
Archit Baniyya and Biniyog Pvt. Ltd. Vs Asha Lata Ghosh

F.A. No"s. 46 and 47 of 2000 Hd. On: 24-27/7. 7, 8, 10, 14, 16. 17, 21, 24, 28-31/8, 4/9 of 2000

Court: Calcutta High Court

Date of Decision: Sept. 7, 2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) â€” Order 23 Rule 3B#Specific Relief Act, 1963 â€” Section 19(b)#Succession Act, 1925 â€” Section 211

Citation: (2000) 2 ILR (Cal) 455

Hon'ble Judges: Ranjan Kumar Mazumdar, J; Ajoy Nath Ray, J

Bench: Division Bench

Advocate: Anindya Mitra, Samaraditya Pal, S.P. Sarkar, Utpal Mazumdar, Sanjoy Basu, Sajal Das, T. Roy and Veneta Meheria, for the Appellant; Sudhir Dasgupta, Jyotirmoy Bhattacharya, Kanti Kumar Chakraborty, Amal Kumar Saha and Bhaskar Prosad Vaisya for Respondent No. 4, Ashok Banerjee, Sanjib Kumar Mai and Chandrani Chakraborty for Respondent No. 5 and 7 and Ashis Kumar Roy, for Respondent No. 1(b), for the Respondent

Final Decision: Dismissed

Judgement

Ajoy Nath Ray, J.

We have heard two appeals from the same decree which is a preliminary decree for partition.

2. The only property centering which arguments have been made in these appeals is premises No. 9/4 Middleton Row. It measures some 1 bighs 6

cottas of land and is situated in one of the best localities in Middleton Row at Calcutta.

3. Although the decree was passed on December 23, 1999, the suit had been instituted as early as in 1981. It was a partition Suit amongst the

heirs of one Balai Chand Ghose, deceased, who died on the August 16, 1980, having led a full and rich life.

4. He left behind him two mourning widows, his first wife having predeceased him in his lifetime. There were 9 other heirs of Balai Chand Ghose

and the Partition suit was, inter alia, amongst these progeny and the wives.

5. Other property than the one mentioned above was also involved in the suit, but we are not concerned with these, At the time of his death, Balai

was living with his third wife Mamanta and his only issue by her, Arindam. They were the first two Defendants in the Partition suit.

6. The Plaintiffs were...the second wife of Balai, namely, Nirmala and her children, the younger son Bhabesh being the Plaintiff No. 4 playing an

important role in the shape of the only witness who came to give evidence on behalf of the Plaintiffs. During the lifetime of Balai, there was a

litigation between him and his second wife Nirmala about 9/4 Middleton Row. It stood in the Benami of Nirmala but the real ownership of Balai

was established by decree and that is not challenged before us.

7. Sometime after the suit was filed in 1981, there was a substitution application made by Arindam in regard to a Debutter matter and therein an

order was passed at Alipore, sometime in the year 1982 permitting substitution of Arindam as executor of Balai appointed by his will, upon

Arindam depositing a copy will within a named date in that very same year.

8. This will of Balai is an important matter in the decision of these two appeals. This is a document of 1977. It has been registered although a will,

as is well known, is not compulsorily registrable. Arindam is the named executor in the will. We have directed the will to be kept in the safe

custody of the learned Registrar, Original Side of our Court.

9. Although Arindam got himself substituted in a legal proceeding in 1982 and mentioned about Balai's Will and his executorship, he had not then

mentioned that he had obtained a Probate of the Will by that time, granted on July 29/31, 1981. Although Arindam had applied for is substitution

as Balai's executor in the next year after he had got the grant, he kept the Probate obtained at his instance and granted to himself a secret.

10. Arindam has proved in the hearing of these two appeals to be quite a slippery customer. He put in an appearance through a learned advocate

before us. But he had left him so ill-instructed, that the learned Advocate was not even able to say before us whether Arindam was supporting the

appeals or not. Soon thereafter, Mr. Saptangsu Basu, the learned Advocate prayed for leave to retire for lack of instructions and we granted him

such leave. One day in Court Arindam had also come and we became aware of him because learned Counsel appearing said that Arindam is in

Court; so far as we remember, although we would not like to lay a wager on this, Arindam appeared to be a well built, tall, and hafty person with

shifty eyes. Thereafter, after Arindam walked out of the Court room, he never and came again. Mr. Saptangsu Basu, learned advocate, also had

no further role to play at the hearing of these Appeals.

11. The Appellants in these appeals are not any of the heirs of Balai. They are ail added Defendants, the addition taking place some 13 years after

the filing of the suit, that is, sometime in 1994.

12. The 14th Defendant crystal Developers claim to have purchased the entire right, title and interest in the premises (hereinafter meaning 9/4

Middleton Raw only) by virtue of a Registered deed of conveyance dated the August 4, 1981.

13. This Deed of Conveyance requires mention in detail which is important like Balai's will.

14. There are four parties to this conveyance. The conveying party is Arindam Ghosh in his capacity as executor of Balai's Will. The taker is

Crystal Developers. The third party is a confirming party being Arindam Ghosh himself in capacity as Legatee and beneficiary under Balai's will; if

the will were to remain probated then under its terms Arindam would be full beneficiary of the premises. The fourth party are the persons who

entered into an agreement for sale with Balai in 1979. They are also confirming parties.

15. The agreement for sale with Balai was entered into by the Doshis, being the confirming parties by way of two written registered agreements.

The first of those is dated in March 1979 and the second is dated in July 1980, less than a month before Balai's expiry. Both these agreements for

sale including the last supplemental one were signed by Arindam as the Power of Attorney holder of Balai.

16. When in 1982 Arindam got himself substituted as executor of Balai's will not only did he keep silent about the grant of probate but he also

kept quite silent about the conveyance dated August 4, 1981, by which he had purported to give away the entirety of the premises to Crystal.

