

*Privy Council Appeal No. 89 of 1929.*  
*Bengal Appeal No. 31 of 1927.*

Rajkumar Sen Chowdhury and others - - - - *Appellants*

*v.*

Ram Sundar Shaha and others - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN  
BENGAL.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 15TH DECEMBER, 1931.

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*Present at the Hearing :*

VISCOUNT DUNEDIN.  
LORD BLANESBURGH.  
SIR JOHN WALLIS.

[*Delivered by* SIR JOHN WALLIS.]

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Disputes about the dispositions and contracts of people of advanced age and failing powers are always difficult cases to decide, and the difficulty is greatly increased when, as in the present case, the record has swollen to enormous size owing to the way in which the examination of the witnesses on commission was protracted, assuredly not in the interests of the parties. A scandalous instance of this abuse is to be found, as observed by the learned Judges of the High Court, in the examination of Ananda Roy, the principal witness for the plaintiffs, which takes up two hundred and twenty-six pages of the record, and contains twelve hundred and fifty questions and answers, most of which, as admitted at the trial by the *vakils* on both sides, were quite irrelevant to the suit.

In another appeal with an enormous record from the same High Court it was recently stated that the cross-examination on commission of a *purdahnashin* lady lasted for a hundred days. In their Lordships' opinion it is imperative that an abuse

of this kind, which enormously increases the costs of litigation without any corresponding benefit to the parties, should be checked, and it would appear to be clearly within the powers of the High Courts to direct an enquiry with a view to disciplinary action in flagrant cases which come under their notice at the hearing of appeals.

The question in the present case is whether the plaintiffs are entitled to obtain specific performance of a registered *bainapatra* or agreement to sell the suit properties executed by Kali Narayan, the father of defendants 1 to 4, who have been brought on after his death with his other descendants in the male line as his legal representatives, and the main defence is that he was then of unsound mind for the purpose of making a contract, within the meaning of Section 12 of the Indian Contract Act, as being at the time he made it "incapable of understanding it and of forming a rational judgment as to its effect upon his interests."

There were also allegations of conspiracy on the part of the plaintiffs, as to which it was admitted at the hearing of the appeal in the High Court that there was no evidence.

The plaintiffs' case, which has been accepted by the High Court is, on the face of it, a perfectly straightforward one. They are traders who had made money, and coming to know in the middle of 1920 that the suit properties were for sale, they entered into negotiations for purchasing them. The properties consisted of two small *zemindaris*, one in the Dacca and the other in the Tipperah District, together with a five annas share of a *shikmi taluq* in one of these *zemindaris*, which Kali Narayan, the *zemindar*, had acquired, the remaining eleven annas belonging to the Majitpur Babus, who were the *shikmi taluqdars*. The Majitpur Babus were naturally anxious to regain the sole ownership of the *talug*, and came forward with counter-offers. Ananda Chandra Roy, an old friend of Kali Narayan, who was advising him about his affairs, was for asking thirty-five years' purchase, subject to certain deductions. This was apparently a very good price, and, probably, as usually happens, a little more than was hoped for. The offers of the plaintiffs and the Babus fell far short of this, and the negotiations went off. In October the properties were publicly advertised for sale, and in December the plaintiffs came forward with a new offer of thirty-two years' purchase. It was refused, and they were going away when Kali Narayan's wife suggested that they should increase their offer to thirty-three years' purchase. Kali Narayan accepted this offer subject to Ananda's approval, which the plaintiffs obtained. Ananda says he thought it a very good price, as it apparently was. A *bainapatra* or agreement to sell was then drawn up by Basanta, the estate lawyer, and was executed by Kali Narayan, who signed in eleven places. It was witnessed by Basanta, the estate lawyer, by Bhupati, Narayan's son, who was residing in the house, and now says he did not know what the deed was about, and by several

other persons. It was then registered by the Registrar of Dacca, who came to the house and obtained Kali Narayan's admission of execution.

Coming to know of the *bainapatra*, the Majitpur Babus, in their anxiety to become the sole owners of the *taluq*, or possibly because they did not care to have mere traders as co-sharers, offered forty years' purchase, three of which were to go to the *almos* or estate servants for their part in bringing about the sale. With this incentive Kali Narayan's estate manager, Durga Sankar, and the estate lawyer, Basanta, exerted themselves to induce the plaintiffs to abandon the contract on terms, but without success. Roy J. also surmises that it was thought that the plaintiffs, who were traders, ought to stand aside in favour of the Babus.

