nath Samanta to inform you that he has to-day filed a suit in the High Court as the next friend of Srimutty Sabitry dassi and others, infant daughters of Hari Charan Sett deceased, against Sreemutty Nabakumari Dasai, widow of the said Hari Charan Sett deceased, for an injunction restraining her from, making an absolute alienation of the premises Nos. 10, 12 and 13 Darmahatta Street, Calcutta, for a declaration that there being no legal necessity the defendant Srimutty Nabakumari Uassi is not entitled to convey an absolute interest in the said premises and other reliefs.

Our client is informed that you are negotiating for the purchase of a share in the said premises from the said Srimutty Nabakumari Dassi. We are instructed to warn you against purchasing the said share and to give you notice, which we hereby do, that there is no legal necessity for the said proposed sale and that our clients dispute the bona fides thereof." This suit and the notice of the suit raised a difficulty as between Bhur and the defendants Nos. 1 and 2, the widows; and, for this reason, that, as is well-known, a widow cannot alienate absolutely the whole of the property unless it can be shown that there is what is called legal necessity for the alienation, and as was pointed out by the learned Advocate-General in the course of his argument, that this question can be raised either at the time by the person who is interested in the estate, by bringing an action claiming a declaration that there is no legal necessity and getting an injunction, or it may be raised after the death of the widow by the reversioner, alleging that the widow had a mere right to alienate her life-estate and that there was no legal necessity which would justify her alienating the entire interest in the property. Consequently a purchaser from a widow runs a very considerable risk, and it is obvious that in some cases he may be called upon to prove the existence of legal or justified necessity at a time when it may be exceedingly difficult and perhaps impossible for the purchaser to bring forward the necessary evidence, On the other hand, if the widow could be persuaded to take out Letters of Administration and get herself appointed administratrix and obtain leave of the Court to alienate, then, of course, the property would vest in the administration and the purchaser would get very much better title or much more reliable title than he would have if he bought from the widow under the circumstances and with the risk to which I have just referral.

5. In consequence of this "golmal", as it was called in the evidence, which as I understand means trouble or difficulty, the sons of Bhuban Chunder Bhur, who were looking after the business on behalf of their father, were advised by their attorney to ask the ladies to take out Letters of Administration, and I think it is desirable for me to refer to the evidence upon that point, which is very shorthand is contained in a few pages.

6. At page 183 of the paper-book one of the sons said, "He" (that is, his attorney) "said, as the "golmal" was raised, it was better to ask the ladies to take out Letters of Administration. He said nothing else. I asked the ladies to take out Letters of Administration. On Tulsi and Gajen calling at my shop, I told

them to ask the ladies to take out Letters of Administration, Gajen and Tulsi said three or four days after that occasion, "Yes, the ladies are willing to take out Letters of Administration but they have no money," and asked me to advance money to meet the expenses for taking out Letters of Administration, and the money so advanced would be deducted from the consideration when the purchase would be completed." At page 189, when the same witness was being cross-examined by Mr. Sircar, a question was put as follows:

Q.--I believe it is your case that the defendants Nos. 1 and 2, through Gajen and Tulsi, agreed that they would take out Letters of Administration and obtain leave of the District Judge to sell and convey the property to you?

A.--After the 7th February after the letter of Norendra Samanta, these things were discussed,

Question repeated.

A.--Yes.

Q.--You understood that the sanction of the District Judge would be required for sale by the ladies after Letters of Administration had been taken out:

(I think this is rather an important passage.)

A.--On receipt of the letter dated 7th February 1910, I understood that.

Q.--You understood that the sale to your father by the ladies was conditional on the sanction of the District Judge?

A.--There was no such condition.

Q.-- Did you understand that the ladies would convey the properties to you on taking out Letters of Administration, even if the District Judge refused sanction to sell?

A.--I did not understand that. Then at page 190, the same witness says: On that day my brother-in-law got all the title-deeds. There was no need for my waiting for the title-deeds. Norendra Nath Samanta took out an injunction from the High Court and I got a letter to that effect. Thereupon I told the ladies that as there was all this "golmal," I could not take the properties unless the ladies took out Letters of Administration," And then he gave a further answer to the Court, "I said I would not take the properties unless the ladies took out Letters of Administration--I would bring a suit to enforce the agreement." I think what he meant there was that he was under the impression that the agreement of the 23rd of January, 1910 gave his father a right to call upon the ladies to take out Letters of Administration. There is some evidence to which I will refer shortly that the attorney had advised him to that effect.