17. Sometime in or about 1986, the other heirs of Balai than the Defendant Nos. 1 and 2 appear to have come to know of the grant of probate.

The fourth Plaintiff Bhabesh applied for revocation of grant which application failed. Then a second application for revocation was made by two

daughters of Nirmala and Flamesh, her elder son. This application succeeded and probate was revoked in 1987. The reason for revocation is not

apparent from the revoking order. However, we have somewhat seen some of the papers in the Probable proceedings by getting production of

those ourselves, and it appears that in the petition for probate, where the heirs of Balai as on intestacy are mentioned the two daughters of Nirmala

are not named at all.

18. Although Arindam has appeared and disappeared before us, he gave evidence at Alipore. His explanation was that he did not put in the names

of the two daughters of Nirmala because they got nothing under the will.

19. It is an important matters that 13 years after the grant of Probate was revoked, no substantial steps have been taken for proving the will before

the Court again, neither by Arindam as executor, nor by any other party for obtaining Letters of Administration with copy will annexed, should the

prospective propounded fail or neglect to act in the matter of getting the will Probated.

20. Crystal took some steps in regard to the premises, which we shall mention hereinafter, and in 1991 sold the premises by 6 several deeds of

conveyance to Defendant Nos. 15 and 20, both inclusive. They were also added to the suit along with the Crystal in 1994. We shall mention the

Defendant Nos. 14 to 20 compendiously as purchasers unless the context should require a differentiation between them to be made as purchasers

and subsequent takers from them.

21. Evidence was given both on behalf of the purchasers and the subsequent takers. The subsequent takers have deposed that flats have been

constructed and 13 of those flats have been handed over to persons who were described to be in permissive occupation.

22. An important point to consider in determining the effect of the conveyance dated August 4, 1981, is, that if Arindam had been the conveying

party as legatee and beneficiary and a confirming party as an executor, the purchasers would not have a word to say in respect of their ownership

of the premises today. This is simply because they would be unable to rely upon the title of Arindam. The title of Arindam as legatee must be

established through the will of Balai and the Will of Balai can be established only by production of Probate. Section 213 of the Indian Succession

Act, 1925 is only too clear on this point.

23. The Appellants have argued these appeals before us for days together only because Arindam has conveyed in the Deed of August 4, 1981, as

executor, and has confirmed as legatee. It is submitted on behalf of the purchasers that a Conveyance by Arindam as executor of a then probated

Will of which the probate gets subsequently revoked, is effective, and remains fully effective, notwithstanding the later revocation of the probate.

24. To our query, whether the Appellants were resting their case on the shifting sands of conveyancing jugglery only, the pointed answer of Mr.

Mitra appearing for the Defendant No. 14 was that it was not conveyancing jugglery, but good, proper and substantial conveyancing.

25. This is the primary point of substance which we have to examine in determining these appeals. If the conveyance by the executor remains

good, the revocation of probate notwithstanding, the purchasers establish substantial case. If, however, the Will has to be looked at somehow for

determination of the substantial rights of the purchasers, then in the matter of proof of the substance of their title, the purchasers must necessarily

fail. We shall examine this important and interesting question presently but after a short and necessary digression.

26. A simple answer which would come to anybody's mind before making the above enquiry, would be why not wait until the Will has been

probated, or otherwise admitted to proof. If the Probate goes through, the academic question of the executor's conveyance will become wholly

otiose because Arindam will become beneficiary cum executor, and the second wife's branch and the first wife's branch would not be able to

challenge the claims of the third wife's branch, in the shelter of whose arms Balai breathed his last.

27. The learned Judge who passed the preliminary decree for partition has expressly noted an order dated November 29, 1999, passed by the

Hon'ble Justice Bhaskar Bhattacharya of our High Court requiring disposal of the suit by December 31, 1999. When we enquired of the origins of

this order, we were shown a Division Bench order dated July 27 1998, wherein the Division Bench itself had fixed a date for disposal of the suit

the matter had come before the Division Bench from an injunction application made in the suit itself. Needless to mention the title of the purchasers

being is issue further change of hands or possession was most undesirable. However, the matter was not left merely at the stage of decision of the

interlocutory prayers but directions for disposal of the suit itself were also given. As the will of Balai was not being got proved by any party

interested, the learned Judge in the lower Court had no alternative to disposal of the suit, leaving the will in its state of limbo.

28. Before us, the Appellants prayed for a hearing on mentioning made on behalf of the Defendant No. 14. It was submitted that the hearing will

take two hours, but we blame nobody in regard to that wrong assessment, which is sometimes made without any error or blame.

29. During the hearing of the appeals, we have again and again asked the purchasers, will you wait and try to see if the will of Balai can be get

proved end do you want the decisions in these appeals to be taken thereafter? Again and again the purchasers have told us, of course in the

politest of language, why should we wait, we have a good title now, we are in possession, we shall go on with the hearing of the appeals and we

submit we are entitled to favourable decisions.

30. Thus, the will of Balai remains in an uncertain state in the safe custody of the learned Registrar, Original Side, and we go on delivering our

judgment in these two appeals.

31. Since nobody has any interest apparently in getting the will of Balai proved, and since the purchasers pray for decision in these two appeals,

the revocation of Probate notwithstanding, we have to decide the interesting question of the executer's title.

32. u/s 211 of the Indian Succession Act, 1925, the property of the deceased vests in the executor. Section 211 Sub-Section (1) is quoted below:

211(1) The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of

the deceased person vests in him as such.

33. We have already mentioned that to prove an executor's right, grant of Probate has to be produced. Section 213 Sub-Section (1) is quoted

below in this regard:

213(1) No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in India has granted

probat of the will under which the right is claimed, or has granted letters of administration with the will or with a copy of an authenticated copy of

the will annexed.