The plaintiffs' case is that this counter-offer was the sole reason why the transaction did not go through, and that to get out of their bargain the defendants falsely charged the plaintiffs with conspiracy and set up that Kali Narayan was an imbecile dotard when he signed the *bainapatra* and did not know what he was doing.

This contention of the plaintiffs receives some support from the fact that no suggestion of the kind was made during the negotiations after the *bainapatra*, and that the defendants confined themselves for a considerable time to an attitude of passive obstruction. When the plaintiffs after repeated applications for the particulars necessary for the sale deed, at the house in Dacca where Kali Narayan was then residing, served notices by registered post upon Kali Narayan himself and on his manager, Durga Sankar, these notices were not accepted and were returned by the postal authorities to the senders. Early in January Kali Narayan went back to his home in Bandar and the plaintiffs went down and were refused admittance. On the 31st January, 1921, they went down again with a pleader and tendered the balance of the purchase money, which was not accepted.

They saw Kumar Krishna, the principal defendant, and Durga Sankar, the manager, and were kept waiting for nearly an hour, when they left to catch their train. They had heard Kali Narayan and his wife talking upstairs, and called out to them as they were going away, but without result. They were not told that this defence was to be raised, or that a few days previously the Civil Surgeon of Dacca had been brought down to Narayangunje on two successive days and, to save time, being a busy man, had seen Kali Narayan in a boat in the river, and had certified that he was incapable of managing his own affairs and was not malingering or feigning loss of memory. An interview with Kali Narayan and his wife at this stage might have given the plaintiffs an opportunity of giving evidence contesting these conclusions, and it was not allowed to take place.

Eventually, on the 30th June, 1921, the plaintiffs filed the present suit against Kali Narayan for specific performance in the

Court of the First Subordinate Judge of Tipperah at Comilla, setting out the contract and the efforts they had made to get the sale deed executed. An application was then made on behalf of the defendant for the appointment of a guardian *ad litem*, on the ground that he was unable himself to defend the suit. The Subordinate Judge saw and questioned him and made the order, though he was not sure whether the confusion in Kali Narayan's answers was wilful or *bona fide*. After the guardian *ad litem* had filed a written statement and issues had been settled, the High Court set aside the order appointing a guardian *ad litem* and directed the Subordinate Judge to hold a judicial inquiry as to Kali Narayan's mental condition. Lieut.-Col. MacKelvie, who was the Civil Surgeon of Dacca, was examined for the defendant, and Dr. K. B. Narayan, Civil Surgeon of Tipperah, was examined on behalf of the plaintiffs, but before the inquiry was completed Kali Narayan died, in July, 1922, and the suit was continued against the present defendants as his legal representatives with substantially the same pleadings and issues.

The principal written statement is a very lengthy document, setting out as it does not only the defendants' contentions, but also much of the evidence on which they intended to rely. Shortly, their story was that Kali Narayan had for many years been in his dotage and had left the management of his property to his sons, and that his favourite son-in-law, Satish Chandra, a *kabiraj* or doctor practising Hindu medicine at Dacca, who was on bad terms with the rest of the family, had by means of false allegations in a petition to the Sub-Divisional Officer, procured the removal of Kali Narayan from his own home at Bandar to Dacca and had got him to execute a registered will in his favour, although he was then like an inert mass, and a mere puppet incapable of understanding what he was doing. Subsequently, Satish Chandra had conspired, it was alleged, with the plaintiffs and others to get a sale deed in favour of the plaintiffs from Kali Narayan at a gross undervalue. It was further denied that Rs. 11,000 deposit mentioned in the deed had been received by Kali Narayan, and it was also alleged that Satish Chandra was to get Rs. 15,000 from the plaintiffs for his services in obtaining these properties for them at an undervalue. They also alleged that the *bainapatra* was bad for vagueness and uncertainty.

The following were the material issues :—

“ 5. Was Kali Narayan incompetent to enter into the contract referred to in the plaint? Was he incapable of understanding the terms and stipulation of the *bainapatra* or of forming a rational judgment as to its effect upon his interest at or before the time of its execution ?

“ 6. Has the said *bainapatra* been secured by plaintiffs by undue influence, fraud and unfair means ?

“ 10. Is the contract bad for vagueness and indefiniteness ? ”

The Subordinate Judge found all these issues in favour of the defendants, gave the plaintiffs a decree for the return of their

deposit of Rs. 11,000 with interest, and otherwise dismissed the suit.

The plaintiffs then appealed to the High Court at Calcutta, who allowed the appeal and decreed the suit.

