
(1927) 06 CAL CK 0004

In the Calcutta High Court

Case No : Appeal from Original Decree No. 121 of 1925

Ram Sundar Saha

APPELLANT

Vs

Raj Kumar Sen Chowdhury

RESPONDENT

Date of Decision : 20-06-1927

Acts Referred:

Citation : (1927) 06 CAL CK 0004

Judgement

Ghose, J.—This appeal by the Plaintiffs arises out of a suit for specific performance of a contract for sale of certain immoveable properties embodied in a bainapatra dated December 4, 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 legal representatives 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 although 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 for 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 Plaintiffs' 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 Nos. 3, 5, 6 and No. 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:

(i) that Kali Narain did not contract to sell the disputed properties to the Plaintiffs:

(ii) 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:

(iii) that the bainapatra had been secured by the undue influence and unfair means of Statis Kabiraj and without Kali Narain understanding its contents and without obtaining proper advice. With regard to the 10th issue, the Subordinate Judge observed that it was clear that the most important element, 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, (i) whether the Defendant was of sound mind at the time when he made the contract; (ii) whether the contract is vague and indefinite, and so incapable of being specifically enforced; and (iii) 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 up 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 Naraia, the Defendant, was a Zemindar having his residence at a village called Bandar in the district of Dacca within Naraingunge 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 of the district of Comilla. They are traders by profession and apparently having made money they desire to acquire zemindary 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 zemindar 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 No. 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 of 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 fair copied by a mohurir of Defendant and the document was executed on the 4th of 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 kabala 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 of 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 the 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 of the Contract Act. I propose to deal with the evidence according to the dates regarding Kali Narain's condition. The first witness relied on by the Respondents is Suresh Chandra Gupta, Deputy Magistrate. This gentleman was not a relative but was well known to the Defendant. His father and the Defendant were on friendly terms. He had invited Kali Narain to the Sradh of his father at which there was some social trouble, but as Kali Narain did not come he went to see Kali Narain at his house at Bandar. He says that Kali Narain could not recognise him and did not speak to him. Kali Narain was then evidently very ill suffering from heart troubles. In such a case it is not the proper thing to allow a stranger to the family to go to the patient and vex him with questions. But that is not the rule with an ordinary Bengali household where every one is allowed to go to a patient however ill he may be and put any number of annoying questions to him. The only resource of the

patient in such a circumstance is not to speak at all if he desires to get rid of the visitor. Whether Kali Narain was really incapable of recognising the witness or simply did not want to be troubled about the social dispute regarding the witness's father's sradh it is difficult to say, but it is in evidence that Kali Narain was subject to severe attacks of illness at intervals. See for instance, the evidence of Abani Mohan Das Gupta, witness No. 4 for the defence, who says that one severe attack in 1918 lasted for not less than 15 days and during the severe attacks he did not speak of his own accord. This witness saw 2 or 3 of such attacks till September 1919 (Bhadra 1326). I am not prepared to say with the Subordinate Judge that the witness, Suresh Chandra, might possibly have an unconscious bias in favour of the Defendants. Giving full credence to the evidence of this witness I am of opinion that it does not advance the case of the Defendants to any extent. At about that time, it is in evidence that Kali Narain desired to execute a Will in order to make certain small provisions for his wife and two surviving daughters who were not in affluent circumstances. The sons and grandsons were opposed to his doing so and the relations between the father and the sons were extremely strained. Kali Narain was examined on the 25th of November 1919 by one Dr. Pringle, who was then practising at Naraingunge, at the instance of a grandson of the Defendant, who is himself a doctor, named Sachindra Narayan. Dr. Pringle said that he examined him for the purpose of seeing whether his condition was likely to yield to treatment. This gentleman gave a certificate which was asked for from him by Sachindra on the 17th of December 1919, in which it is stated that "almost "complete loss of memory is the most distinctive "mental condition in the case and a progressive loss " of memory beginning from about a year and a half "previously and gradually becoming worse". In his evidence the doctor says that he had seen Kali Narain only once, but from his certificate one would think that the patient must have been under his observation for at least a year and a half. Dr. Pringle says that his opinion about loss of memory was made from information received from Dr. Sachindra Babu. and the appearance of the patient. He also said that the patient had lost the normal use of his legs and his opinion was that his condition was not likely to improve but would on the contrary get worse. The certificate was taken from him on the allegation that it was required for the purpose of exempting the patient from attendance in Court. It is not necessary to consider whether the doctor knowingly gave a certificate which was not true. But I doubt very much whether he would have given any such certificate if he was told what had happened between the 25th of November when he examined the patient and the 17th of December 1919 when he gave the certificate.

7. Early in December 1919 two letters were received by Babu Ananda Chandra Roy of Dacca signed by Kali Narain (Exhibit 23 and 24). The Subordinate Judge is of opinion that these letters were not written under the instruction of Kali Narain but were written at the instance of Kali Narain's wife under the instruction of Satis Kabiraj, a son-in-law of Kali Narain. I am unable to agree with that opinion. I have already stated that the relation between Kali Narain and his sons and