At page 20-6 the other brother gives evidence: He says, On receipt of the letter dated 7th February 1910 we were advised by our attorney to ask the ladies to take out Letters of Administration.

Q.--There was no difficulty in getting a conveyance from the ladies as widows and not as administratrixes?

A.--Norendra obtained an injunction against them, our attorney's advice for our additional safety was to take the conveyance after Letters of Administration with leave to sell was obtained. By reason of our attorney's advice we waited for the Letters of Administration and the order to sell. It was our idea after the 7th February. I was waiting all these months, because after the 7th February I understood that the order of the Judge to sell was necessary. This was the only reason why I was waiting from the 23rd January to August." Then at page 161 is to be found the evidence of the attorney. He says: I subsequently ascertained that they had asked the defendants Nos. 1 and 2 to take out Letters of Administration. They told me that the defendants Nos. 1 and 2 were agreeable to take out Letters of Administration, but the defendants Nos. 1 and 2 desired they, the Bhors, should furnish them with funds and deduct the same from the purchase-money to which the plaintiff had agreed. I saw Mritunjoy and Bhola in the middle of March. They told us that Gajen and Tulsi had told them that the Nundi defendants were trying to get hold of these properties, that Norendra Nath Samanta was instructed at the instigation of the Nundi defendants, that the Nundi defendants were defraying the expenses of the suit, and so I advised them to advertise the fact of the agreement and I also sent a letter from our office giving notice of the agreement to the Nundi defendants." Then at page 167, he says: "My brother Kalimohan (that is, the attorney) suggested that Letters of Administration should be taken out by the ladies. I was then present. Before the receipt of the letters of the 7th February, there was no suggestion by anybody as to taking out Letters of Administration by the ladies. After the receipt of the letters of 7th February, I had a discussion with my brother. My brother (that is, the attorney) suggested that Letters of Administration should be taken for greater safety.

Q.--May I take it that you consider that the conveyance by a lady on the allegation of legal necessity was less safer?

A.-- No. As all those disputes had arisen, we advised them for greater safety that the ladies should take out Letters of Administration.

Q.--What disputes?

A.--There was a suit filed by Norendra.

Q.--Because somebody was disputing the existence of legal necessity, the taking out of Letters of Administration would be safer?

A.--No, but because there would be difficulty owing to the change of circumstances of procuring witnesses.

The conveyance by an administratrix would dispense with the question of legal necessity. As a matter of fact the two ladies got Letters of Administration at the instance of my clients. My clients advanced the money and my clients were

aware all along what was going on in the Letters of Administration proceedings. As an attorney of the case I went through the papers in connection with the cases Nos. 15 and 16 of the Hooghly Court." There is only one other passage at page 170, to which I need refer:

Q.--Was it any time agreed between Bhuban and the ladies, or any of them, that the ladies should take out Letters of Administration and then convey the property to Bhuban?

A.--I was informed to that effect by the plaintiff.

Q.--Was the agreement between Bhuban and the ladies in writing?

A.--There was no writing to that effect.

Q.--Was it a verbal agreement?

A.--We told the plaintiff to tell the ladies to take out Letters of Administration with leave to sell, and this was in pursuance of a clause of the agreement that the ladies would conform to any requisition that may be necessary to complete the title.

Q.--Is it your evidence that whatever agreement there was for taking out Letters of Administration, it was in that agreement by virtue of that clause?

A.--Yes.

7. Beyond that clause there was no other agreement, written or oral, for taking out Letters of Administration. But pursuant to that clause we asked the ladies, and they agreed, to take out Letters of Administration."