At the hearing of the appeal it was admitted by the defendant's counsel that there was no evidence on which a finding that the plaintiffs had been a party to any conspiracy could be based. This of itself greatly detracts from the weight of the Subordinate Judge's judgment. Further, he failed to see that, as admitted before their Lordships, if the principal witnesses for the plaintiffs are to be believed, and he did not find they were not, they abundantly established that Kali Narayan was of sound mind during his stay at Dacca, where the *bainapatra* was executed.

It has, however, been contended by Mr. de Gruyther for the appellants here that the learned Judges, in accepting the evidence of these witnesses, failed to attach sufficient weight to medical evidence, which he contends shows clearly that Kali Narayan was of unsound mind during the whole of his stay at Dacca, and that the witnesses who depose that he was not are unworthy of credit. That is really the question on which their Lordships are now called upon to decide after hearing it argued for several days and giving it their anxious consideration.

At the end of 1919 Kali Narayan was undoubtedly an old man, who had long been in bad health and had for several years left his sons to manage his affairs. He was no longer the man he was, but was depressed and his memory was bad. It was said by one of the medical witnesses that loss of memory in elderly people means incipient senile dementia, and in the case of Indians sets in at forty. Happily, even if this be so, it does not usually reach such a stage during the lifetime of the individual as to unfit him for the management of his own affairs, especially if he is wise enough not to rely on his own judgment, but to act on the best advice available. This, the learned Judges have found, is precisely what Kali Narayan did in this transaction.

The defendants' case is that at this time he was an imbecile dotard, incapable of forming any judgment of his own, and that his wife and his son-in-law Satish Chandra were anxious to get him to Dacca to execute documents to the prejudice of his sons. The plaintiffs' case is that he wanted to make reasonable provision by will for his daughters and daughters' sons, who would have taken nothing if he died intestate, and that he was also very anxious about the condition into which his affairs had been brought under his sons' management and the mortgages he had had to execute.

In Dacca he had an old friend, Ananda Chandra Roy, a successful lawyer who had retired from business and acquired *zamindari* property, and was admittedly one of the most influential men in Dacca. In December, 1919, Ananda received a letter signed by Kali Narayan, begging him to come to his assistance, as his sons were causing trouble and would not allow him to go to Dacca.

Ananda, who was 75, could not go himself, but he obtained a *vakalat* from Kali Narayan and sent a pleader to apply to Mr. Steeg, the Subdivisional Officer at Narayangunje, for an order to produce Kali Narayan before him. Mr. Steeg made the order, and the sons, who were told of it, offered no active resistance, but are alleged to have been responsible for the fact that there were no bearers for the *dhooly* in which Kali Narayan's wife was to go with him. Kali Narayan did not allow this to stand in his way, but set off in his *palanquin*, leaving his wife to follow on foot. The Subordinate Judge regarded his exposing his wife to such an indignity as an act of madness, whereas the learned Judges, as it appears to their Lordships with more reason, regarded it as a proof of his determination to get away and as a strong exercise of will power on his part.

Krishna Kumar, one of the sons and the principal defendant, followed behind to see where they were going, travelled on the same train to Dacca, and then returned to Bandar. If Kali Narayan had then been an imbecile dotard, he had only to call Mr. Steeg's attention to the fact. He did not do so, and Mr. Steeg, after seeing Kali Narayan in his *palanquin*, merely recorded that he was proceeding to Dacca. He waited at Narayangunje station for his wife and left for Dacca by a late train, arriving late at night. Before proceeding to his son-in-law's house, he went to Ananda, thanked him for what he had done, and asked for his assistance in extricating his estate from its difficulties, which Ananda consented to do. He also spoke about a will and, though Ananda told him there was no hurry about it, it is common ground that a few days after his arrival at Dacca he executed and registered a will by which he left a legacy of Rs. 5,000 to his wife and made a modest provision for annuities to his daughters and daughters' sons. The will also contained provisions of more doubtful wisdom that the estate was not to be handed over to his sons until eleven years after his death, and was in the meantime to be managed by his executors, his wife and another, who were to make the sons such allowances as they thought fit. Ananda says he was shown the draft will before execution and made certain corrections in it.