grandsons was strained on account of the desire of Kali Narain to execute a Will. When the father is old and grown up sons well advanced in middle age who are actually managing the property are against him, it is natural that all the household would be against the old man, as everybody knew that the sons, who were in fact the masters, would be rightfully so shortly in the course of nature. The position of the old man in this case was that he was practically a prisoner in his own house. The Subordinate Judge does not appear to have realised the situation. The letters appear to me to have the true ring. The inaccuracy in exhibit 23, about the Defendant having already executed the Will shows that Kadambini, the daughter who wrote it, could not actually catch the words dictated to her, and not that the letters were all prepared as the result of a conspiracy between Kali Narain's wife and the son-in-law. The Subordinate Judge also seems to me to be hypercritical as regards the terms of friendship between Kali Narain and Ananda Babu. Ananda says that they were friends for about 40 years. Defendant's witness, Suresh Chandra Gupta, whom I have mentioned before says: "I know Kali Narain Babu was on very good terms with Ananda Babu "At one time Ananda Babu was a sincere well-wisher "of Kali Narain Babu's family. Ananda Babu is a man "of great influence at Dacca. I am aware that Kali "Narain Babu was in debt. Kali Narain Babu "told me on a previous occasion about his debts." To whom should Kali Narain turn for help to save him from trouble from his own descendants but to Ananda Babu? At Ananda Babu's instance a pleader, Babu Surendra Nath Mukherji, was instructed to apply to the Sub-divisional Magistrate for police assistance in order to enable Kali Narain to come to Dacca, and when Surendra Babu went there Kali Narain saw him from a window on the first floor and beckoned him to come up. Surendra went to Bandar with one palki for Kali Narain. But his wife, who seems to have been a woman of strong personality, determined to come away with her husband. Surendra Babu relates how his attempts to get another conveyance for the wife were frustrated. It is surprising that, if the sons or any of the servants had made the least attempt, a conveyance could not have been found for the lady. But the sons threw obstacles in the way as they knew that their mother would not let her husband go without her and they thought that if the mother could be prevented from going the father would not go. But they did not count on the strength of will of the mother. She cast her family pride to the four winds and determined to follow her husband on foot. The Subordinate Judge takes this as an instance of the weakness of mind of Kali Narain. I take it the other way. It shows that he had then a good deal of strength of mind and was determined to leave the village. The affair is not creditable to the sons. The father was weak and old. He could not walk the distance and so was compelled to use the palki leaving the lady to come as she might. If Surendra Babu is to be believed (and no reason has been addressed to us for disbelieving him, nor does the Subordinate Judge give any reasons for doing so) there is no doubt that Kali Narain possessed the ordinary mental powers of a normal person of his age at or about the 9th of December 1919 when he left Bandar and came to Dacca. He saw the Sub-divisional Officer of Naraingunge on that day, who would certainly have taken the pleader to task

for his endeavour to rescue an old man from his sons if he had found him to be an imbecile and incapable of movement.

8. The subsequent events of that day also show that Kali Narain was not mentally or physically in a really bad condition. When he reached the Railway Station he found that his wife had not arrived there. He waited for her, letting the evening train pass and arrived at Dacca late in the night, got into a ticca gharri and came to the house of Ananda Babu. Ananda Babu had a talk with him before he went to the house of his son-in-law, Satis. He stayed in that house for a few days and rented a house for himself afterwards. Some time after he came to Dacca he executed a Will. Probate was not taken of the Will as the executor appointed did not want to get into trouble with the sons, and I do not think it is necessary to discuss the fact of the Will at all in connection with this case. I have stated the events of the beginning of December 1919 in some detail because in my judgment, whatever may be the value of the examination of Dr. Pringle on the 25th of November on which the certificate of 17th December was given, at the beginning of December Kali Narain's conduct shows that he was the reverse of a pet-son suffering from senile dementia and was anything but a man of unsound mind. If he was very bad on 25th November he must have made a good recovery shortly after.

9. As I have already said there is no evidence worth the name on the part of the defence as to the mental condition of Kali Narain in 1920. There is one incident, however, on which the Subordinate Judge lays some stress. In April 1920 one of the two surviving daughters of Kali Narain, Kadambini, died. Shortly after that his wife had a stroke of apoplexy. Colonel Newman was called in for 2 days and he says in his deposition that he was struck by Kali Narain's attitude as he did not reply when the doctor spoke to him and he found him silent and apathetic. Colonel Newman did not speak Bengali and Kali Narain did not know English. Besides when Kali Narain found his wife struck down with apoplexy, a man of his age would naturally feel stunned, and he would not venture to ask the doctor anything lest the last hope may be taken away by the doctors answer. In my opinion this evidence proves nothing. The wife survived that attack. Contrast with this the evidence of Dr. Abani, who cured the lady of cholera subsequently. There is, however, ample evidence on the record that Kali Narain's state of mind was normal.. I would first of all mention Babu Ananda Chandra Roy. He was a leading pleader at Dacca and well known throughout Eastern Bengal. After practising his profession for 40 years he evidently made his fortune and retired. He now owns zamindaries and has great local influence. I have already shown from the evidence of a defence witness that Ananda Babu was a well-wisher of Kali Narain and was his friend. Ananda Babu says that Kali Narain was much troubled about his debts and the management of his property, and talked of selling some of his properties to pay off the debts. Ananda Babu's evidence shows. that Kali Narain took a rational view with regard to the management of his properties and sought for his advice in various matters. His evidence leaves no room for doubt that Kali Narain was of sound mind. The learned advocate for