34. The law is that an executor can file a pleading before the Court even without obtaining Probate, but finally to establish the right as an executor

and to obtain a decree, the probate has to be produced. The judgment of Justice Anil Kumar Sen (As His Lordship then was) in the case of

Ashoke Mukherjee v. Musha Khan (1988) 1 C.L.J. 38 might be conveniently referred to in this regard.

35. u/s 227 of the said Act, the Probate validates all action taken at the intermediate stage by the executor. The said section is quoted below:

227. Probate of a will when granted establishes the will from the death of the testator, and renders valid all intermediate acts of the executor as

such.

36. u/s 307 the executor is permitted to go on acting even before obtaining Probate. Such action includes even disposal of the deceased's

property. Sub-Section (1) of Section 307 of the said Act is quoted below:

307(1) Subject to the provisions of Sub-Section (2), an executor or administrator has power to dispose of the property of the deceased vested in

him u/s 211, either wholly or in part, in such manner as he may think fit.

37. Under the Indian Succession Act debtors to the Estate paying the money due bona fide to the executor get a valid discharge, notwithstanding a

later revocation of the grant. Section 297 of the Indian Succession Act, 1925 is set out herein below in this regard:

297. When a grant of probate or letters of administration is revoked, all payments bona fide made to any executor or administrator under such

grant before the revocation thereof shall, notwithstanding such revocation, be a legal discharge to the person making the same; and the executor or

administrator who has acted under any such revoked grant may retain and reimburse himself in respect of any payments made by him which the

person to whom probate or letters of administration may afterwards be granted might have lawfully made.

38. This section envisages payment by of debtors to an executor, acting on a grant of probate, operative for the time being, provided the payment

remade bona fide.

39. There is unfortunately no section like Section 297 which deals with the reverse situation, that is, the situation of disposal of property by the

executor during the continuance of the grant of a probate which later gets revoked.

40. Thus arises the important and interesting question debated before us.

41. Before we discuss the case law we should bear in mind the two possible answers which could be given to the question of the temporary

executor's sale, if we might use this somewhat loose but convenient, expression.

42. One answer would spring from the well known principle applicable in the matter of sale of goods, which is Nemo dat Quod non Habet. No

one can give what he himself does not possess. This principle would squarely apply against the Appellants, Arindam to convey as legatee and

beneficiary on August 4, 1981, today there is no probate, today Arindam cannot prove that he had absolute interest in 9/4 Middleton Raw.

Section 227 cannot operate because there is no probate; the purchasers would be defeated by the simple plea that Arindam could not sell away

the premises because he never had it.

43. It is possible, or rather, it was possible, for the law of executors to proceed in the above way too, but it has not proceeded in that way. The

second answer, which is possible to give in regard to conveyances by persons who have imperfect title, is the answer given by the doctrine of

protection afforded to the innocent third party; the Nemodat principle is one of the principles in the hard core of common law; similarly, the

doctrine of protection of the bona fide purchaser for value Without notice, is in the hard core of the doctrines of equity. The executor has been

dealt with similarly as persons who are entrusted with the legal estate impressed with trusts, although an executor is not a trustee square and

proper.

44. The position of the executor has to be examined both legally (including equitably) and historically to understand his exact status.

45. The glorified executor of today, in whom the deceased's property vests is not, as might be supposed, centuries old; this executor with vested

property is barely more than a century old. Before 1898, the law in England as to realty was that the realty of the deceased did not vest in his

personal representative (which includes an executor), but went immediately to the heir or devisee as the case might be. See in this regard page 543

of the Law of Real Property, 1966, 3rd Edition, written by His Lordship R.E. Megarry, who was then Queen's Counsel, and the celebrated Prof.

H.R. Wade, better known for his treatise on Administrative Law.

46. Though the book is a detailed and an accurate one, it is no more than a students' manual: also the edition is 34 years old. There is a good

justification for using the book, nonetheless.

47. The point which crops up for decision is one relating to executors, closely connected with equitable doctrines. Since our Independence and

since the adoption of our Constitution, because of the Governmental policy of nationalisation and governmental controls, the Government has been

the most important litigant in our Courts. The result has been that there is a huge crop of public law cases. As compared to this crop, the cases

decided on such private law matters as tort or equity are incomparably few in number. Thus we have many experts in many branches of the law,

but where equitable doctrines and principles are concerned, even, the experts have to go back to their student days and students' books.

48. Now as to old edition; after the adoption of our Constitution in 1950 we do not use the decisions given by English Courts, not even as

persuasive decisions unless the field of the decision is appropriate for use by Indian Courts in India.

49. Article 372 of our Constitution validates laws in force at the date of adoption of it. Article 372(1) is not set put below in as it is easily available.

50. What the body of this law in force exactly is incapable of exact enumeration. It is quite clear that these laws in force were in force just before

the adoption of our Constitution, on the basis of some other constitution or primary validating law. Before the independence of India the validating

force would have been that of the British constitution. The body of general laws including common law and equity which was in force at the date of

adoption of our Constitution was huge. Numerous common law and equitable doctrines were useable in India, a rich and prosperous country as it

was on the day of winning of independence. Calcutta was known as the London of the East. All general equitable doctrines could be used by the

Courts, including High Courts at Calcutta, immediately after the January 26, of 1950, unless it could be shown that the use of such general

equitable doctrine came in conflict with some. Indian law, some Indian practice or some other special and typical Indian factor. The situation has

remained so ever since. We therefore have, served to us on a plate, the well developed general doctrine of equity to be picked up and used by the

law Courts in India whenever they should find use for those, provided the doctrines are not in conflict with other Indian laws, say the Trusts, Act of

1882, or the Specific Relief Act (now of 1963) or the Transfer of Property Act, 1882. Where the general body of equitable doctrines is

concerned, a Reputable English book of 1966, is perhaps of more use and more value to an India Court than one of the year 2000. Thus we draw

freely upon the sources of M.W. (Megarry and Waive), in the confidence, that if a celebrated English Judge and a celebrated English Professor of

Law do not know equity, then American Scientists do not know modern engineering and Indian Yogis do not know religion.