As regards the management of his estate during his own lifetime, Kali Narayan, under Ananda's advice, removed his sons from management and put in as manager Durga Sankar, whom Ananda had found for him, and appointed the pleader, Basanta, as the estate lawyer, it being understood that Ananda himself was to be consulted in matters of importance. Ananda says that this scheme was adopted after the sons had rejected an alternative scheme under which they were to be left in possession of part of the estate. Kali Narayan then directed that the sons were to live separately, each son receiving the apparently inadequate allowance of Rs. 6 a month, and gave notice that no credit was to be given to them. The defendants' case now is that, in taking these steps, Kali Narayan was a mere puppet in the hands of his son-in-law, Satish Chandra, and of Ananda, and

was incapable, owing to his condition, of exercising any volition of his own. If this had really been the case, it is strange that they acquiesced without protest in the drastic action taken against them, as they undoubtedly did. Their lame explanation is that they were acting on the advice of a pleader, who told them to keep quiet and do nothing beyond obtaining a medical certificate from an English doctor who had examined Kali Narayan as to the advisability of his going to Dacca for treatment a few days before he went there. The pleader has not been called, and all that is proved is that, after hearing of the registered will, they obtained this medical certificate, no doubt for the purpose of using it to resist probate. The certificate and the doctor's evidence will be considered later.

As to Ananda's part in these transactions, great as was his influence, it was perhaps not very wise of him, from his own point of view, as was proved by the event, to interfere in this way in his old friend's affairs; but that a man of his position and experience should have interfered in this way without authority in the affairs of an imbecile dotard in the hope of corrupt gain, as suggested by the defence, is as improbable as that Kali Narayan's sons should have acquiesced in his doing so.

Their Lordships have already stated and will not repeat the circumstances under which the *bainapatra* came to be executed. The defendants now go so far as to assert that they never knew of any proposal to sell these properties till afterwards, although negotiations had been going on for months, the plaintiffs had been down to Bandar to see the manager, Durga Sankar, and inspect the properties with a view to purchase, and they had been publicly advertised for sale. It is further proved that the defendants were frequently at the parents' home in Dacca, and no doubt whilst "keeping quiet," knew perfectly all that was going on. As already stated, the *bainapatra* was witnessed by one of the defendants, Bhupati, whom it was sought at the trial to represent as a simpleton. The fact that the manager, Durga Sankar, was absent on account of a funeral ceremony in his family when the bargain was finally struck and the deed executed is of no consequence, as the previous negotiations had been with him, and the price was approved by Ananda, on whom Kali Narayan relied. Comment has also been made on the fact that the plaintiffs did not call Satish Chandra, the son-in-law, who was included in their list of witnesses. One of the executors of the will who was going to give evidence for the plaintiffs, had a conversation with Satish shortly before the trial, which left him under the impression that Satish thought the plaintiffs had a good case and would succeed. He would probably not have been sorry, having regard to the imputations which had been made against him. Nothing, however, was then said about his giving evidence himself. It was the interest of his wife's family to get out of the bargain, and he may have been reluctant actively to oppose them. The plaintiffs were probably wise in not calling him.

Witnesses have been asked if Kali Narayan could have understood all the terms of the *bainapatra*, but that was unnecessary. It was enough if he knew he was selling his property on terms approved by his protector Ananda by a document prepared by the estate lawyer. In India, as here, it is enough for the executant of a legal document to understand the nature of the transaction, leaving the details to his lawyer.

As to his state of mind at the time, the evidence of witnesses, which there is no reason to distrust, shows that during his stay in Dacca, though an infirm old man, he was not destitute of understanding, feeling or manners. The leading Indian doctor who attended him for rheumatism and heart disease says he saw him frequently, and noticed nothing wrong with his mind. When one of his daughters died, he felt it so deeply that he insisted on moving to another house. His wife had an apoplectic fit, and, when she had got over it, a choleraic attack. He was so grateful to the doctor who cured her that he insisted on giving him a dinner, and himself came down and observed the courtesies usual on such occasions. When there was an election of the Legislative Council he went to the voting place and recorded his vote. He inquired where the mark was to be made, and the polling officer saw nothing wrong with him. The defendants' story that at this time he was paralysed and unable to move is clearly disproved by this evidence. Lieut.-Col. Newman, who examined him subsequently for the purpose of these proceedings, on behalf of the defendants, says that he saw him on a few occasions when attending his wife, and that he seemed morose and scarcely spoke to him, but he was then in great trouble and there was the difference of language. There is no doubt he then suffered from time to time from severe attacks of angina pectoris, and it is not unlikely, that owing to their anxiety to help Kali Narayan himself and his family to escape from what they were told was an unconscionable bargain, there was much exaggeration in their evidence.

Their Lordships agree with the learned Judges that the evidence as to Kali Narayan's stay at Dacca goes to show that he was of sound mind when the *bainapatra* was executed, and that, as already shown, this conclusion is strongly supported by the defendants' own conduct down to the time when the present dispute arose.