the Respondents argued that an incident in the life of Ananda Babu shows that he is not a reliable witness, and that was that many years ago he purchased a property at a revenue sale with the object of getting it free from incumbrance although he was an unrecorded part proprietor himself. But he did not depose in that case falsely. On the other hand, the Court described his deposition as stating the facts with "cynical frankness". Whatever that may be, there is no reason to suppose that he would perjure himself in favour of the. Plaintiffs who apparently were strangers to him, and residents of a different district. There is also the evidence of Babu Nirmal Kumar Gupta who is a professor at a higher grade College of Dacca. His evidence is that Kali Naraian had the power of understanding about the management of his property and talked about the means of repayment of his debts. The Subordinate Judge dismisses his evidence with the observation that he did not scrutinise his mental powers and there was no suspicion in his mind about his mental powers. I think it is hardly fair to deal with his evidence in this way. It is true that long observation and expert evidence may be necessary to prove whether a man is a lunatic or not. But to say that an ordinary man of intelligence is unable to judge whether a person is capable of understanding a matter or of forming a rational judgment as to its effect upon his interest by repeated conversations with him, seems to me an absurdity. The other reasons given by the Subordinate Judge with reference to the evidence of this witness for holding that Kali Narain was of weak mental powers do not also seem to be of substance. If a man has a talkative wife who speaks of business matters about which she probably heard from her husband, the husband naturally would not speak much specially if he is by disposition taciturn. There is also the evidence of Purna Chandra Das Gupta who is admitted to be the leading Kabiraj at Dacca, i.e., a physician practising the Hindu system of medicine. This gentleman saw Kali Naraian on several occasions from time to time as he was under his treatment. The last time the Kabiraj saw him was towards the end of December 1920. He says he never saw anything abnormal in Kali Narain but the Subordinate Judge again dismisses his evidence with the remark that he did not examine Kali Narain with a view to ascertain whether he had the capacity to manage his property. In my opinion that is not necessary. It is sufficient if a man has intelligence enough to form a rational judgment as regards a transaction. The evidence of this witness in my opinion goes entirely against the case set up by the defence This evidence has not been attacked in any way by the Respondents' counsel: nor has the evidence of Dr. Abani Das Gupta who treated Kali Narain's wife successfully for cholera. His evidence speaks of facts in June or July 1920. There is next the evidence of Babu Jyotish Chandra Sen, Deputy Magistrate, who was returning officer for the election of members to the Council of State and also for the Legislative Assembly. Kali Narain was a voter for both. The witness swears that Kali Narain went to his house in the first half of the beginning of December 1920 and recorded his votes for both. This does not show either mental incapacity or such physical incapacity as the defence witnesses say. The summary of the evidence of both sides shows that although Kali Narain had heart disease and was suffering from rheumatism or occasional slight stroke of

paralysis, he recovered from acute attacks of illness after a short time: He cannot by any means be said to be otherwise than one of sound mind, although he might not have been naturally a very intelligent man.

10. The all-important point, however, is with reference to the time when the contract was made. Plaintiffs' evidence shows that there was a good deal of haggling over the price. On the last day, i.e., the 30th November 1920 when the bargain was struck, it was Kali Narain's wife who said that the Majidpur Babus had offered 32 years' purchase and asked the Plaintiffs to pay 33 years' purchase to which the Plaintiffs consented. A draft was prepared by the Plaintiffs' pleader, which draft was made over to Defendant's Mohurir, Hara Nath, and Defendant's son Bnupati. They took it to Basanta Babu, Defendant's pleader, who made certain corrections. The matter of the agreement was communicated to Ananda Babu who considered the price offered to be very good. On the 4th of December the draft was read over to Kali Narain in the presence of witnesses. It was fair copied by his Mohurir, Hara Nath Das Gupta, who signed as scribe. It was executed by Kali Naraian, who signed the document in 11 places, and it was attested by 11 witnesses. I shall not describe the details which have been stated by the Subordinate Judge. There were 3 pleaders among the witnesses including Basanta Kumar Sen, the pleader of Defendant. There is ample evidence on the record that he was Defendant's pleader, and although the Plaintiffs made an attempt to examine him at a late stage the Defendant never thought of examining him in support of their case. Of the other attesting witnesses Bhupati is the son of the Defendant; Ram Chandra Pal is an officer of the Defendants still in their service, but he has not been examined; Chandra Kumar is Plaintiffs' servant and was examined by them. Satis Chandra Dutt, a pleader, was examined by the Plaintiffs. Radha Ballav Das and Bhagaban Chandra De are two witnesses not connected with "either party who have been examined by the Plaintiffs. Another witness was Satis Chandra Das Gupta, the son-in-law of the Defendant, who has been charged with wrongful conduct by the defence and who has not been examined by either party. The witnesses examined by the Plaintiffs show that the Defendant was of sound mind when the bainapatra was executed. The execution of the deed was not a hole-and-corner business. The matter was discussed for several months. The price was settled after a good deal of haggling. Ananda Babu was consulted about the matter. Defendant's pleader settled the draft. It was made over to Defendant's son, Bhupaci, and Mohurir, Hara Nath), who now poses as an honest man who was compelled somehow or other to take a leading part in a dishonest transaction but did not think it tit to inform the most interested of the sons of Kali Narain, Krishna Kumar, of the great conspiracy that was going on.

11. I am of opinion that the evidence establishes sufficiently that Kali Narain was in a state of mind which showed that he knew what he was doing and that he was capable of understanding the nature and consequences of the contract he had made. He was anxious to pay off his debts by selling a part of his property situate in the district of Comilla. The price was settled at 33 years' purchase of