8. This is all the evidence upon that point.

9. Now, the learned Judge on that point has found this (page 378): "The idea of applying for Letters of Administration was not present in the mind of any of the parties at the time of the agreement, and it did not occur to any of them till they came to know of Sabitri's suit wherein legal necessity was challenged." There the learned Judge was perfectly justified in coming to that conclusion on the evidence--"I cannot hold that applying for Letters of Administration came within rectifying and clearing the title-deeds." The clause in the agreement to which the learned Judge was referring is to be found at page 27, and runs thus:

The time for (your) purchasing our said share shall be a period of one month from the date of your attorney approving of the title-deeds. We shall at our own expenses do everything which your attorney shall consider necessary for rectifying and clearing the title-deeds. I agree with the learned Judge that this question of taking out Letters of Administration was never contemplated by the parties at the time they made this agreement. In my opinion, the learned Judge was also right in coming to the conclusion that taking out Letters of Administration would not come within the phrase do everything which your attorney shall consider necessary for rectifying and clearing the title-deeds."

There undoubtedly was an agreement between the parties that the ladies should apply for Letters of Administration. It was to the effect that the ladies should take out Letters of Administration and that the plaintiffs' father should supply the necessary funds for those proceedings, an agreement which, in my judgment, was made for good consideration, and which was binding on the parties. But whether this agreement was done in pursuance of the original contract as the attorney thought it was--and which, I think, it was not--or whether the application for administration proceedings was made in pursuance of an additional verbal contract--which I think it was--in either case the agreement involved or application to the Court and the obtaining of the leave of the Court to the proposed sale. Furthermore, it was done at the instance of the plaintiffs' father and at his request and by so doing, in my judgment, they subjected themselves to the risk that the Judge, when he heard the application, might not approve the sale for any good and valid reason which might be put forward. On that application he would have to consider several matters; amongst them, first of all, whether there was necessity for sale; secondly, whether the price which was offered by the intending purchaser was a proper price. The contract, in my judgment, was to this effect, namely that the widows were to clothe themselves with the character of administratrixes; and, further, they were to obtain the leave of the Court to sell the premises in question to the plaintiffs: In other words, the contract became a conditional one--conditional upon the performance of these two matters at all events. What happened there is as follows: On the 1/3rd of February 1910, both the 1st and the 2nd defendants applied for Letters of Administration. With regard to the proceedings by the 1st defendant Norendra Nath Samanta objected, and there were several applications and interlocutory orders given by the learned Judge of the District Court, and the matter came to a climax, if I may use the word, as is shown by the proceedings at pages 134 and 135. At page 135 is a petition put in on behalf of the 1st defendant in which she says as follows: She first describes her share in the properties in question and says that "the price of the same has been settled with an intending purchaser at the rate of Rs. 8,000 per cottah" and, then she goes on to say, "Mohendra Nath Samanta objected at the time of obtaining certificate and he is giving out that he can secure higher offers than the price fixed by this petitioner. It is, therefore, prayed that permission be granted for the sale of my own share in premises Nos. 10, 12 and 13, Darmahatta Street, at such higher price as Mohendra Nath Samanta might be able to secure and failing that at the price settled by this petitioner." Then the learned Judge passed an order of the 10th of August 1910, to the effect "Let the grantee ascertain whether the persons named by the objector are willing to pay Rs. 10,000 per cottah for the property and report by the 18th instant." And, on the 18th of August he made the following order, considered an application of the grantee for permission to sell the properties to Gopi Nath Nundi and Brothers who offer to pay Rs. 10,000 per cottah. The application is granted.

10. With regard to the proceedings by defendant No. 2, the material passages

may be found at pages 122, 125, 123 and 124. In that case in the first instance the application of defendant No. 2 was granted, and then a rescission of that order was obtained by defendant No. 2 on a petition which is set out at page 123. She says in her petition: "The petitioner Srimutty Nabokumari Nandini Dassi begs to submit I applied for permission to sell an 8-annas share,"--then she describes her share, and says--"at Rs. 8,000 per cottah and your Honour's Court gave the said sanction. At present Babu Gopi Lal Nundi and Brothers of Darmahatta Street Calcutta, have made an offer for purchase at Rs. 11,000 per cottah." Then after stating that this petition was verified by an affidavit, she prays that "with a view to pay off" the debts of my husband estate orders be passed for the sale of the said properties belonging to his estate to Gopi Lal Nundi and Brothers at Rs. 11,000 per cottah instead of Rs. 8,000, per cottah," Therefore, the result was that in each case, I mean in each of the administration proceeding's by defendants Nos. 1 and 2, leave of Court was given to the proposed sale to the Nundis, and the consent of the Court to the proposed sale to Bhuban Chunder Bhur was not obtained. I am not sure that it is at all necessary to deal with the allegation which is put forward by the learned Counsel for the appellants, that the defendants did not really bring all the facts relating to the transaction to the notice of the Court, but if it is necessary for me to consider that, I am not satisfied that they did conceal the facts. I have gone carefully through the different orders and the statements which were made in the different applications, and I am not satisfied that the applicants to the District Court failed to disclose the material facts relating to the matter; In any event, there is no doubt that the order of that Court stands. This is not an appeal from the order of that Court, and under that order as I have already mentioned, consent of the Court was given to the sale to the Nundis and it was not obtained by the two administratrixes for sale to Bhuban Chunder Bhur.

