

1885
 SRI KISHEN
 v.
 THE SECRETARY OF
 STATE FOR
 INDIA IN
 COUNCIL.

statements refer to two different periods of time, and the claim made in this suit embraces the longer period. Therefore the Judicial Commissioner was perfectly right in allowing the larger amount.

That being so, their Lordships are of opinion that the appeal of Mohun Lal should be dismissed with costs.

With respect to the cross appeal their Lordships think that the decree ought not to be varied in respect of the costs before the Judicial Commissioner, and that the cross appeal should be dismissed with costs.

Their Lordships will humbly advise Her Majesty in accordance with that opinion.

Appeals dismissed.

Solicitor for the appellants: Mr. *William Buttle*.

Solicitor for the respondent: Mr. *H. Treasure*.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Agnew.

1885,
 August 5,

NARAIN PATRO (PLAINTIFF) v. AUKHOY NARAIN MANNA AND OTHERS (DEFENDANTS).*

Specific performance—Contract—Agreement to sell land by guardian of minor contingent upon the permission of the Court—Specific Relief Act, (I of 1877), s. 26.

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.

Held, that the contract was not one which could be specifically enforced, and that s. 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

* Appeal from Appellate Decree No. 377 of 1885, against the decree of H. Gillon, Esq., Officiating District Judge of Midnapore, dated the 29th January 1885, affirming the decree of Baboo Nilalohit Mukherji, Additional Munsiff of Nermal, dated the 20th of May 1884.

permission of the Court, and the permission of the Court did not extend to the whole contract as agreed upon between the parties.

1885

NARAIN
PATRO
v.
AUKHOY
NARAIN
MANNA.

THIS was a suit to enforce specific performance of a contract to sell land made by a certificated guardian of two minors, the contract being made contingent upon the leave of the Court being obtained.

The facts of the case are sufficiently stated in the judgment of the High Court.

Baboo *Troyluckho Nath Mitter*, for the appellant.

Mr. *C. Gregory*, and Baboo *Jadub Chunder Seal*, for the respondents.

The judgment of the High Court (TOTTENHAM and AGNEW, JJ.) was as follows:—

THIS was a suit to enforce the specific performance of a contract to sell certain property to the plaintiff for the sum of Rs. 768. It was alleged that Rs. 600 out of the sum agreed upon as the price had been paid in advance, and the plaint contained an alternative prayer that should the Court be of opinion that the contract could not be enforced, a decree may be made for a refund of the Rs. 600 with interest. The defendants in the suit were two minors represented by their mother and guardian. The mother of the minors was the person alleged to have made the contract with the plaintiff, and to be acting as guardian of the minor sons. She had been appointed guardian under Act XL of 1858, and had therefore no power to sell the property of the minors without the consent of the Court. This fact was recognized in the agreement, and the contract to sell was subject to the consent of the Court being obtained. The terms of the agreement were reduced to writing in a document called a *shuttanamah*. An application was made to the Court for sanction. In the meantime the plaintiff sought to have the *shuttanamah* registered. On this the mother of the minors denied execution, and the Sub-Registrar was compelled to refuse registration. The District Registrar, however, on appeal ordered the document to be registered. In the meantime, the Court having sanctioned the sale of the property in question, not for Rs. 768 but for Rs. 800, the mother of the minors sold to the defendant No. 2. The plaintiff

1885
 NARAIN
 PATRO
 v.
 AUKHOY
 NARAIN
 MANNA.

has sued both parties, that is, the minors represented by their mother and the purchaser, for the specific performance of the contract to sell the property to him at the price originally fixed.

The first Court decided the case against the plaintiff upon the merits.

The lower Appellate Court was of opinion that specific performance of the *shuttanamah* could not be had. It found that the defendant had no power to carry out the contract in its original state; that the Court sanctioned the sale only at a price higher than that agreed to by the plaintiff; and that the defendant was not competent to sell the property to him at a price less than that fixed by the Court. The Judge further considered that the specific performance sought by the plaintiff was barred by certain clauses of the Specific Relief Act, namely clause (e) of s. 21 and clause (b) of s. 27. The plaintiff appears to have suggested that s. 26 of the Act would permit the Court to give a decree for the performance of the contract with a variation, that is as to the price to be paid by the plaintiff. The lower Appellate Court held that s. 26 did not apply to the case. I ought to say here that as to the alternative relief prayed for in the plaint, namely as to the refund of the consideration money advanced by the plaintiff, the lower Appellate Court states that the pleader for the plaintiff before him admitted that in this suit he could not expect to get that relief, inasmuch as the defendants in this suit were the minors and the purchasers, whereas the refund of the money must be sought against the mother personally, not in her capacity as guardian, and as against the minors only in respect of such part of the sum as may have been used for their benefit.

The appeal was, therefore, dismissed by the lower Appellate Court.

In this second appeal the vakeel for the appellant has contended that the Judge was wrong in law in holding that s. 26 of the Specific Relief Act did not apply to the case, and that the plaintiff was barred by clause (e) of s. 26 and clause (b) of s. 27. It has also been contended that the Court should have decided the matter as to the alternative relief sought in the plaint.

It is not necessary for us to express any opinion as to whether

the suit was barred by clause (e) of s. 21 or clause (b) of s. 27 of the Specific Relief Act, for in our opinion the Judge was quite right in saying that the contract as it stood could not be enforced, and that s. 26 had no application to the case. The contract, such as it was, was not a complete contract at any time. It was contingent upon the permission of the Court. The Court's permission did not extend to the whole contract as set out in the *shuttanamah*. The defendants, therefore, could not be compelled to carry out the terms of the original agreement, nor could they have insisted upon the plaintiff's carrying out the terms sanctioned by the Court. Section 26, upon which the vakeel for the appellant relies, sets out cases in which contracts cannot be specifically enforced except with a variation; and there are five particular cases set out in which a contract may be enforced subject to a variation, such variation being in favour of the defendant, and the section in our opinion assumes that the parties or vakeels representing them are agreed as to the existence of the contract but not agreed as to specific terms. The section provides that, when fraud or mistake of fact, or misrepresentation has induced the defendant to sign an agreement, that agreement can only be enforced on the terms which the defendant intended to agree to. There is no provision of law of which we are aware which entitles the plaintiff to claim a variation in the terms of his contract, when he finds that the contract itself cannot be carried out. In the present case the plaintiff by his plaint sought to enforce the original contract without any variation. It seems to us, therefore, that the Judge was right in holding that the agreement in the *shuttanamah* could not be enforced as it stood, and that s. 26 would not entitle the plaintiff to enforce it with a variation.

As regards the alternative prayer for a refund of the Rs. 600 advanced by the plaintiff, we think that upon the fact stated by the Judge that the plaintiff's pleader did not press for a decision on that question in this case, it cannot be said in second appeal that the lower Appellate Court was wrong in law in not coming to a decision upon it. Strictly speaking the Judge was perfectly correct in law in not going into that point in the present suit framed as it was.

The appeal is dismissed with costs. *Appeal dismissed,*

1885

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