51. Realty thus passed in England directly, without the intervention of the executor, vesting straight in the legatee before 1898. The present

executor as we know him, first appeared in England by reason of the enactment of the Land Transfer Act of 1997, and under that Act until the

great real property legislation of 1925 in that country, all property whether real or moveable vested in the personal representative, including the

executor after the death of the deviser (M.W. pages 544-545).

52. The statutory executor, the vested executor, in whom the property of the deceased vested irrespective of realty or personality, made his

appearance in the statute book in India, before he appeared in an Act of Parliament in the native English soil, where the law of executors, like so

much other law, was born.

53. In the making of the necessary research for finding out the details of this rarely discussed branch of law, we made a little bit of our own

research but we were greatly assisted by the industry and experience of the learned Counsel appearing. Mr. Anindya Mitra appearing for the

Defendant No. 14 opened his appeal first and he made well-informed and exciting arguments as is customary with him. His arguments were

adopted by Mr. Pal appearing for the subsequent takers but he did not stop merely at adoption of arguments, but made considerable arguments on

his own and cited several authorities too. The preliminary decree for partition was principally supported by Mr. Dasgupta who appeared on behalf

of the branch of the second wife. His arguments were adopted by Mr. Banerjee who also made submissions on facts; he appeared for the children

of the first wife, who, as we have mentioned had predeceased Balai.

54. The appearance of the vested executor in India was more or less with the passing of the 5th Act of 1881, being the probate and Administration

Act. This Act along with the Hindu wills Act (21 of 1870) were replaced by the corresponding provisions, with additions and amendments by the

Indian Succession Act of 1925.

55. Mention of these two Acts would be found in a case given by Mr. Pal, being an advisory opinion of the Judicial Committee given in the case of

Subamma v. Rammayya AIR 1932 P.C. 82 Section 4 of the Act of 1881 was the vesting section parallel to Section 211 of 1925. Section 90,

Sub-Section 2 of that Act was parallel to the present Act Section 307, which gives the executor power to deal with and dispose of the deceased's

estate, even before obtaining probate. In this case it was clearly laid down that in view of the terms of these sections it would be impossible to hold

that before probate nothing vested in the executor and that he had no power of disposal at all.

56. The Division Bench judgment of the Bombay High Court in the case of Mahomed Yusuf v. Hargo-vandas Jivan AIR 1922 Bom. 392 also

given by Mr. Pal, is an authority for the proposition that an executor can act even without the grant of probate. The statutory sections contemplate

even disposal of immovable property by the executor without a probate. That the executor needs to produce the probate for establishing in any

Court a right flowing from the Will does not militate against the executor's power to act before probate. It was laid down that probate is

conclusive, but such conclusiveness does not impliedly negative the title of the executor in its absence. It is also noticed that... it is a common place

of English law that an executor derived his title from the Will and not from the probate...".

57. It is therefore an indisputable proposition of law that the disposal of an estate by an executor cannot be negative because, and only because

there is no subsisting probate to Validate the Act of the executor as per Section 227 of the Act, 1925 if he can act without probate, he can act

with probate, which is later revoked.

58. An exact case on all found with the facts of ours could not be found and usually such an exactly fitting case cannot be found. There was no

case where the disposal had been made by the executor during the subsistence of a probate later cancelled, and in which case the Will had also

been left by the parties in a state of derelict neglect, like here.

59. Two cases could be found where the executor had acted on a probated Will, the probate of which was ultimately cancelled, and the regrant of

which probate was, by the facts of the cases, shown to be impossible to obtain once again in the future. Let us discuss these two cases now. the

first is the case of Debendra Nath Dutta where the Judicial Committee affirmed a judgment of the Calcutta High Court but on a different reasoning

than adopted here in that case, one Cowie, whom Lord Macnaghten described as a rogue and an impostor, had set up a false will, obtained letters

of Administration with two sureties, and on the basis of that grant had obtained the possession of certain shares, after disposal of which he

absconded. He was later apprehended and punished. The Administrator General of Bengal, on assignment sued the two sureties for the lost value

of the shares, and Debendra Nath Dutta, one of the two, took the decision to the Privy Council. The argument before the Judicial Committee was

that the Will set up by Cowie was fraudulent and nonexistent and therefore the grant of the Letters of Administration was void ab initio, if that be so

there could not be any surety to support a void grant.

60. This argument was negated by the Judicial Committee. In the extremely short opinion it is quite clear that the judgment was given on the

policy of the Court having to protect the third parties who might, in some cases, innocently act on the basis of grant given by a Court under its seal.

61. It is really a question of finding out where the loss will lie once the fraud has been committed. In giving an answer to this question in a situation

of the nature we are now discussing, the Court has again and again protected the innocent third party, and the Court has not applied mechanically

the ordinary rule applicable to chattels, if there is no good title, none can be passed.

62. The decision of the Special Bench of the Calcutta High Court, which the Judicial Committee affirmed in *Debendra Nath Dutta v. Administrator*

General of Bengal 3 C.L.J. 422. Unlike the Judicial Committee the Special Bench had proceeded on the basis that the grant obtained by Cowie

was void, but Debendra Nath Dutta lost on a construction of the terms of the surety bond. In opining the grant to Cowie as void, the Special

Bench had relied upon certain English decisions which need not be mentioned by us in details. Suffice it for us to state that those decisions, which

were English decisions, were overruled later in England in the case of *Hewson v. Shelley* (1914) 2 Ch. 13. There is also an, interesting sequel to

Debendra Nath Dutta's (Supra) case in the case of *Craster v. Thomas* (1909) 2 Ch. 348 where the purchaser of the shares fraudulently got

released by Cowie namely, one Thomas, was successful in proving his status as bona fide purchaser of the shares for value without notice. He

could maintain the shares, notwithstanding the initial fraud of Cowie, because Thomas was a party dealing at arms length, away from Cowie and

unconnected with him.