the net income. The question of the Kutchery Bari was directly referred to him and he agreed not to charge a separate price for it. If this story had been false Hara Nath, who is said to have been present when this matter was discussed with Kali Narain, would certainly not have written out the terms in the document. It was further stipulated, in order to safeguard the interest of the parties if there was any mistake in the calculation of the price, that it would be liable to alteration if the net profit was found to be more or less than what was calculated. The nature of the document was a simple contract for sale and even if Kali Narain could not understand all the terms contained in the document there is no reason to suppose that he did not understand the effective terms under which the property was agreed to be conveyed. There is no question that Plaintiffs paid Rs. 11,000 as earnest money. I have no hesitation in disbelieving the evidence of Bhupati and Hara Nath that Kali Narain was not of sound mind. If that were so, there is no reason why they should attest the deed or take so prominent a part in the transaction. The next thing I have to mention is, as to what happened immediately after the execution of the deed. Krishna Kumar Sen is the second of the surviving sons of the Defendant and is the real protagonist of the play, as his elder brother and other brothers do not seem to take any special interest in the matter, except Bhupati who has given evidence as I have already stated. Krishna Kumar attended a meeting at the house of Basanta Babu, pleader, with Kali Narain's manager, Durga Sankar, where it was proposed that some arrangement should be made with the Majidpur Babus about the property. Krishna Kumar did not then say anything about the incapacity of his father to make the contract. This is not natural if the fact were true. Krishna Kumar became aware of the bainapatra the day after, but it does not appear any where that he took exception to the transaction on the ground that his father was of unsound mind. He had also the opportunity of saying so when the Plaintiffs went to Bandar with the balance of the purchase money for the execution of the kabala. Arabinda Guha, a pleader, who was taken there by the Plaintiffs, says that Krishna Kumar was asked to tell his father that the Plaintiffs had arrived there for the kabala with the money. Krishna Kumar did not say anything but disappeared. Krishna Kumar, however, says he was then absent from Bandar. But I see no reason to disbelieve the pleader about this matter. Last, but not the least, there is the evidence of Mouivi Apsaraddin Ahmed, the District Sub-Registrar, then of Dacca, who executed the commission for registration of the bainapatra and before whom Kali Narain admitted execution, and signed his name below the endorsement of the Sub-Registrar. The Sub-Registrar has stated facts on which there is no room for doubt that Kali Narain had executed the deed with full knowledge of its effect and he acted with such politeness and consideration which is expected from a man of his position towards the Sub-Registrar. The Sub-Registrar was an officer of experience holding a responsible position under Government and no reason has been suggested at the bar why his evidence should not be accepted except that his evidence goes against the evidence of all the medical witnesses. I do not think so, as no medical witness examined by the Defendants saw Kali Narain at the time. The evidence of the medical men may be true as regards the condition

of the patient when they saw him. But their opinion was to some extent formed on the statements made by other people which they believed to be true. I have dealt with the evidence in considerable detail, partly because the Subordinate Judge did so with whose conclusion I do not agree, and partly out of deference to the elaborate arguments addressed to us

12. I need only refer to certain other minor matters mentioned by the Subordinate Judge which, however, I do not think relevant to the enquiry in this case. The first is with reference to the case brought by Kali Narain in 1918 against a purchaser of a tenancy right for ejectment. The plea of the Defendant in that case was that the plaint was not Kali Narain's and that he had paid Selami to Kali Narain and was not liable to be ejected. Kali Narain as Plaintiff wanted to examine himself on commission. In such a case the certificate of the doctor for inducing the Court to issue a commission must be in strong terms But the evidence of Kali Narain in the case (Ex. M) does not show that he did not understand what he had to say in support of his case. An old man's memory cannot be expected to be as good as when he was young. But that does not mean that he is not capable of taking care of his interest. The other matters referred to by the Subordinate Judge, that the wife of Kali Narain was consulted in certain matters or Ananda Babu's advice was sought for, also do not show the mental incapacity of the Defendant. The lady as I have observed was intelligent and strongwilled. That the grandmother would be asked whether a grandson should be sent to the Cotton School at Calcutta, which, by the way, is a disciplinary school for unruly boys, is natural. The evidence as to the mental capacity of the Defendant at the end of January 1921, or at any subsequent time, also does not seem to me to be of any consequence. Attempts were repeatedly made by the sons to take the Defendant from Dacca to Bandar. He was taken there on 6th January 1921, on the ground that one of his sons had fallen ill. After that he was examined by Colonel Newman on the 24th and 26th of January. One can only imagine what treatment he received from his own people and it is no wonder that Kali Narain's condition was then bad. The medical evidence as to the condition of Kali Narain on subsequent dates does not agree with each other. Kumar Bhabeudra Narain, Civil Surgeon, with European qualifications and of 34 years' experience in Government service, examined the Defendant from 17th to 19th April 1922. He took elaborate notes of the questions put to the Defendant, and his opinion is that Defendant was mentally sound. On the other hand Dr. Mac Gilvie, who examined him on the 23rd and 24th April 1922, is of the contrary opinion. In this state of the medical evidence I can only say that each gave his opinion as to what he observed at the time when he examined the patient. 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.

13. 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 son, 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 Farid-un-nisa v. Muktar Ahmad (1925) L.R. 52 IndAp 342, 352. where the onus was on the person claiming under the deed. His Lordship observed 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.

14. 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.

15. In that view I do. not consider it necessary to discuss the numerous cases cited before us on the point.

16. 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 annas. 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". The law on the subject may be stated thus: "In all sales it is evident that the 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 Ed., Sections 353, 354. I may also refer to the case of The New Beerbhoom Coal Co. v. Bularam Mahata (1880) ILR 5 Cal 932, 937 : L.R. 7 IndAp 107, 114. 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 difficul-"ties 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 the 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 3rd item in the bainapatra was taken into account. The evidence of Chandra Kumar Chakravarti (at page 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. Another argument is urged by Mr. Sircar for the Respondents here. The argument is that the contract was to execute a kabala containing necessary stipulations, and it is urged that such a contract is not capable of specific performance and the cases of *Rummens v. Robins* (1865) 3 De G.J. & S. 88. and *Hyam v. Gubbay* (1915) 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 *Hari Chand v. Govind* (1922) ILR 47 Bom. 335 : L.R. 50 IndAp 25. 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 mean 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.

17. 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), illustration (d) of the Specific Relief Act and the case of *Twining v. Morrice* (1788) 2 B.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 3 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 ground 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 Annada 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 circum-" stances, 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). The case of *Davis v. Maunq Shwe Goh* (1911) ILR 38 Cal 805, 823 : ILR 38 IndAp 155., cited by the Appellants may also be referred to in this connection. 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 Plaintiff's limit; it is in "evidence that he 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 advan-" tage of his position or the difficulties of the "Defendant." 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 pay off the Plaintiffs or to get 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 the 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.

18. 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.

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

Roy, J.