11. The first question I have to consider on these facts, is whether the plaintiffs can obtain a decree for specific performance of the contract against the first two defendants. In my opinion, the plaintiffs cannot succeed in obtaining this decree.

12. The case which was referred to by the learned Advocate-General Narain Pattra v. Aukhoy Narain Manna 12 C. 152 was to this effect: A certificated guardian of certain minors entered into an agreement with the plaintiff to sell certain land belonging to them for a fixed price contingent upon the leave of the Court, which was necessary, being obtained to the transaction, and a portion of the purchase money was paid by the plaintiff. The Court sanctioned the sale but at a higher price than that agreed on between the plaintiff and the guardian, and the latter sold to a third party. The plaintiff, thereupon, sued the minors by their guardian as next friend and the third party for specific performance of the agreement to sell to him at the price mentioned in the agreement: It was held that the contract was not one which would be specifically enforced, and that Section 26 of the Specific Relief Act did not apply. The contract as it stood was never a complete contract at any time as it was contingent upon the permission of the Court, and the permission of the Court did not extend to the whole

contract as agreed upon between the parties." Having held, as I have, that there was a verbal-agreement subsequent to the execution of the agreement of the 23rd of January 1910, which constituted an agreement between the parties a conditional one, dependent upon the consent of the Court being obtained to the sale, I am of opinion that this case is governed by the principle laid down in the case to which have just referred. Therefore, specific performance against defendants Nos. 1 and cannot be obtained. Consequently, if-the plaintiffs are not entitled to specific performance against defendants Nos. 1 and 2, it follows naturally and as a matter of course that they cannot obtain it against the Nundi defendants. Therefore, the question of notice to the Nundi defendants of the contract of the 23rd of January 1910 does not arise. As regards these defendants, there can be no claim for damages as they were not parties to the contract.

13. Therefore, as against the Nundi defendants this appeal must be dismissed with costs.

14. As regards the claim for damages, which must be confined to defendants Nos. 1 and 2 here again, having decided that the agreement was varied by the consent of the parties and became conditional on the ladies changing their character and becoming administratrixes to the estates, and getting leave of the Court, that would bar the plaintiffs' claim, for damages, because it must be pointed out that this action is not based upon the conditional contract, but it is based upon the original contract of the 23rd of January 1910 unvaried, and the breach is specified in paragraph 19 of the plaint. That alone would be a sufficient answer to the plaintiffs' claim for damages. But I would like to add that even if the administration proceedings are to be considered as taken under the clause of the contract to which I have referred--though as I have already pointed out, I do not think they can have been--the administration proceedings were taken at the instance of the plaintiffs, and it was at the instance of the plaintiffs that the matter was made subject to an application being made and the sanction of the Court to sell being obtained; and, such a condition involved the risk that a higher offer might be forthcoming, which, if made, the administratrix would be bound to bring to the notice of the Court, and which the Court in the interests of all the parties concerned would have to consider as against the price which was mentioned in the original agreement of the 33rd of January. It is also to be noticed that in the Court below no attempt was made to prove the damages which were stated in the plaint to be Rs. 20,000.

