

(1927) 06 CAL CK 0006
In the Calcutta High Court

Ram Sundar Saha and Others

APPELLANT

Vs

kali Narain Sen Choudhury and Others

RESPONDENT

Date of Decision : 20-06-1927

Acts Referred:

Contract Act, 1872 — Section 12

Citation : AIR 1927 Cal 889

Hon'ble Judges : Roy, J;B.B. Ghose, J

Bench : Division Bench

Judgement

B.B. Ghose, J.—This appeal by the plaintiffs arises out of a suit for specific performance of a contract for sale of certain Immovable properties embodied in a bainapatra dated 4feh December 1920, executed by Kali Narain Sen Chowdhury who was the original defendant in the suit, and who will be referred to as the defendant henceforth. Kali Narain died during the pendency of the suit on 29th July 1922, and his Iegalfrepres3entatives have been substituted in his place. The suit was instituted on 30th June 1921. After service of summons, Krishna Kumar Sen, the second of the surviving sons of the defendant, and another person serving as manager under the defendant, presented a petition in Court on 29th July 1921, that the defendant, by reason of unsoundness of mind and mental infirmity was incapable of protecting his own interest and a guardian ad litem should be appointed for him. Thereupon the Subordinate Judge held that though the defendant was not mentally deranged and could fully understand, the questions put to him and give rational answers, he was incapable of sustained or independent mental efforts owing to senile decay. He made an order of the appointment of a guardian for the defendant. This order was set aside by the High Court in revision which directed a fuller enquiry on the question of unsoundness of mind or mental infirmity for reasons stated in the order. Before this enquiry could be held the defendant died and his legal representatives were substituted in his place as stated above.

2. The substituted defendants filed lengthy written statements contesting the

plaintiff's claim. Their main plea was that Kali Narain was not of sound mind and certain other questions, were also raised. A large number of issues were framed by the Subordinate Judge, but the principal questions were dealt with by him under issues 3, 5, 6 and 10. After a very elaborate discussion of the evidence and the circumstances of the case, the Subordinate Judge came to the following conclusions on the first three issues stated above : (1) that Kali Narain did not contract to sell the disputed properties to the plaintiffs ; (2) that his mind was so much enfeebled and impaired by age and disease" that Kali Narain was quite incompetent, to enter into the contract referred to in the plaint and was incapable of understanding the terms of the bainapatra and of forming a rational judgment of its effect upon his interests; (3) that the bainapatra had been secured by the undue influence and unfair means of Satis Kabiraj and without Kali Narain understanding its contents and without obtaining proper advice. With regard to the issue 10, the Subordinate Judge observed, the price or the method for ascertainment of the price in the contract for sale was not definitely settled between the parties and he was, therefore, of opinion that the contract was bad for vagueness and indefiniteness. Upon these findings the Subordinate Judge dismissed the claim for specific performance of the contract but made a decree for the earnest money, Rs. 11,000 paid by the plaintiffs, with Rs. 750 as interest. From this decree the plaintiffs, appeal to this Court and the respondents prefer cross-objections against the decree for money in favour of the plaintiffs. The cross-objections, however, have not been pressed by the learned advocate for the respondents.

3. The plaintiffs urge that the finding of the Subordinate Judge is erroneous on every point. It is conceded by the learned advocate for the respondents that the finding of the Subordinate Judge that Kali Narain did not contract to sell the disputed properties is inaccurate as there is no question that he signed the bainapatra. It is also conceded that there is no evidence on which the finding that the bainapatra was secured by undue influence and unfair, means could be based. The effective issues are simplified before us and the questions we have to consider in this appeal are: (1) whether the defendant was of sound mind at the time when he made the contract; (2) whether the contract is vague and indefinite and so incapable of being specifically enforced; and (3) whether specific performance should be decreed in the exercise of the discretion of the Court having regard to the allegation of hardship made by the defendant. Another question was raised by the learned Counsel for the respondents, that, although the defendant was not actually of unsound mind he was a man of weak intellect and incapable of managing his own affairs. Under such circumstances the Court should not make a decree for specific performance of the contract, although the plaintiffs might be entitled to damages. The appellants object to this point being raised before us on the ground that it is a new one.