63. Rare is the case of the third party purchaser without notice. The equitable doctrine of the bona fide purchaser for value without notice is as

common as his actual and practical appearance in the case book is rare. We shall discuss this point further as this is at the heart of the matter but

the case of Thomas is interesting to note, as it is a rare instance of a person proving his third party status. The other case which the executor had

acted on a probate which was later revoked is the case of Akshoy Kumar Pal v. Nandalal Das ILR 1946(1) Cal.432 a decision given by S.R.

Das, J. as his Lordship then was. There the grant of the first Will failed because of the discovery of a second Will and everybody accepted that the

first Will was for all practical purposes dead for ever. In the decision, the Court came to the finding that the claimant had been unable to prove the

status of bona fide purchaser for value without notice. The Indian Succession Act and its several sections were noticed by the Court in great

details. Section 297, which protects bona fide debtors to the estate dealing with an executor with a temporary grant was particularly noticed. The

learned Judge, however, said as follows:

In my opinion, Section 297 is only illustrative and not exhaustive and has been inserted in the Act ex-abundante equitate (page 437).

64. His Lordship also noticed the English Administration of Estate Act, 1925 giving statutory effect to the decision in Hewson v. Shelley (Supra)

which we have mentioned above.

65. With the greatest of respect, in our opinion, Section 297 was not inserted ex-abundante equitate, but it was inserted because the position of the

vested statutory executor needed clarification by appropriate Statutory provisions. The debtors to the estate dealing with the executor are dealt

with in Section 297; If we had a section, for all persons dealing with executors operating under a temporary grant we would not have to discuss so

much law as we are discussing now; but that section is not there Thus Section 297 is not only not otiose, but it shows its necessity, by the contrast

that the absence of a similar section, dealing with purchasers from the executor, makes with it.

66. Though we do not have such a section, such a "statutory provision was inserted in the said Administrator of Estates Act 1925 in England.

Section 37 Sub-Section 1 of the said Act is as follows: (The sections may be seen in Williams and Morhimer on Executors, Administrators and

probate I have consulted the 1970 edition, esp. pp. 445, 848, 356, 1062 and 1076):

Validity of Conveyance not affected by revocation of representation-

37-(1) All conveyances of any interest in real or personal estate made to a purchaser either before or after the commencement of this Act by a

person to whom probate or letters of administration have been granted are valid, notwithstanding any subsequent revocation or variation, either

before or after the commencement of this Act, of the probate or administration.

67. The word "purchaser" occurring in this section, the absence of which in our Act of 1925 we once again lament, is defined in Section 55 Sub-

Section (xviii) of the said English Act as follows:

"Purchaser" means a lessee, mortgagee or other person who in good faith acquires an interest in property for valuable consideration, also an

intending purchaser and valuable consideration" includes marriage, but does not include a nominal consideration in money.

68. Although the above sections we do not have, in our opinion, the principle enacted in those sections is applicable in India with all force. In other

words, if from an executor operating under a probate, later revoked, a bona fide purchaser takes property of the deceased, without any notice of

any fact, which gives the purchaser notice of his possibility of defeating the interest of another person, whether taking under the Will or under

possible intestacy, and if the purchaser also pays valuable consideration and is, in substance, a bona fide third party acting on the grant by placing

reliance on the seal of the Court from where it is issued, the purchaser shall be protected. Such protection the Court shall extend, if only for the

purpose for upholding the value, importance and dignity of its own grant and its own seal. If, however, the purchaser has notice of possible estates

or interest which he might be defeating by his purchase, if he is but a third party in the grey area, and not clearly so, if he could have made

reasonably more enquiry before his purchase, if he had acted too hastily; if he had acted in such a manner that he might complete his title before

any unwelcome embarrassing knowledge might come to him, if there are any of these factors, then the third party is not a true 3rd party, and he

cannot defeat an estate or interest.

69. The situation of the executor dealing with the estate on a later revoked probate, is" different from an executor dealing with an estate on a

probable which is never revoked, but in spite of which, questions arise as to whether the executor properly dealt with estate of the deceased. This

might be the situation where the legatees or beneficiaries challenge a disposal or mortgage by the executor, alleging that, by such act of the

executor, their interests have been unduly affected, and the taker from the executor or the mortgage cannot take in defeasance of the beneficiaries"

interest. These cases are interesting, but these are on facts which are so dissimilar to ours, that drawing a parallel from these cases to our case,

would be, in our opinion, dangerous. One such case, of the situation of a valid will, given by Mr. Mitra was the decision of the Judicial Committee

in the case of AIR 1940 30 (Privy Council) There a mortgage by the executor was in issue. The judicial committee was asked to consider the

argument that "in a question between the executors and the beneficiaries, the executors were not entitled to use the immovable properties for the

purpose of business. The business related to the well-known book sellers R. Cambray. The Judicial Committee said as follows:

the question must be whether the proposed lender had a duty to enquire into facts outside the Will as they existed immediately prior to the

testator's death. Their Lordships are unable to hold that the mortgages had any such duty, and the nature of the enquiry held in the present case

and the decisions below, show how impractical it would be... The Statutory powers Conferred by Section 307 on executors in India would be

nullified, if such a duty of enquiry was imposed on parties dealing with executors.