15. For these reasons in my judgment, the plaintiffs are not entitled to damages against defendants Nos. 1 and 2.

16. As regards the question of costs, that is a matter for the discretion of the learned Judge. I am not sure that if I had been sitting as a Judge of first instance, I should have made quite the same order as to costs as the learned Judge did. But that is not the question. Costs are in the discretion of the learned Judge, and the question I have to consider is whether I am satisfied that

sufficiently good cause has been shown for me to interfere with the discretion which the learned Judge has exercised. I am not so satisfied: I bear in mind that the learned Judge must have had all the facts before him at the time he made the order. Not only that: this question of costs was expressly raised and argued before him, and especially the question of the reserved costs of the commission was strenuously argued, as I was informed, by the parties before him: and, under those circumstances, I cannot go so far as to say that I am satisfied that this Court ought to interfere with the discretion which the learned Judge has exercised, I am, therefore, of opinion that this appeal ought to be dismissed with costs.

Woodroffe, J.

17. I am not satisfied that the ladies understood the consequence of, and were bound by, the alleged agreement of the 23rd January 1910. It is to be observed that the document was said to have been explained by the attorney of the purchaser. It apparently did not occur to him in dealing with the pardanashin ladies, who were said to be selling their property, to recommend that they should be represented by a separate solicitor. There was a solicitor of the estate Mr. Srimani, who had been the deceased's solicitor; and he was not consulted. It was apparently not explained to the ladies that in the event of the Marwari Pachasia getting a decree for damages the ladies would in that case have been liable therefor. Nor was it explained to them that, as contended in the trial, the provision as to clearing the title might be relied upon for the purpose of showing that there was a duty upon them to get out Letters of Administration to the estate and to incur the additional costs of such administration.

18. But if the ladies were at one time bound by that agreement it was in my opinion, superseded by another according to which the sale was to be, not by the widows, but by administratrixes contingent on the Court's sanction being obtained. There can be under the circumstances no decree for specific performance as claimed either against the first or second defendant or the Nundi defendants. Nor as against these latter defendants any question of notice arises.

19. Then as regards the damages, they are claimed against the first and second defendants only. It is sufficient to say that the claim has been made in the plaint on the basis of the agreement of the 23rd January 1910, which I hold has gone. I may further add with reference to the contention that the 1st and 2nd defendants were bound to do all they could to get sanction from the Court, that the grant of Letters of Administration altered the character of the vendors; and that the case of the plaintiffs is that Rs. 8,000 per cottah was the proper price of the premises. So according to them there was no loss except the alleged hypothetical loss said to be due to an alleged disturbance of their business, with regard to which there is nothing on the record to show that it is not too remote if it be held to exist at all, of which there is no evidence.

20. As regards the question of costs it is true that the plaintiffs succeeded in

certain points in the first Court. But the learned Judge, though asked to take this into account in his order for costs, has not done so. Apart from the findings above mentioned in my judgment, I do not think that sufficient ground has been made out for interfering with the discretion of the Court in this respect.

21. I, therefore, agree with the order proposed by the learned Chief Justice.

Mookerjee, J.

22. I agree that the decree made by Mr. Justice Imam is substantially correct and should not be disturbed.

23. The facts material for the determination of the questions raised before us, as I gather them from the evidence, may be very briefly stated. The subject-matter of the litigation is house property in this city which was owned at one time by Hari Charan Sett and Panchanan Sett. The share "of the former devolved upon his death on his widow, the 1st defendant, while the share of the latter passed on his death to his mother, the second defendant. The proprietors died heavily indebted, and the ladies found it necessary to sell the disputed land to liquidate the debts. The Bhurs, the plaintiffs in this suit, as also the Nundis who form the last three defendants in this litigation, were in occupation of different portions of the property as tenants. They were rival traders and carried on business in hardware on the premises; they were consequently both naturally anxious to acquire the property. As the result of negotiations, on the 23rd January 1910, the first two defendants executed in favour of the Bhurs a contract of sale and undertook to execute a conveyance on receipt of the price, which was fixed at Rs. 8,000 per cottah. Immediately after this, on the 7th February 1910, a suit was instituted against the first defendant, on behalf of her infant daughters, (who were the reversionary heirs to the estate of her husband), to restrain her from making an absolute alienation of the premises. The claim was founded on the assertion that there was no legal necessity for the alienation and that the price. Fixed was wholly inadequate. The plaintiffs realised that a purchase of the premises, in these circumstances was likely to involve them in serious trouble, and, with a view to fortify their position, they induced their vendors to apply for Letters of Administration in respect of the estates held by them and to obtain the sanction of the District Judge to the intended alienation u/s 90 of the Probate and Administration Act. The object of this device was obvious. If the plaintiffs took a conveyance from the ladies in their character as a Hindu widow and a Hindu mother, respectively, vested with qualified powers of alienation, their title would be liable to be challenged on the death of the ladies by the then actual reversioners, and the burden would be cast upon the plaintiffs to establish the existence of justifying legal necessity. On the other band, if the ladies were clothed with the character of administratrixes and made the alienation with the sanction of the District Judge u/s 90 of the Probate and Administration Act, although the sale might not be operative precisely in the same way as a sale by order of the Court in administration proceedings, yet, as pointed out by Sir. Richard Garth in *Sikher Chund v. Dulputty Singh* 5 C. 383 : 5 C.L.U. 374 : 5 Ind.