4. Before I take the points for decision I must express my strong disapproval of the manner in which the case was conducted in the Court below. Hundreds of pages of depositions of witnesses have been recorded a good deal of which was

admitted in the lower Court to be useless and a considerable portion of which was not at all referred to by counsel on either side before us. Although in the elaborate and careful arguments addressed to us, both sides tried their best to avoid irrelevant matters, still the mere act of finding the relevant pages caused much useless waste of our time. It reflects little credit on the practitioners who conducted the case in the Court below that they went on examining witnesses for days and days to no purpose and which was not at all for the benefit of their clients.

5. Kali Narain, the defendant, was a zamindar having his residence at a village called Bandar in the district of Dacca within Naraingunj sub-division. His income was about Rs. 12,000 or Rs. 15,000 a year and it appears his family was held in great respect in the locality although he could not be called a very rich man. He was about 75 years old when the story opens in 1920. For some years previously it appears he had made over the management of his properties to his sons. Their management does not appear to have been very successful. Kali Narain got into debts. He had executed two mortgages on his properties, one for Rs. 10,000 in January 1918, and another for Rs. 47,000 in January 1919. He had also incurred other debts on hundis. His properties were situated within the districts of Dacca and Comilla. The plaintiffs are residents in the district of Comilla. They are traders by profession and apparently having made money they desire to acquire zamindari properties in their own district. Kali Narain wanted to dispose of some of his properties within Comilla District in order to pay off his debts, and in June or July 1920 the plaintiffs came to Kali Narain and made offers as to the price they were prepared to pay. The offer not being accepted, they went away. Again, in September or October, they renewed negotiations: and made higher offers which also were not accepted. The plaintiffs found at that time that another zamindar family, called the Majidpur Babus, were also endeavouring to purchase the properties. Being unsuccessful, the plaintiffs again went away. Subsequently they got a printed notice purporting to have been issued under the authority of the defendant, which is Ex. 1 in the case, offering to sell some properties and inviting purchasers. On receipt of the notice they again went to the defendant about the end of November expressing their willingness to purchase item 3 given in that notice. At that time the Majidpur Babus were also making their offers. It is not necessary to state in detail the story of the various negotiations on that occasion. It is sufficient to state that the plaintiffs' case is that, on the 30th November 1920, the defendant accepted the offer of the plaintiffs and agreed to sell the properties included in the bainapatra at 33 years' purchase of the net income. The Majidpur Babus had previously offered 32 years purchase. A draft of the bainapatra was prepared by a pleader on behalf of the plaintiffs. It was made over to the defendant's men and corrected by defendant's pleader, Basanta Babu, who was acting as his adviser. It was faircopied by a mohurir of defendant and the document was executed on the 4th December 1920, by the defendant and made over to the plaintiffs who paid Rs. 11,000 out of the purchase-money. The document was presented at the registration office at Comilla for registration

as the properties were situated within that district. A commission was issued to the Sub-Registrar at Dacca who went to the defendant's house, and before him defendant admitted execution of the document on the 10th December 1920, on which admission it was registered. The defendant went back to Bandar at the beginning of January 1921. When the plaintiffs went to Bandar with the balance of the purchase-money and desired to have the kobala executed, they were not allowed to see the defendant, and hence the suit. On behalf of the respondents it is contended that, although the onus of proving unsoundness of mind so as to invalidate a contract is on the party who alleges it, the respondents have succeeded in proving it as the lower Court has found. The question does not depend merely on belief or disbelief of the witnesses examined before the Court, but depends largely upon the inference to be drawn from the evidence. Most of the important witnesses were not examined before the Subordinate Judge. We are, therefore, in a similar position as the Subordinate Judge for deciding the matter.

6. The question we have to decide is the state of mind of the defendant at the time when he made the contract, i.e., the 4th December 1920, and we have to examine the evidence adduced by the parties from that point of view. The case for the defence is that, about the latter part of 1918, Kali Narain had a severe form of heart disease and he had rheumatism or paralysis in his lower limbs. Senile dementia had also set in with consequent loss of memory. He was, however, not actually incapable of transacting business till about September 1919, when he had a severe attack. After that it was evident that dementia had definitely set in. The evidence on which the learned advocate for the respondents mainly relies is as to the mental condition of Kali Narain at the end of November 1919, and as to his mental condition at the end of January 1921 and afterwards, from which he asks us to infer that the defendant was not competent to contract early in December 1920. There is no evidence worth consideration on behalf of the defence as to the state of mind of Kali Narain from December 1919 to the end of December 1920. It is urged that the proper inference from the evidence given is that the defendant was not of sound mind according to the meaning of the expression in Section 12, Contract Act. (After considering evidence the judgment proceeded). The all-important question is, as I have already observed, the state of the mind of the defendant at the time of the transaction in question. I am definitely of opinion on the evidence that at that time the defendant was of sound mind, quite capable of understanding the transaction and of forming a rational judgment as to its effect upon his interest.