70. If this dictum, cut off from the facts and the situation, is applied without due appreciation of the facts in our case, we might well reach the unjust

result of protecting a third party who knows of the facts known to the executor either actually or constructively and who is able to establish that on

the basis of the will itself no adverse notice can be imputed to him. When we see the facts regarding notice in detail, we shall easily appreciate why

the will and the will alone is not the end of the matter in this case. Even at this juncture we should point out that it is not the beneficiary under the

will who would be protected if the executor's disposal fails here; the beneficiary is Arindam himself; the person who would be protected on the

failure of Arindam's disposal all the heirs as on intestacy of Balai, two daughters of whom are not even mentioned in the will. The will is not the

only, or the most important document here.

71. The case of Adeline Maude Ellanor Catchick Nee Robertson and Another Vs. Sunderlal Daga and Others, is also not a revocation case. The

Division Bench of our High Court said in that case at para 35, that the alienee from the executor is not bound to see to the application of the money

obtained by him. However, the immunity of the alienee is lost if he has notice, actual or constructive, of the title of other persons and of the fact that

the executor is acting in breach of trust. The Division Bench quoted from Lord Kenyon: "Let the executors do their duty and let the authority cease

when injustice begins" (Watpins v. Cheek 25 E.R. 181.

72. We respectfully agree with the spirit of this paragraph which is thoroughly consistent with the spirit of equity. Another case of the executor's

dealing with the estate is that of G.F.F. Foulkes and Others Vs. A.S. Suppan Chettiar and Another, a Division Bench judgment of the Madras

High Court. In dealing with alienees from executors, the Division Bench opined at Para 16 that the transaction must stand unless the purchasers

were privy to a breach of trust committed by the administrator. Their Lordships said as follows:

It is a general rule of law and equity in England-and that rule is followed in India-(Please note here our discussions on the Law in force as per

Article 372)-that an executor might dispose of the testator's assets over which he has an absolute power and they cannot be followed either by the

creditors or by the legatees in to the hands of alienee. But neither jurisdiction will permit the rule to be observed so as to protect a disposition

founded on fraud or a transaction amounting to a breach of trust, concerted between the executor or administrator and the purchaser.

73. It will be seen from some of the above decisions, that although the executor is not in equity at all times a trustee, yet the fiduciary duty of the

executor is noticed; beneficial interests to be protected by the executor are also noticed, and the possible breach of trust by the executor is also

noticed. If the executor is not a trustee, in spite of this, then what is he?

74. The point to understand is that an executor is not a trustee of the estates or interests devised under the Will immediately on the death of the

deceased, because the debts of the estate also have to be paid. The executor in proper discharge of his duties to the estates, sell a property left

behind by the deceased; then he will defeat the interest of the legatee in that property; the executor might well do so if he is acting fairly and

honestly. The purchaser taking from the executor, when he is acting in due administration of the estate, is fully protected, and no equitable interest

can be set up by a prospective legatee. Thus the executor is not always a trustee but he becomes a trustee when the administration of the estate is

complete, and all that is left for him to day is to give assent to the different legacies.

75. Once this is understood, it will be appreciated why the executor is not dealt with as per the provisions of the Indian Trusts Act 1882, but is

dealt with on the sections of the Indian Succession Act 1925, and the general law of executors and administrators as pronounced by Judges in

different Courts from time to time. An executor is a statutory creature; an executor is not exactly in trustee, but then, an executor has to act

properly like a trustee, he has to protect interests which were confined to him by the deceased in the will, he has to see to it that a third party does

not unduly defeated legacies which might take the effect later on. This point of the executor not being exactly a trustee, but also not being never a

trustee, would be seen clearly from the judgment given in the case of V.M. Raghavalu Naidu and Sons by executors, C.G. Krishnaswami Naidu

and Another Vs. Commissioner of Income Tax and Excess Profits Tax, (affirmed in AIR 1992 S.C. Page. 446) both cases were given by Mr.

Mitter and he correctly explained that in that Income Tax situation which was before the Madras Division Bench the Court ruled that the income -

would be of the executor before completion of administration, but would be of the beneficiary under the Will after completion of administration,

because after such completion the executor becomes a trustee proper, and the beneficiary gets the interest under the Will under which he become

a Cestuy que trust. Mr. Mitter also gave us the case of Sailaja Prosad Chatterjee and Others Vs. Jadu Nath Bose which is authority for the

proposition that revocation is not retrospective, and the work of the executor done prior to revocation do not fall with such revocation.

76. We are therefore, of the opinion that in the situation of dealings with real property by an executor, operating under a grant which is later

revoked, the equitable doctrine of bona fide purchaser for value without notice operates.

77. This doctrine is one of basic justice, and was one of the first concepts adopted by the Courts of equity. Such is the strength and wisdom of this

doctrine that it operates even in situations which are not strictly equitable.

78. From the discussions which have taken place before us, we have found the operation of this doctrine in several situations which we mention

below.

79. The first situation is the classical situation of the equitable estate being defeated by the taker of the legal estate, who takes for consideration and

without notice of the equitable estate.

80. Secondly, Mr. Das Gupta pointed out to us Section 53 of the Transfer of Property Act where fraudulent transfers intended to defeat creditors

are liable to be avoided, but that provision is expressly stated not to impair the rights of a transferee in good faith and for consideration.

81. Mr Dasgupta gave us some authorities on this aspect, namely C. Abdul Shukoor Saheb Vs. Arji Papa Rao and Others, and Basavegowda and

etc. Vs. S. Narayanaswamy (by Lrs.) and Others, and we note this here though we are dealing with a different situation, that in those cases the

alliance was to prove that he had prior notice, and was within the conception (see para. 17, at P. 1157 of the Supreme Court judgment and head

note B of the Karnataka judgment).