20. The Appellants here are certain Saha Merchants of the Tipperah District who were Plaintiffs in the Court of the 3rd Subordinate Judge, Tipperah, in the suit from which this appeal arises. The Defendant was Kali Narain Sen Chowdhury, zemindar of Bandar, thana Naraingunge, District Dacca. Kali Narain was an old man and he died during the pendency of the suit and his heirs are the Respondents here. The suit was for specific performance of a contract made on 1st December 1920. Kali Narain is said to have agreed to sell his zemin-dati property, Joar Panchkitta, in the Tippera district for a sum of little over a lakh which was calculated on the net annual income of the mehal at 33 years' purchase. Rs. 11,000 was paid as earnest money. The agreement or the bainapatra was duly registered 6 days after. It appears that the Majidpur Babus, who are neighbouring proprietors and with whom Kali Narain had been in litigation, came in at this stage and offered 40 years' purchase (really 37 times to the proprietor and 3 to the Amlas) and friends of the parties tried to induce the Sahas to give up their claim or to join with the Majidpur Babus in purchasing the property. The Sahas did not agree. The contract was made at Dacca where

Kali Narain was residing at the time. He had left Bandar about a year before. With increasing old age (apparently he was about 70 or 75 years old) he left the management of his zamindari to his sons or rather to his 2nd son, Krishna Kumar. The estate had become largely indebted and Kali Narain was not quite satisfied with the management of the properties. There were bickerings among the sons and grandsons. Kali Narain had also paralysis or rheumatism in his legs and suffered from severe heart attacks. It is said that he also wanted to make a provision for his wife and his 2 daughters then alive. He wished to go to Dacca for treatment. This was opposed by the sons. Kali Narain wrote to an old friend, Babu Ananda Roy at one time a leading pleader of Dacca and now a zemindar and a person of great influence. Through his help and by appealing to the Sub-divisional Magistrate of Dacca, Kali Narain went to Dacca. He seems to have made a will a few days after. Kali Narain placed his properties under the management of Babu Ananda Roy, and there was repeated discussion that unless a part of the properties was sold there was no possibility of paying up all the debts. It was in these circumstances that the Sahas made their negotiations and made their final offer of 33 times the annual net income from the mehal. The kabala was to have been executed within 2 months. But in the meantime Kali Narain went back to Bandar and, though the Plaintiffs took the balance of the money there, Kali Narain would not appear before them. The Plaintiffs then commenced this action on 30th June 1921.

21. The defence was that Kali Narain was unsound of mind at the time of the alleged agreement. At the outset a prayer was made for the appointment of a guardian ad litem for him, and the learned Subordinate Judge after a personal inspection of Kali Narain appointed Krishna Kumar (who he thought was the eldest son) as guardian ad litem. There was an appeal to this Court against this order, and the decision of this Court was that there should be a judicial enquiry into the question of the alleged unsoundness of mind or mental infirmity. Various doctors examined the old gentleman. He, however, died in July 1922 and his heirs were substituted. At the trial numerous witnesses were examined before the Subordinate Judge and several witnesses were examined on commission issued by him. The learned Subordinate Judge dismissed the main prayer of the Plaintiffs, but granted them a decree for the earnest money they had paid. From this decision the Plaintiffs have come up here in appeal. For the Respondents there is a cross-objection in respect of the earnest money decreed, but Mr. Sircar who appears for the Respondents does not press the cross-objection. The simple question for decision therefore now is, whether specific performance should be enforced.

22. 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.

23. Mr. Chakravarti 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:

1st. That Kali Narain did not contract to sell the properties to the Plaintiffs.

2nd. That his mind was 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.

3rd. 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 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 of the 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 has and refuse enforcement of the contract. His second ground is that the contract is void for uncertainty.

24. The case for the defence was that Kali Narain was unsound of mind at the time the document was; executed, viz., 5th 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., i.e., to say by April 1919. This is Krishna Kumar's statement on page 139 of Part I 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." 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.

25. The earliest is the occasion when Kali Narain deposed in February 1919 in a suit he had brought against one Imamaddi for ejectment. A doctor's certificate was taken on 18th November 1918 to get exemption from his appearance in Court, and the doctor's certificate and the fact, that Kali Narain said before the Commissioner that he suffered from loss of memory and was ailing, are relied upon for the inference that senile loss of memory had set in. The deposition is an exhibit and, if it shows anything, it shows that Kali Narain was emphatic in

asserting that he did not meet Imamaddi and that Imamaddi never paid him any money and that, unless he gave his sanction, recognition of a tenant was not valid. Kali Narain's deposition gives no indication that he did not understand the management of his zamindari.

26. In January 1919 Kali Narain borrowed Rs. 47,000 on a mortgage (previously he had borrowed Rs. 10,000 on another mortgage) and from April to July 1919 he was borrowing moneys on hundis and on 20th November 1919 he executed a patta. An attempt was made to get rid of the effect of these transactions by Krishna Kumar by asserting that he and the amlas made all the arrangements and that Kali Kumar only put his signature on the documents. Krishna Kumar's evidence shows, however, that Kali Narain was consulted; and the proper inference is that Kali Narain was exercising his will in these matters and it was his will which was being followed in the execution of these documents. It may be mentioned that Kali Narain continued to execute similar instruments when he was in Dacca, and that after his return to Bandar in January 1921 he continued for some time to sign complaints and written statements.

27. Babu Suresh Chandra Gupta, Sub-Deputy Magistrate and a friend, paid Kali Narain a visit in August (or September) 1919 at Bandar and was disappointed that Kali Narain, who had welcomed him eagerly before, did not respond to his salutation and answer his question but looked vacantly at him. This evidence is said to be proof that dementia had set in. The learned Subordinate Judge has himself considered that the witness being a connection may have described the mental condition of Kali Narain with an unconscious bias in favour of the Defendants. There is another circumstance disclosed in his evidence. Kali Narain's wife requested him to speak to her sons and ask them not to give so much trouble to their father in his old age and he spoke to them. In the course of cross-examination the witness tried to minimise the effect of this statement, but I think his first statement may be taken as correct. The statement shows that there was a conflict of wills between father and sons, and the assertion that Kali Narain had no will left cannot be believed. The statement corroborates also the story that there was discussion going on between Kali Narain, who wanted to go to Dacca, and the sons, who were against it. The defence examined 3 witnesses who saw Kali Narain soon after this witness and they also speak of Kali Narain not responding to their questions and sitting looking vacantly about him. The learned Subordinate Judge has not referred to them. They were casual visitors. It appears that Kali Narain had several attacks of the heart at about this time, and it is possible to suppose that he was prostrated and at this particular time he was not in the mood for seeing visitors. Soon after he went to Dacca and was under the treatment of a Kabiraj and we have it in evidence that he talked to people, went about for drives, and so forth.