7. This finding disposes of the question raised by the respondents' counsel before us, that Kali Narain being a person of weak intellect is entitled to special consideration, According to the general rules of English law, which have been applied in this country and extended to the case of pardanashin ladies, protection is given to persons whose disabilities make them dependent upon or subject them to the influence of others although nothing in the nature of fraud or coercion may have occurred. But in this case, even if the defendant is considered

to be of such weak intellect, there was ample protection with reference to the transaction. There were his sons, two of his officers and his own lawyer. Disinterested third persons were also there. No advantage was taken of his alleged weakness but very good value was secured for the property. The question may be looked at from the point of view indicated in the case of a pardanashin lady by Lord Sumner in the recent case, in the Privy Council, of 89 Ind. Cas. 649 (Privy Council) where the onus was on the person claiming under the deed. His Lordship observes as follows:

It must be a question whether, having regard to the proved personality of the settlor, the nature of the settlement, the circumstances under which it was executed, and the whole history of the parties; it is reasonably established that the deed executed was the free and intelligent act of the settlor or not. If the answer is in the affirmative, those relying on the deed have discharged the onus which rests upon them.

8. As I have already said, even if the defendant was of weak intellect there was full independent advice which would sustain the transaction, and I find no reason to doubt that the contract was his intelligent act. In that view I do not consider it necessary to discuss the numerous cases cited before us on the point

9. I shall next deal with the question of vagueness or indefiniteness of the contract. The value of the properties was fixed at Rs. 1,07,131-4-0. There is this provision in the bainapatra:

The amount of consideration money is fixed at 33 times the net collection after deducting revenue cesses, etc., from the amount of gross collection of the properties described in the schedule below and deducting from the balance collection charges at 10 per cent. The amount of consideration is to vary in proportion if the amount of gross collection varies on seeing the papers, and both the parties shall abide by the same.

10. The law on the subject may be stated thus:

In all sales it is evident that price is an essential ingredient, and that where it is neither ascertained nor rendered ascertainable the contract is void for incompleteness and incapable of enforcement. It is not, however, necessary that the contract should in the first instance determine the price. It may either appoint a way in which it is to be determined, or it may stipulate for a fair price. Fry on Specific Performance, 6th edition, Sections 353, 354.

11. I may also refer to the case of New Beerbhoom Coal Co. v. Bularam Mahata [1980 5 Cal. 932, where the Courts in India refused specific performance of a contract to grant a lease of certain lands "at a proper rate." The High Court affirmed the decision of the trial Judge on the ground that it was impossible to determine what was "a reasonable rate." Their Lordships of the Privy Council observed on this question:

There might have been considerable difficulty in fixing the rate; but difficulties

often occur in determining what is a reasonable price or a reasonable rate, or in fixing the amount of damages which a man has sustained under particular circumstances. These are difficulties which the Court is bound to overcome.

In the present case the price was settled in a definite manner and provision was made for its alteration if any ground was made out for alteration. It is urged that in this case the revenue payable for a portion of a touzi cannot be apportioned with reference to the revenue payable for the entire touzi. It is true in one sense, as any apportionment made by the vendor and purchaser will not be binding on Government. But when the vendor tells the purchaser that he would have to pay a certain amount of revenue for the portion purchased and the purchaser accepts it, I do not see any difficulty in the matter. That agreement would be binding on the parties. If the vendor asks for a larger sum, the net profits would diminish; if a smaller sum, it would increase. The plaintiffs say that the revenue payable" was settled according to the amount in printed notice Ex. 1. It is, however, urged by the respondents that it has not been proved that the notice was issued under the authority of Kali Narain. But in fixing the price in the bainapatra the collections and the revenue must have been settled somehow. The defendants do not say that it was with reference to any other papers. They do not also say that the net collections are different or that the price calculated at 33 times the net income would be different. I am unable to see that there is any vagueness in the contract. It is argued that it does not appear that the price of the third item in the bainapatra was taken into account. The evidence of Chandra Kumar Chakrabarty (at p. 103) shows that it was. done, and he also states that certain collection papers were shown to them about the properties sought to be sold. That evidence is not contradicted. I therefore hold that the price was fixed with reference to the net income as shown by the defendant.