82. We were also referred to the Specific Relief Act, here u/s 19(b), a transferee for value who has paid his money in good faith and without

notice of the original contract cannot be made a Defendant for specific performance of that original contract. In England a contract of specific

performance gives rise to an equitable estate, but not so in India. Although there is no equitable estate created by agreement for sale of real

property in India yet the third party doctrine prevails here. It is; a doctrine of justice ; it prevails by the force of justice, and has forced its way into

the Indian statute law; for the difference of Indian Law from England Law in regard to the specific performance situation, see the case of Bai

Dosabai Vs. Mathurdas Govinddas and Others, (not cited at the bar).

83. The doctrine of the third party purchaser is also mentioned in Section 96 of the Indian Trusts Act, 1882; that section occurs in Chapt. IX

which is the Chapter on quasitrusts. It is stated in Section 96 that nothing in the Chapter shall impair the rights of transferees in good faith for

consideration.

84. We note therefore, that we have to apply here the doctrine of the third party purchaser, and it is on this doctrine, that the purchasers wish to

take an absolute interest in 9/4, Middleton Row, even if the will is never proved.

85. The person who wishes to take advantage of the doctrine of the bona fide purchaser, must show that he comes squarely under the doctrine.

The plea of the bona fide purchaser is in the nature of an excuse. The bona fide purchaser does not, and cannot dispute the existence of the rights,

title or estate which he is seeking to defeat. But he says, I defeat those admitted rights or estate, because I am a bona fide taker for value without

notice it is not for others to show that he has got notice, that he must have got notice. It is he himself who has to establish his status of a bona fide

taker for value without notice.

86. It is a special situation where even the Defendant might be faced with the burden of proving the case on the basis of which he wishes to

succeed. If for example, in a situation of a specific performance suit, a subsequent taker seeks to defeat the original contract, he has to prove his

bona fide status, and has dealings in ignorance, which have taken place for honest consideration, at least honest from his side.

87. Take the case, for an example of Sankarlal Narayan Das Mundaey v. The Mufussil Co. Ltd. 50 C.W.N. 603 a decision of the Judicial

Committee. In that case, no attempt has been made at the trial to prove that the purchase money had been paid in good faith and without notice of

the original contract. In such a situation, the Judicial Committee found it unnecessary to examine the evidence in detail, because it was undeniable

that the burden of proving good faith and lack of notice lay upon the Defendant.

88. Take also the case of Dr. Govinddas and Another Vs. Shrimati Shantibai and Others, in which case again we see that the onus was on the

Appellant to prove that the Appellant was a bona fide purchaser, because the Appellant would benefit from the establishment of such plea. It was

also stated that such onus is not light. On facts, there was hasty registration in that case, which is a point of similarity with ours.

89. Mr. Mitter sought to distinguish the situation of specific performance of a contract; he submitted that Section 19(b) places the burden

specifically on the later taker. However, we do not find any such specific indication in the words of the section. It is the general doctrine that the

person who alleges, and the person who shall succeed upon the proof of that allegation, has the burden of proving that allegation Since the bona

fide purchaser for value without notice alleges so and proposes to take benefit from the establishment of such allegations, it is he who has to prove

it, and prove it he must to such satisfaction of the Court of equity, as clears the Court's conscience completely.

90. We quote here from M and W a certain passage which is useful in this context, (at page. 121) the onus of proof lies on the person setting it up;

it is a single plea and is not sufficiently made out by proving purchase for value and leaving it to the Plaintiff to prove notice if he can.

91. Also at page 130. The tendency of the Court of Chancery was constantly to extend and refine the doctrines of constructive and imputed

notice. So much property was held under trusts and other equitable dispositions that the frequent appearance of the bona fide purchaser of the

legal estate without notice would have been intolerable. Equity's ambition was to eliminate him, so far as possible, by ensuring that: it should be

almost impossible to escape notice of any equity properly created and recorded. In so far as he could be excluded, equitable rights were as secure

as legal rights. Equity's policy was in the main successful, as may be Judged from the rarity and abstruseness of the cases in which the defence of

purchaser without notice has been made out;...."

92. Let us now examine the facts of this case, which notwithstanding, the purchaser state that they have taken without notice.

93. In 1980 in the month of September, Arindam Ghosh forwarded a copy of the will under cover of his letter to Crystal. It is mentioned in the

letter that Jalan and Co. are acting as common solicitor.

94. Sometime in the month of April 1981, the suit for specific performance was instituted by the Crystal Developers against Arindam Ghosh in his

capacity as executor. None of the other heirs of Balai Chand Ghosh as on intestacy was a party to that suit. It is alleged there that Arindam Ghosh

is refusing to execute, as per agreement of sale dated March 1979 and July 1980. We have not found any facts or letters that there is any sign of

any refusal by Arindam Ghosh. The suit was instituted at a time when Probate had not been granted.

95. The application for probate was made only thereafter by Arindam in the month of May, 1981. Probate was granted on July 29, 1981 or the

July 31, and we shall explain the double date later.

96. Mr. H.S. Basu learned advocate appearing for Arindam was acting for Arindam in obtaining the certified copy of the probate. On August 3,

1981 which was a Monday, the suit for specific performance was decreed on compromise. Although Arindam was impleaded as an executor,

which is no doubt a representative capacity, leave of Court and the notice necessary as under Order 23 Rule 3B were not paid any attention to,

but we do not know why the parties have not argued on under Order 23 Rule 3B either.

97. Be that as it may, after the decree was passed on Monday, the Deed of Conveyance, on which the purchasers rely as their main and last

document of title from Arindam, was executed on Tuesday. In the Deed, the decree for specific performance is not mentioned; also that date of

grant of probate is scored out from July 29, to read as July 31.

98. When the decree for specific performance was passed on compromise, one Sri T.K. Dutta, learned advocate appeared for Arindam. After

August 3, was over the common Solicitor Jalan and Co. and their Pankaj Sharaf of 1980 came back again and continues on August 4, 1981, to

act again as common solicitor.