28. Kali Narain left Dacca on 9th December 1919 under police protection. This fact seems to have been considered by the learned Subordinate Judge as a ground for deciding that Kali Narain was of unsound mind at the time. No doubt

he had become feeble and infirm and had not the strength to order his sons about and leave for Dacca. No doubt he, who at one time was a genial and amiable gentleman, had become taciturn and irritable; but unless we shut our eyes to the evidence of the witnesses and act blindly on the evidence of Krishna Kumar we cannot come to any such conclusion. It is not intelligible what conspiracy Kali Narain's wife could contemplate against her sons. If she desired that some provision should be made for herself and the 2 daughters it is not an iniquitous desire. Kali Narain, it appears, used to lean on his son-in-law, Satis Kabiraj. That, too, a man is entitled to do. Krishna Kumar admits that there was a discussion going on that the father should go to Dacca for treatment, and he opposed it. He says he was apprehensive that Satis Kabiraj might induce his father to execute some document. That gives the real reason for his opposition. Kali Narain felt himself a prisoner in his own house and wrote to Babu Ananda Roy of Dacca to rescue him. He got a reply and wrote again. He was still the gentle father and wished Ananda Babu to write to each of his sons a letter of recommendation that "no harm would be caused to them". These letters bear Kali Narain's signature and we are to suppose that Kali Narain did not really write them but merely put his signature on them. Eventually an application was made before the Sub-divisional Magistrate of Naraingunge and a pleader went with the police and brought Kali Narain away. The pleader has deposed and we learn from him that, though it was suggested that it was late, Kali Narain would not wait saying that, if he did not go then, he might not go at all. A palki had been brought for Kali Narain. No dooly-bearers could be procured, however, for the wife, and the pleader's suspicions, that the bearers made themselves scarce at the instigation of the sons, do not seem to be unreasonable from the circumstances of the case. The poor old lady had to walk. The indignity of a zemindar's wife having to walk through the village leads the learned Judge to condemn the conduct of Kali Narain. The sons, however, gave no help though the father was determined to go. A man may be too ill to walk and see his wife walking and yet be sound enough in mind to do business. Kali Narain was taken to Mr. Staig (the Magistrate of Naraingunge) and he makes an endorsement on the application that Kali Narain was proceeding to Dacca. Kali Narain went to the Station and had to wait for the train. He arrived late at Dacca, but drove straight to Ananda Babu and thanked him, apologising for waking him up at that time of the night. The version of Krishna Kumar is that the Police came with a number of lathials, the suggestion being that Kali Narain was only an inert mass. Krishna Kumar it appears followed the party to Dacca keeping himself at a distance. The circumstances have only to be considered to show how unreliable Krishna Kumar is. Babu Ananda Chandra Roy's deposition and that of the Pleader who went with the Police and brought Kali Narain to Naraingunge show a very different state of things.

29. 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 he 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. Fatteh Muhammad (1892) ILR 22 IndAp 4, 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 give 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 sound mind. Whether there was any undue influence with regard to the Will it is not for us to consider here.

30. At this stage it is just as well to refer to the evidence of Dr. Pringle (a medical officer attached to the jute firms at Naraingunge) on whom Mr. Sircar has asked us to place our reliance. We are unable to do so. Bandar is just across the river from Naraingunge, and this gentleman was called in to see Kali Narain on the 25th November 1919. After Kali Narain went to Dacca and when Krishna Kumar was apprehensive that some document was going to be executed he went to Babu Rajani Gupta (now the leading pleader of Dacca who was employed in this case subsequently to cross-examine Babu Ananda Roy) and apparently under his advice Krishna Kumar went to Dr. Pringle and obtained a certificate, dated the 17th December 1919 (two days before the Will). Dr. Pringle certified that Kali Narain was paralysed in his lower extremities and his mind appeared to have failed and that he had been suffering from progressive loss of memory for a year and half. The learned Judge himself has noticed that the Defendant, Sachindra, a grandson of Kali Narain, a doctor at Naraingunge, supplied him with details which find a place in the certificate. This Sachindra told him that he wanted the certificate for the purpose of exempting Kali Narain from attendance in Court (as we learn from his deposition which was taken in England in 1924). This doctor deposed that "Kali Narain was "suffering from senile degeneration, and I

therefore "inferred that his condition would not improve but "would on the contrary get worse". It is unusual for a doctor to say that there is no chance of improvement in the patient he had been called in to treat. Dr. Pringle made no notes and gave a certificate three weeks after he saw him. It seems to me that his evidence, that Kali Narain was suffering from complete loss of memory and was unable to use his legs, is of little value in view of the fact we know, viz., that Kali Narain went to Dacca and was going about and discussing the question of proper management of his properties.