12. Another argument is that the contract was to execute a kobala "containing necessary stipulations" and it is urged that such a contract is not capable to specific performance, and the cases of *Rummens v. Bobiins* [1865] 3 De. G. J. & S. 88 and *Hyam v. Gubbay* 20 C.W.N. 66 are cited in support of the contention. In the first case the Vice-Chancellor held that there was no concluded contract and that was also the finding of the majority of the Court in the latter case. But here it cannot be-questioned that there was a concluded contract. Reference may be made to *Harichand Mancharam v. Govind Laxman* AIR 1923 P.C. 47. If a contract is framed in general terms the Court will carry it into effect where the law will supply the details: *Fry on Specific Performance*, Section 368. For example, where a contract for lease was "to contain all usual covenants and provisions" or the terms were "the usual public-house contract" the Court gave effect to the contract. Here the expression "necessary stipulations" evidently means the stipulations for sale implied under the law and contained in the Transfer of Property Act. On the whole I do not think that there is any vagueness or indefiniteness in the contract.

13. The next question is one of hardship and whether we should decree specific

performance in the exercise of our discretion. Mr. Sircar refers to Section 22(1), 111. (d), and the case of *Twining v. Morrice* [1788] 2 Bro. C.C. 326 on which the illustration is based. It is argued that the agents employed by Kali Narain to carry on the negotiations did not try to obtain the best value. It is not sufficient that the proper value was obtained but the best value should be secured in order to decree specific performance. The Majidpur Babus were staying at Dacca and the agents did not inform the Babus that the plaintiffs had offered 33 years' purchase. If they had done so the Babus might have at once offered a higher price, as they subsequently offered 40 years' purchase (which was really 37 years purchase as three years purchase-money was to go to the amlas). Even if the fact were so I do not think the principle applies. In the case cited the purchaser did an act, however innocently, by asking the seller's attorney to bid for him, by reason of which the vendor was placed at a disadvantage and the property was knocked down at a low price. Here the purchasers were strangers who were only offering the price they were prepared to pay. They did not do anything to induce the agents of Kali Narain to get the property for them at a low price. They were negotiating directly with Kali Narain. If Kali Narain closed the bargain with them they were not to blame. But the fact is that the Majidpur Babus did not at once offer to pay any higher price on hearing about the bainapatra. They tried at first to share the property with the plaintiffs or to buy them off. It was only after some days, when they failed in their attempt, that they offered 35 years' purchase and then 40 years' purchase. If specific performance is not allowed to a purchaser on the grounds that another person offered a higher price after the contract was concluded, then I think in no case can specific performance be allowed to a purchaser. Because, in the majority of such cases, the vendor is unwilling to perform the contract as he expects a higher price. Then it is urged for the respondents that it is hard that the defendants should be compelled to sell at the price which did not take into consideration the khas lands, the grass lands, and the bazar. The evidence with regard to these is only that of Ananda Charan who is now the manager. There is no corroboration even in the evidence of Krishna Kumar who used to manage the property. If the lands had produced any income they must have been entered in the papers of the zamindari. But no papers have been produced. I have no hesitation in rejecting the evidence of this witness. Besides, when a zamindari is sold, the usual practice is to take the income only into consideration. Moreover,

if the contract has been entered into by a competent party, and unobjectionable in its nature and circumstances, specific performance is as much a matter of course and, therefore, of right, as are damages. The mere hardship of the results will not affect the discretion of the Court: *Fry*, Section 46 see; also Section 422.

14. The case of *Davis v. Maung Shwe Go* [1911] 38 Cal. 805, cited by the appellants, may also be referred to in this connexion. Their Lordships observe in answer to the contention that, having regard to the onerous character of the bargain specific performance should not be allowed in the exercise of discretion:

In the absence of any evidence of fraud or misrepresentation on the part of the plaintiff which induced the defendant to enter into the contract, their Lordships see no reason to accede to the argument. The bargain is onerous, but there is nothing to show that it is unconscionable. The defendant knew all along that a lakh was the plaintiffs' limit; it is in evidence that he had frequently urged the defendant's daughter to advise him to sell the land if he was getting a higher offer. It is difficult to say under the circumstances that he took an improper advantage of his position or the difficulties of the defendant.