99. Mr. Dasgupta emphasized as important facts, that it would be impossible, without the helping hand of Arindam, to obtain the conveyance deed

appropriately drawn up for signature immediately after the grant of probate, and also timely lodgment of the deed for stamping, so that it becomes

a valid and appropriately stamped document. The Section 230A clearance was also already made clear and ready.

100. We have no manner of doubt that on the law above applicable, and the facts above states, when the questions of fact are to be decided in the

case, the Court must proceed on the basis that whatever Arindam knew or should have know, was also known, or should have been known to the

14, Crystal.

101. Now the point about grant of probate. We have examined the petition for probate and we found that it is granted in common from. Probate is

granted in two ways, either in solemn from or in common from. The grant in solemn from is when the grant is made in open Court after examination

of witnesses. The grant is said to be made in common form when papers are put up before the learned Judge taking testatory matters; afters

examination as to service, witnesses to the will, and other preliminaries by the department. Signature of the Judge is put privately by him without

examination of any witness in the box the judicial conscience being satisfied upon the affidavits annexed to the petition as to the due execution and

validity of the will.

102. The practice in England is the same as prevails here. See "Probate in Earl Jewitt's Dictionary of English Law (2nd Ed. 1977 at p, 1436). In

Calcutta, as our judicial experience also confirms, the probate in common form is granted upon the papers being put up by the learned Registrar in

insolvency before the Hon^{ble} testamentary Judge in his rooms in Court (the word "Chamber" might mislead).

103. After signature of the Judge the learned Registrar, Original side does the probate act i.e. he enters in the proper register the fact of the grant

of probate. The copy of the certified copy of the probate produced before us shows that the probate was granted and signed by the Hon^{ble} Mr.

Justice Dipak Kumar Sen (as his Lordship then was) on July 29, 1981, and the probate act was performed by the learned Registrar, S. Mitra on

July 31, 1981. The certified copy of the probate is dated a month thereafter i.e. August 31, 1981;

104. Before issuance of the certified Copy of the probate, the concerned parties had no difficulty in drawing up and completing the conveyance

dated August 4, 1981. They had no access to the signature of D.K. Sen, J. which we have seen appended to the Petition for probate, by

exercising our special power by directing production. They had no access to the Register where the learned Registrar, Original Side had made

record of the grant of probate i.e. had performed the probate act. In view of this and in view of what is stated above the position is confirmed, that

Arindam and Crystal were not acting at arm's length, but were acting hand in hand.

105. In view of the law discussed above, we opine that, notice in the situation of the bona fide purchaser, imports all those facts, and all those

information, whether actual or constructive, which would, or should have given notice to the alleged third party, of the possibility, however, slight

but nevertheless real, of the existence of persons and their rights, interest or status, which the third party is seeking to defeat by bringing in the plea

of the bona fide purchaser.

106. In this case, the notice is not of the contents of the Will. The notice is of the existence of the heirs as on intestacy of Balai, and as to whether

they had been given due information for probate, in view of their possible interest in 9/4 Middleton Row, Calcutta, which might remain untouched

and unaffected, if the Will "proved" by Arindam, and its probate, should ultimately appear to the Court to have been obtained without following the

due procedure prescribed by law.

107. That Arindam had obtained probate without following due procedure prescribed by law is today beyond challenge. This is because the

revocation order has not been challenged by anybody. No reasons were mentioned in the order revoking the grant of probate but the learned

Judge who revoked the probate has done so, and nobody can today challenge that the learned Judge has not properly done so. Upon the

completion of the performance of the judicial act which is today unchallenged, the probate was impliedly as having been improper obtained and it

was revoked, as being revocable as per the express provisions of Section 263 of the Indian Succession Act, 1925.

108. Arindam has not appeared to say that he had obtained probate upon due service and in all good faith. He has not appeared before us to say

that he took all steps to serve all persons who are entitled to be served in law. He has not told us whether he was misled by any legal advice.

Arindam has appeared before us and/has also disappeared. This is the person that Crystal was acting hand in hand with. Crystal cannot be heard

to say that what even defects in the proceeding for grant of probate might have been there, Crystal is not a party to it. Such a plea cannot be

accepted by any Court in the present state of law and the facts. We opine that it is not only not true that Crystal did not have notice, but the

correct assessment is that Crystal was sunk in a quagmire of notice.

109. The plea of bona fide purchaser for value without notice therefore does not succeed.

110. Before we come to the next point we clarify that it is not, that a discussion of the law of executors and temporary executors will, be found in

the judgment under appeal; we have ourselves found it to be a branch of law, which is difficult to understand, and difficult to apply. In this situation,

it is absolutely unfair and unjust to attack the finding of the lower Court in any manner because of any paucity of discussion. If one finds that the

decision reached by, the lower Court, for whatever reason, happens to be the decision properly to be reached then that decision must stand.

111. Although on the substance of the issues of title, the purchaser fails, they raised the plea that this issue was not there before the lower Court at

all. It is, they say, not merely a lack of details as to legal discussion, but it is a substantial denial of justice to them if they are now to be defeated in

the appeal Court on pleas which were not before the trial Court at all.

112. Undeniably, the plea of the bona fide purchaser for value without notice was well before the eyes of the contesting parties throughout. The

plea is clearly taken in the written statement itself, and repeated in the additional written statement of Crystal filed on December 10, 1999, on

which day the witness of Defendant No. 14 also gave evidence from the box. He has mentioned that the probate proceedings were examined on

behalf of Crystal.

113. We find from the issues settled in the lower Court that issue No. 3 was one as to the Plaintiff's right, title and interest in the suit property;

issue No. 9 is about the validity and binding effect upon the Plaintiffs of the transfer deeds executed by Arindam; issues Nos. 11 and 12 raised the

points of revocation of probate