31. Kali Narain took a house at Dacca near Ananda Babu's house and there were several meetings between the two men. Ananda Babu has deposed that he proposed two alternative schemes and these he discussed both with Kali Narain and his sons Krishna Kumar's denial on this point counts for very little. It was Kali Narain who said that he felt doubtful if the scheme of leaving the sons in management of some of the properties would work. Eventually Babu Ananda Chandra Roy took up the management of Kali Narain's properties. Kali Narain's daughter, Kadambini, died and we learn that Kali Narain moved to another house as he could not bear to live in that house any longer. In the second house Kali Narain's wife had a stroke of apoplexy. A move was made to a house in Bangla Bazar. Here his wife had cholera, and it was here later on that Kali Narain executed the bainapatra. During the whole of Kali Narain's stay at Dacca he was under the treatment of the best Kabiraj of that town, viz., Purna Chandra Das Gupta. The Kabiraj has deposed, and nothing can be said against him and nothing has been said against him. He deposes that he saw nothing unusual about Kali Narain. The evidence of the Kabiraj shows that Kali Narain had capacity. Dr. Abani Nath Das Gupta, a homoeopathic physician, treated Kali Narain's wife when she had cholera, and he deposes that he was invited to a meal in the house after she recovered, and he tells us that Kali Narain came downstairs and used words of courtesy to the effect whether he could give an adequate dinner to the Doctor. Kali Narain was very old but there was nothing out of the normal about him. This dinner took place about a month before the bainapatra. The youngest son, Bhupati, was all along living with his parents.

32. Babu Ananda Chandra Roy is by far the most important witness in the case. Mr. Sircar has referred to the case of Harendra Lal Roy Chowdhury v. Nawab Salimullah Bahadur (1910) 12 C.L.J. 336. from which it appears that Babu Ananda Roy arranged with Garth and Weatherall for a fraudulent revenue sale in order to get rid of the encumbrances of the tenure-holders. This was put to Ananda Babu in cross-examination. The learned Subordinate Judge has not referred to it, because apparently in spite of it he held the respect of people in this locality, and all throughout witnesses speak of him as the big man of Dacca. He had nothing to gain in taking up the management, which he did" , at the earnest solicitation of an old friend like Kali Narain. The learned Subordinate Judge has not disbelieved him. He has quoted the witness's observation that Kali Narain's memory was not sharp and that if any matter relating to his affairs was explained to him he could understand it. The learned Subordinate Judge's

opinion is that the witness's estimate of the mental capacity of Kali Narain is not justified by reason of the fact that once having taken up the management he took the strongest measures, and he appointed the officers and thereafter it was to him that the sons and grandsons appealed, and so on. If Babu Ananda Chandra Roy, however, took complete charge, he did it at the request of Kali Narain. It is in no way inconsistent with the evidence of Ananda Babu that whenever he met Kali Narain he discussed the latter's affairs with him. A letter written to inform the Kartri (or Kali Narain's wife) and get Kali Narain's signature has been considered indicative of the fact that Kali Narain had no mind. If Kali Narain was able to discuss his affairs as we know, it may well be that Ananda Babu did not wish to trouble Kali Narain directly who was admittedly in ill health. Surely a wife may convey the position of affairs to the husband and get his final orders. As regards "the state of Kali Narain's mind at Dacca, we have the evidence of two pleaders on the side of the defence. One is Rohini Kumar Bhattacharjya, the pleader of Rai Mohan Poddar, the mortgagee; and he deposes that he went to see Kali Narain soon after his arrival at Dacca and enquired after his health. He said Kali Narain gave a reply but he could not remember what he said. The second witness is Rohini Mukerji, Kali Narain's pleader at Naraingunge. He went to see him in April 1920 at Dacca and Kali Narain could not recognise him. If his evidence suggests the inference that Kali Narain was suffering from senile dementia we have it that this gentleman was accepting plaints and vakalatnamas all the time signed by Kali Narain. The evidence of these witnesses, who were only casual visitors, does not in any way displace the positive evidence of men like Ananda Babu or the Professor, who were discussing all his affairs with Kali Narain, not to speak of the physician (the kabiraj) who was attending Kali Narain when at Dacca.

33. This brings us to the question of the bainapatra, and after all it is the only question which is important, viz., in what circumstances did Kali Narain execute the deed and what was his mental state at the time. The question seems simple enough though it was overloaded with irrelevant matters by the strenuous defence put up. The evidence on this point is entirely one-sided.

34. The first thing that strikes me is that these Plaintiffs are perfect strangers. They have nothing to do with the domestic dispute between Kali Narain and his sons. They are innocent merchants who heard that Kali Narain was intending to sell some of his properties and came along and negotiated the sale and eventually entered into the contract and paid Rs. 11,000 as earnest money. The second thing is that it was not an affair accomplished in a corner. There were repeated negotiations and then the bainapatra was executed. It took a whole day to make a draft--alter it when necessary and so forth--and then the instrument was signed. There were no less than 3 pleaders present. Kali Narain's officers, 2 of them, were present. One of them wrote the deed and eventually identified Kali Narain before the Sub-Registrar of Dacca. The youngest son was present and was a witness to the deed. Various other men were witnesses including an old friend, Radhaballav Dass, who had been also a signatory to the Will. It is idle to