15. The present case is much stronger, as the evidence shows that the defendant secured a very good value for the property. Under these circumstances, I am unable to hold that there was any hardship, or that there is any ground for not decreeing specific performance in the exercise of our discretion. In my judgment, there would have been no question about selling the properties to the plaintiffs if the Majidpur Babus who appear to be influential zemindars, had not offered a higher price after failing to buy off the plaintiffs or getting a share of the properties from the plaintiffs by paying a proportionate share of the price for which the plaintiffs had contracted to purchase. The defendants have not shown that the net income of the property is higher than what is stated by the plaintiffs, and there are no materials on record on which it may be held that the purchase-money should be more than what is stated in the bainapatra. It should, therefore, be held that the price given in that document is the proper price.

16. On these grounds, I would set aside the judgment and decree of the Subordinate Judge and decree specific performance of the contract embodied in the bainapatra dated the 4th December 1920.

17. The appeal is decreed with costs in both Courts. The cross-objection is dismissed without costs.

Roy, J.

18. After stating the facts as given in the judgment of B.B. Ghose, J. his Lordship proceeded. The simple question for decision now is whether specific performance should be enforced. The evidence is voluminous. The evidence of Babu Ananda Chandra Roy alone runs into over 220 printed pages. He was examined on commission. The scandalous length of the examination of this witness and of several others reflects great discredit on the members of the Dacca Bar concerned, when it is acknowledged that considerable portions of this evidence is entirely irrelevant.

19. Mr. Chakravarty, for the plaintiffs, contends that the learned trial Judge has not appreciated all the circumstances of the case as touching the plaintiffs and that the view taken by him of the evidence is grievously wrong. The learned Subordinate Judge does not seem to have distinguished the inconsistent pleas set up. He has, after a general examination of the circumstances of the case, come to these conclusions:

- (1). that Kali Narain did not contract to sell the properties to the plaintiffs;
- (2). that his mind was much enfeebled and impaired by age and disease, and that Kali Narain was quite incompetent to enter into the contract referred to in the plaint and was incapable of understanding the terms of the bainapatra and of forming a rational judgment of its effect upon his interest.
- (3). That the bainapatra had been secured by the undue influence and unfair means of Satis Kabiraj (Kali Narain's son-in-law) and without Kali Narain's understanding its contents, and without his obtaining proper advice. Mr. Sircar tries to support the decision of the trial Court by arguing that, regard being had to the condition of Kali Narain before and after the bainapatra, an inference may be drawn that Kali Narain had not that soundness of mind which is contemplated u/s 12, Contract Act, and that, at any rate, it is proved that Kali Narain was weak in mind at this time and that specific performance of the contract should be refused on this ground as also because the full value of the property was not obtained. The main argument of Mr. Sircar, if I have understood him properly, is that, regard being had to all the circumstances of the case, the Court should exercise the discretion it had and refuse enforcement of the contract. His second ground is that the contract is void for uncertainty.

20. The case for the defence was that Kali Narain was of unsound mind at the time the document was executed, viz. 4th December 1920. The position taken by Krishna Kumar Sen, the second son who is really the contesting defendant, and by some of the other witnesses, is that Kali Narain's mind was gone by the end of 1325 B.S., that is to say by April 1919. This is Krishna Kumar's statement on p. 139 of part 1 of the paper book:

From the latter part of 1325 onwards till his death my father had no capacity to understand the terms of a document and why the deed was being executed and its effect upon his interests.

21. Mr. Sircar contends that on the evidence it should be held that Kali Narain's incapacity dated from towards the end of 1919. I think it would be convenient to follow the learned Subordinate Judge in his discussion of the various incidents. (His Lordship then dealt with evidence and proceeded.) Within a few days of Kali Narain's arrival at Dacca, and while he was staying with his son-in-law, Satis Kabiraj, Kali Narain executed a will. We are not concerned actually with the validity of the will, but it has some bearing on the case. By this will (there was a previous will as it appears) Kali Narain made a provision of Rs. 150 a month for his wife for her life and he gave each of his two daughters (Satis Kabiraj's wife and Kadambini) Rs. 15 a month for their life and on their death Rs. 5 a month to each set of sons by these daughters. Kali Narain's income is given as between Rs. 12,000 to Rs. 15,000 a year. Kadambini died at Dacca. The provisions made in the will by themselves do not go to show that Kali Narain was doing anything violent to the detriment of his sons. We learn from the pleader, Surendra Nath, who went to Bandar to his rescue, that Kali Narain told him that he wanted to