Jur. 200 : 2 Ind. Dec. (N.S.) 847, the burden would lie heavily upon those that might impeach the validity of the transaction. The ladies accordingly applied for Letters of Administration at the instance of the plaintiffs, who also supplied the funds requisite for the conduct of the proceedings. But an unforeseen difficulty arose. The District Judge granted Letters of Administration, but ultimately declined to sanction the sale to the plaintiffs on the terms arranged. That the District Judge knew all the circumstances and was competent to make this order is indisputable. The Nundi defendants seized this opportunity, intervened, and offered Rs. 10,000 a cottah for the property, with the result that the District Judge sanctioned a sale at the higher price. Consequently, on the 15th July and 24th August 1910, the ladies executed conveyances in favour of the Nundi defendants. On the 15th September following, the plaintiffs instituted the present suit for specific performance of the contract of the 23rd January 1910, and, in the alternative, for damages for breach of contract. In my opinion, it is perfectly plain that the plaintiffs are not entitled to a decree for specific performance of the contract on which they rely. That contract was substantially varied when, at the instance of the plaintiffs, the ladies applied for Letters of Administration. Both parties to the agreement must be deemed to have implied that the transaction should not be effected until after the ladies had been clothed with the character of administratrixes and had secured the requisite permission of the District Judge. The original contract, when so varied by mutual consent, became in substance a contingent contract. The contingency has not happened, and, consequently, the plaintiffs are not entitled to claim performance of the contract. See *Narain Pattro v. Aukhoy Narain Manna* 12 C. 152; *Sarbesh Chandra Basu v. Hari Deyal Singh* 5 Ind. Cas. 236 : 11 C.L.J. 340 : 14 C.W.N. 451. In these circumstances, the observation of Lord Redesdale in *Harnett v. yielding* (1805) 5 S & L 549 : 9 R.R. 98 at p. 101 applies the plaintiff must show that in seeking the performance, he does not call upon the other party to do an act which he is not lawfully competent to do, for if he does a consequence is produced that quite passes the object of the Court in exercising the jurisdiction which is to do more complete justice." On behalf of the appellants, it has been argued, however, that this view may render possible an evasion of contractual obligation wherever an unscrupulous person enters, into a contract and subsequently places himself under the jurisdiction of the Probate Court as an administrator. There is, in my opinion, no real foundation for this apprehension. For the purposes of the present case, it is only necessary for me to hold that the original contract was by implication varied by mutual consent, when, at the instance of the intending purchasers, the vendors agreed to obtain Letters of Administration. In my opinion the original contract has been varied; and has been transformed into a contingent contract. In the events which have happened, the plaintiffs cannot claim specific performance of that contingent contract. From this it further follows that as there has been no breach of the modified contract by the defendants, the plaintiffs are not entitled to damages. A decree has been made in their favour for refund of the earnest money and the costs of the Letters of Administration proceedings. No question has been raised in this Court as to the

propriety of this order.

24. Finally we have been asked to vary the order for costs made by Mr. Justice Imam as between the plaintiffs and the first two defendants. I am not satisfied that the order is so manifestly erroneous or unjust as to call for our interference. The decree must consequently be affirmed and this appeal dismissed with costs.