contend that all these men conspired to be parties to a deed executed by a man who had lost his mind. The Plaintiffs have examined one of themselves, an employee of theirs who made the negotiations, their pleader who was present and Radhaballav. We learn that the pleader, Basanta Sen, had been told to do everything for Kali Narain by Ananda Babu and this pleader made certain corrections in the draft. It can serve no useful purpose to discuss who should have called him or the other pleader. The Plaintiffs have given sufficient evidence. The Defendants examined Hara Nath, the writer, and the son, Bhupati. Their conduct in attesting the deed is inconsistent with their allegation that Kali Narain was of unsound mind at the time. The positive evidence of Kali Narain's capacity, and the positive evidence of the execution of the deed in presence of numerous witnesses, is not displaced by the kind of suggestions made by them. I do not propose to discuss in the meticulous manner in which the trial Judge has gone into the so-called inconsistencies and discrepancies in the evidence. The fact, that the negotiations were completed by the 11th Aughrayan 1327 (30th November 1920) and that Kali Narain came downstairs in the baithakkhana that night and gave his final word, was found not to tally with the fact that on the 18th Aughrayan 1327 (4th December 1920) several journeys were made to Kali Narain's bedroom and his decision taken there and the bainapatra was finally executed there. The conclusion of the trial Judge in one case is that Kali Narain could not have been down to the baithakkhana and in the other that Kali Narain was not in his senses because these things were done in his bedroom. The learned Judge has not paid attention to the positive evidence nor to the broad facts of the case. Kali Narain got greatly involved and there were repeated discussions that unless a part of the property was sold there was no way of saving the whole estate. Ananda Babu was consulted. The Professor was asked to find if the Chamarias would take the Naraingunge lands. Even Rohini Bhattacharjya deposes that Rai Mohan Poddar was approached if he would buy the property. Krishna Kumar says he was not willing to sell any property. Even if this is true, which I doubt, I do not see that he had any say in the matter. His mother, his brother-in-law and various advisers were giving a different advice. Purchasers were sought and the Plaintiff, Guru Charan, and his man, Chandra Kumar Chakravarti, depose to their coming and negotiating for the sale in Assar and again in Assin. Ananda Babu had advised an advertisement but it was not issued till Aughrayan 1327. The Majid pur Babus also came, but the Plaintiffs made the higher bid, viz., 33 times the net profit, and it was accepted. It appears that the Sahas were packing up to march off when Kali Narain's wife asked them to raise from 32 to 33 years' purchase, and the Sahas agreed. Kali Narain came down and clinched the bargain. Mr. Sircar has contended that there is nothing to show that Kali Narain was present at the various discussions about the details. It is not unnatural that the details should be debated by the amlas on both sides. It is again said that Hara Nath was only a bazar sarkar and the manager, Durga Sankar, appointed by Ananda Babu was not present. He was not present at the execution of the deed, but the details had already been settled. The notice or the advertisement gave the details, and if the Plaintiffs chose to

accept them it is their look out. The price fixed is exactly 33 times net income given in the notice. It was a simple enough transaction for Kali Narain to comprehend and there is nothing to show that he did not comprehend what he was doing. The bainapatra spreads out into several pages and there are about a dozen signatures of Kali Narain. The signatures are shaky as those of a feeble old man, but there is no indication of the loss of his intellect; six days after the Sub-Registrar of Dacca came to the house, and Kali Narain admitted execution before him, and he was satisfied that Kali Narain had executed the document. The evidence of the Sub-Registrar is assailed on the ground that he deposes that Kali Narain stood up until he sat down and that he walked up to the top of the staircase when he left. The evidence of Ananda Babu and Nirmal Babu was also attacked on the ground that they do not seem to have realised that Kali Narain was suffering from paralysis. One has only to mention that at about this time, i.e., early in December 1920, Kali Narain drove out to the Magistrate and exercised his right of voting for the Legislative Assembly and the Council of State. The Magistrate has deposed and the fact cannot be challenged.

35. The Majid pur Babus heard of the bainapatra, and the very next day we see them moving in the matter. They at first tried to get the Sahas to join with them in the purchase and when they failed they made bids beginning from 35 years" purchase and finally closing at 40 years" purchase (3 of which were to go to the amlas). Krishna Kumar says he was not willing to sell at all. His voice probably did not carry weight; but the strongest thing seems to be that Basanta Sen, pleader, Durga Sankar, the manager appointed by Ananda Babu, Babu Rajani Gupta, the leading pleader now, and various other people are found trying to persuade the family to accept the Majid pur Babus" offer and pay off the Sahas. I may be wrong, but I can't help thinking that this was only possible under the idea that these Sahas were mere traders and should give place to the Babus of Majid pur. These proceedings lead to 2 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.

36. 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 zamindari can fetch. Ordinarily 33 years" purchase is a high price and this 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.

37. 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 move. The Majid pur 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 bainapatra. The Majid pur Babus were in and out of the house. The Plaintiff, Guru Charan, says that the Majid pur 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 Majid pur Babus were willing to go any better. Their first move after the bainapatra was to try to get a 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 ?" 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 brokerage has the sanction of custom. Ananda Babu says so, and the Majidpur Babus were willing to give 3 years' net profit to the amlas.

38. 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.

39. 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.

40. 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 Narayan, 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 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 21th 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 was 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 mind. Law was made to redress wrongs when a contract is 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.

41. 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 talabbaki, 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 sthit was more. They have not exercised that option. It is said that in the notice only touzi No. 304 of the Dacca Collectorate appears, but in the bainapatra two other properties, a sikimi taluk and another touzi of the Tipperah Collectorate, 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 Panchkitta. Kali Narain seems to have

bought back a share of taluk within the mehal 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.

42. 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 (1867) 1 B.L.R. 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 executant. I will refer to a few of the cases cited. The case of Blachford v. Christian (1829) 1 Kna 73. was referred to. The transaction was set aside because the deed was obtained by imposition from an imbecile old man. The cases in 33 Bevan page 419 and 31 Bevan page 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 any one else, and the latter was a case where the purchase was made at an undervalue and made with great precipitation. The case of Willan v. Willan (1809) 16 Ves. 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.

43. Mr. Sircar quoted illustration (d) of Sub-section of Section 22 and he formulated his proposition thus: "if the agent of the vendor does not act so 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 (1783) 2 BCC 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 purchasers 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.

44. The case of *Clowes v. Higginson* (1813) 1 Ves. 524. was referred to in connection with the contention that khas lands, etc., had not been taken into account. In the case quoted there was a 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 any one 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.

45. 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. Gubbay* (1915) 20 C.W.N. 66. The decision in these cases proceeded upon the footing that there was no concluded contract. In *Hampshire v. Wickens* (1878) 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 *Harischand v. Govinda Luxman Gokhale* (1922) 28 C.W.N. 73., the provision meant no more than the kabala 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.

46. 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 becomes 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 disables 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 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 strangers 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 Courts.