execute a will at an early date. By the will, Nirmal Kumar Gupta, Professor, Jagannath College, was appointed one of the executors. He has deposed. He is a relative and he tells us how Kali Narain appealed to him also to save his estate, and. he went and saw Ananda Babu and consulted him. The learned Subordinate Judge on this point says that it is not at all unlikely that the wife and son-in-law worked Kali Narain up to a state in which Kali Narain should say that he wanted to execute a will, but, at the same time, comes suddenly to the conclusion that Kali Narain had no testamentary capacity in December 1919. As was observed by their Lordships of the Privy Council in Sayad Muhammad v. Fateh Muhammad [1895] 22 Cal. 324 undue influence and incapacity are totally different things. Nothing can be said against this Professor and the learned Subordinate Judge can find nothing against him except that Kali Narain's wife apparently did all the talking. The Professor, however, deposes that Kali Narain joined in the conversation from time to time. Both he and Ananda Roy gave positive evidence of the capacity of Kali Narain. It is established beyond any doubt that Kali Narain wished to execute a will and had a mind. Whether there was any undue influence with regard to the will it is not for us to consider here. (After considering evidence his Lordship proceeded.)" These proceedings lead to two clear inferences : One is that no one, not-even the son Krishna Kumar, questioned the capacity of Kali Narain to sell his property; the second is that there was no controversy raised about the net profits of the property which had been ascertained or could be ascertained. The only question was how many years' purchase was to be paid by the purchaser.

22. This leads us to the question of the adequacy of the price. Mere assertion that 50 years' purchase could be had, will not do. The assertions come from interested parties or from a cultivator, who was produced to depose what a zemindari can fetch. Ordinarily 33 years' purchase is a high price and that is the opinion of Ananda Babu himself, a great landlord apparently. Mr. Sircar referred to the evidence of Annoda, the present manager, that a bazar had been established and the income derivable from it had not been taken into account or that the khas lands were ignored and-so forth for his argument that the whole income had not been taken into consideration. We cannot rely only upon: Annoda's evidence. The collection papers and other papers were available and could have been produced. It is common ground that the sale was to be on so-many years' purchase of the sthit and it is well understood what the sthit or annual profits connote. The sthit was given in the notice and Chandra Kumar's evidence is that he examined the talab baki. If there was anything wrong in the notice it could have been shown to be wrong. It was argued that Ananda Babu's evidence shows that he did not understand that 10 per cent, would be deducted for collection charges. He was labouring under an error and he himself says he may have been mistaken. The net profit must be the profit after the collection charges.

23. It was contended that Satis Kabiraj did not get the full value of the property as he did not inform the other intending purchasers. There was Rai Mohan

Poddar, but he was lukewarm and made no offers. He wanted to be informed about the offers made by others early in 1920, but made no further offer. The Majidpur Babus were on the scene, but it is obvious that they made no offer approaching the plaintiffs till after the bainapatra. Rohini Bhattacharjya, the pleader examined for the defence, was pressed on the point and he deposed that he could not say if they had made a better offer before the bainapatra.

24. The plaintiff Guru Charan says that the Majidpur Babus offered 32 times. Well, he was told that and it was by telling him this that Kali Narain's wife got the plaintiffs to go up one more point. There will come a time when haggling must cease and the evidence does not show that the Majidpur Babus were willing to go any further. Their first move after the bainapatra was to try to get share in the property. A good deal of mud has been thrown on Satis Kabiraj, the son-in-law. Rohini Bhattacharjya took him to task for getting this contract through and his reply was:

Have I done anything wrong? Where are purchasers available for such a large property?

25. Strenuous efforts were made to show that Satis Kabiraj had taken brokerage. The attempt failed. It seems unlikely that he got much since the sale was not concluded. In the second place, it appears that a brokerage has the sanction of custom. Ananda Babu says so and the Majidpur Babus were willing to give three years' net profit to the amlas.

26. There is nothing to show that in this transaction Satis Kabiraj was doing anything detrimental to the interests of Kali Narain. In *Rowland v. Chapman* [1901] W.N. 153 the fact that the agent took a secret commission from the vendor was held not to give a right to rescission if the amount of commission is such that his duty did not conflict with his interest.

27. It is clear, therefore, that the price obtained was adequate, The transaction was made openly. The evidence establishes sufficiently that Kali Narain was in a state of mind which showed that he knew what he was doing and that the act which he did was one which he intended to do and that he was capable of understanding the nature and the consequence of the act which he had done.

28. This really disposes of the matter. It seems hardly necessary to refer to the evidence of the Civil Surgeon, Colonel Macgilvie, who examined Kali Narain on the 23rd and 26th April 1922, and found his mind a blank. Another retired Civil Surgeon, Kumar Bhabendra Narain, examined Kali Narain on the 17th, 18th and 19th April 1922, and he found that Kali Narain had still some mind left. This, was nearly 18 months after the bainapatra. Mr. Sircar's contention was that, regard being had to the evidence of Colonel Macgilvie of the state of Kali Narain's mind in April 1922, regard being had to the observations of the Subordinate Judge who examined Kali Narain personally on 14th September 1921, and regard being had to the testimony of Colonel Newman who examined Kali Narain on 24th and 26th January 1921, and seeing that senile dementia is a progressive disease, it is

a legitimate inference that Kali Narain was of unsound-mind at the time of the contract. Mr. Sircar referred also to certain passages in the evidence of Guru Charan and his man Chandra referred to by the Subordinate Judge. They are plaintiff and his man, and they were probably apprehensive of making any admission to the effect that Kali Narain's condition was worse when the Subordinate Judge saw him, in the same way as Krishna Kumar and his men would have us believe that by the end of 1325 B.E. Kali Narain had become an imbecile. It is idle to speculate what Kali Narain's mental state might have been if this evidence is followed back, when we have independent positive evidence of Kali Narain's capacity fortified by the circumstances of the case. A word has to be said about Colonel Newman's evidence since he examined him within two months of the deed. This doctor treated Kali Narain's wife when she had apoplexy. He could have seen Kali Narain only casually at the time, yet he ventures to give an opinion and his later examination suffers from the defect that he had been told that Kali Narain had sold property much below its market value, and he gave his evidence accordingly. We cannot place in such circumstances any great reliance on his evidence. It is argued that the fact that Kali Narain resiled from the contract soon after is an indication at least that he is easily open to influence or persuasion. Men do change their made. Law was made to redress wrongs when a contract s violated. The fact that a man has changed his mind is not a ground for thinking that he was of unsound mind when he made the contract.

29. The second ground is that the contract is vague for uncertainty. There does not seem to have been anything vague about the terms. The net income was taken from the notice and the talab baki, and the settlement records have been produced which show the correctness of the figure within a few rupees. It was urged that there is nothing to show how many years' net income was taken into calculation. The plaintiff accepted, as I said before, the figure given by the vendor or his people. There was a clause that if there was any variation shown by the actual production of collection papers in the sthit, the purchase-money would be calculated accordingly. It gave an option to the defence to show that the sthiti was more. They have not exercised that option. It is said that in the notice only Touzi No. 304 of the Dacca Oollectorate appears, but in the baina-patra two other properties, a sikimi taluk and another touzi of the Tipperah Gol-lectorate, viz. touzi No. 1706, are included. It is acknowledged, however, that joar panchkitta is a compact property and it is not shown that the properties mentioned in the contract are outside joar panchkifcta. Kali Narain seems to have bought back a share of taluk within the mahal, and touzi No. 1706 bears a revenue of Rs. 12 only. Since Kali Narain was selling all he had in joar panchkitta it is intelligible how these properties came to be mentioned in the bainapatra. Then again it was urged that it is not shown how the revenue was apportioned. People do sell parts of touzis and the vendor makes the estimate of the proportionate revenue on the basis of the proportion of collections. This was the method followed in the notice. The purchaser has accepted it. It is not shown

that the apportionment was wrongly made.

30. Mr. Sircar has discussed a number of cases. This case is pre-eminently one for decision on facts, and the cases referred to do not appear to us to be of any great assistance. The cases were quoted for the purpose of showing that the Court can exercise a greater discretion when it is a suit for specific performance and not merely for rescission and for the purpose of establishing that the Courts have interfered in cases of proved weak intellect. An allied theory was referred to in the observations of the Court in the case of *Monohar Das v. Bhagabati Dasi* 1 B.L.R. O.C.J. 28, that in the case of a pardanashin lady the Court will give the same protection as the Court of Chancery does to the weak, ignorant and infirm; and the English cases mentioned therein were cited. Whether it is a case of rescission or specific performance it is clear, however, that the Court interferes only when some advantage is taken of the executants. I will refer to a few of the cases cited. The case of *Blachford v. Christian* [1829] 1 Knapp. 73 was referred to. The transaction was set aside because the deed was obtained by imposition from an imbecile old man. The cases in *Baker v. Monk* [1864] 33 Beav. 419 and *Clark v. Malpas* [1862] 31 Beav. 80 were quoted. The former was a case to set aside a deed from a lonely, aged woman in the lower rank of life without her having any consultation with anyone else, and the latter was a case where the purchase was made at an undervalue and made with great precipitation. The case of *Willon v. Willon* [1810] 16 Ves. Jun. 72, which was quoted was one of combined effect of imbecility and ignorance and though there was no fraud it was a case of surprise, neither party understanding the effect of the transaction. On the other hand, the sanctity of contract is always respected. The discretion of the Court is not to be arbitrary but judicial, and when the contract has been entered into by a competent party and is unobjectionable in its nature and circumstances, specific performance is a matter of course and, therefore, of right, as are damages : *Fry*, Section 46. The principle has found a place in Section 22 of our Specific Relief Act.

31. Mr. Sircar quoted 111. (d), Sub-section (1), Section 22, and he formulated his proposition thus : if the agent of the vendor does not act as to get the best price, specific performance ought not to be allowed. Mr. Sircar's contention was that *Satis Kabiraj* could have got a better price. The illustration mentioned above is taken from the case of *Twining v. Morrice* [1788] 2 Bro. C.C. 326, There the solicitor of the vendors honestly and by inadvertence offered and bid at an auction which was taken as a bid for the vendors and considered as a puff. The sale was immediately chilled and specific performance was refused because the Court was not convinced that a better price would not have been reached. Here we have the case of a private sale; *Satis Kabiraj*'s conduct has been the subject of attack because he did not inform other intending vendors about the terms offered by the plaintiffs. We know that other people made better bids or said they would have if they had known, as in the case of *Rai Mohan Poddar*, only after the event. Haggling had been going on and *Kali Narain*'s wife and *Satis* seem to have got a very handsome price from the plaintiffs.

32. The case of *Clowes v. Higginson* [1813] 1 Ves. & B. 527 referred to in connexion with the contention that khas lands, etc., had not been taken into account. In the case quoted there was controversy whether certain timber was included in the contract or not and suits brought by the vendors to resile from the contract and by the purchaser for specific performance of the contract were both dismissed because the parties were not agreed as to the actual terms. The contract in this case was on the sthit or net income and anyone connected with the zamindari knows that the sthit includes all available income. The oral evidence produced cannot be accepted when the defendants could have easily produced their books.

33. The contract contemplated a sale-deed "containing necessary stipulations" and the contract has been assailed as being indefinite. Learned Counsel has quoted the case of *Rummens v. Robins* [1865] 3 De. G. J. & S. 88 which was cited by Jenkins, C.J., in *Hyam v. Gubbey* 20 C.W.N. 66. The decision in these cases proceeded upon the footing that there was no concluded contract. In *Hampshire v. Wickens* [1873] 7 Ch. D. 555 the power of the Court to enforce a contract to accept a lease to contain all usual covenants and provisions, was admitted and as observed in *Harichand Mancharam v. Govind Laxman Gokhale* AIR 1923 P.C. 47, the provision meant no more than that the kobala would be put into proper shape and, in legal phraseology, with any subsidiary terms that the lawyers might consider necessary for insertion in a formal document.

34. This brings me to the end. The question for decision as I have said, is simple and the evidence and the circumstances of the case can lead but to one conclusion, viz. that Kali Narain, when he made the contract, was capable of understanding it and forming a rational judgment as to its effect upon his interest. Kali Narain was, of course, old and infirm, but if there is any suspicion that there was any weakening of his intellect, there is the fact that he made the contract with the advice of his well-wishers and in presence of a host of witnesses. The only person not consulted is Krishna Kumar, the contesting defendant, and he was the son from whom Kali Narain had to run away. The matter is of some importance. People must get old including owners of property. They continue to do business till they die. With increasing old age there must be loss of vigour and even mental energy and there may come a time when extreme old age has brought a vacuity of mind, but all transactions made by a man before his mind became a blank cannot be set aside. It must be shown clearly that when any particular transaction is made there is that infirmity of mind which disabled the man of old age from understanding what he is doing. The defence have failed to make out such a case and, as I have said, the plaintiffs have been able to show that, at the time when Kali Narain executed the bainapatra he was able to understand business matters and to know what he was doing. The plaintiffs, who were stranger and negotiated in good faith and paid earnest money, are entitled to specific performance. It cannot be said that they could or did take any advantage in the bargain made openly and in consultation with the vendor's numerous friends. For the above reasons, I agree with my learned

brother in decreeing the appeal with costs in both the Courts.