They will now proceed to consider the medical evidence, on which the defendants mainly rely. In 1918, Dr. Sankar granted a certificate in support of an application for Kali Narayan's examination on commission in a suit in which he was plaintiff, on account of his state of health. The certificate states, among other things, that he was suffering from loss of memory, but does not suggest that he was unfit to give evidence. It is said, however, that his deposition shows that his mind was failing. The question in dispute was whether he had agreed himself to accept the defendant as a tenant. He denied that he had done



so, but admitted in cross-examination that his memory was bad, and the suit appears to have been compromised. In their Lordships' opinion, this proves nothing. What is much more important is that Dr. Sankar, who gave evidence for the plaintiffs on commission in April, 1922, was not prepared to say that Kali Narayan was incapable of managing his own affairs when he went to Dacca in December, 1919. He said he had seen him several times after granting the certificate—he could not say how often—whenever he went to the house. Questioned as to Kali Narayan's mental condition at this time, he said that all he could remember was that he was suffering from loss of memory and could not say if it had got worse. It was subsequently stated by Krishna Kumar, the principal defendant, in his cross-examination at the trial, that Dr. Sankar was Kali Narayan's medical attendant at this time and saw him twice a week and had also seen him in consultation with one of the leading doctors in Dacca who has not been called, so that he had every opportunity of judging whether Kali Narayan was then an imbecile dotard incapable of managing his own affairs. It should be added that Dr. Sankar was present at the examination in January, 1922, and confirmed the Civil Surgeon's conclusions.

Next comes Dr. Pringle, who, in November, 1919, examined Kali Narayan as to the advisability of his going to Dacca for treatment. On December 17th, after the execution of the will in Dacca, the defendants obtained a certificate from him to be used in resisting probate. Their Lordships attach little or no weight to this certificate or to Dr. Pringle's evidence, as he had not examined Kali Narayan as to his mental condition, and the statements in the certificate appear to have been based largely upon what he was told by the defendants.

Of much greater importance were the certificates and evidence of Lieut.-Col. Newman and of Lieut.-Col. MacKelvie, who succeeded him as Civil Surgeon of Dacca, both members of the Indian Medical Service. Their Lordships desire to make it clear at the outset that they see no reason to question either the truthfulness or the general competence of these officers.

It has been argued for the plaintiffs that Kali Narayan's condition may have got worse after the execution of the *bainapatra* on December 19th, 1920. There is less force in the suggestion as regards Colonel Newman's examination at the end of January, 1921, than as regards Colonel MacKelvie's examination in April, 1922. There is, however, a much more important factor detracting from the weight of their evidence, and that is the extent to which the medical history of the case, which must have influenced them very much, was derived from an unreliable and interested informant, Kali Narayan's grandson Sachindra, the fifth defendant, who was in practice at Narayangunje as a *kabiraj* or Hindu doctor. It appears from Colonel MacKelvie's notes that it was reported to him by Sachindra that Kali Narayan was

irritable, threw away food and plates, did not sleep, passed urine and fæces in bed, could not recognise sons and grandchildren; also threw cups and glasses and assaulted Sachindra, and also beat his wife. Colonel MacKelvie inserted in his certificate, at the request of the estate manager, a statement that he was satisfied that Kali Narayan had not been shamming in his answers, to meet any suggestion from the plaintiffs' side that he was making himself out to be more stupid than he really was, in order to get out of the contract. Cross-examined as to this, he explained that he had come to the conclusion that Kali Narayan was suffering from a definite form of insanity, senile dementia, which barred shamming, and he admitted that the plate-throwing, wife-beating and like things reported to him were considered by him in coming to the conclusion that Kali Narayan was suffering from senile dementia, and that they were some of the important features in the case. This they undoubtedly were, if true, such conduct being among the signs of advanced senile dementia given in the text-books. The witnesses who speak to them are the son, Krishna Kumar, and a servant of the estate, whose evidence in other parts of the case is clearly unworthy of credit. On the other hand, Dr. K. B. Narayan, Civil Surgeon of Tipperah, who examined Kali Narayan for the plaintiffs a few days earlier, and recorded his questions and answers, and had not this misleading history of the case before him, came to the conclusion that Kali Narayan had made up his mind to say "I do not recollect" to certain questions which mostly concerned his property and its management, and that his memory was not so bad as he made it out to be. Colonel Newman's notes are not in evidence, and it is not possible to say what Sachindra told him, but the certificate itself shows that he was improperly informed that Kali Narayan had without the knowledge of his heirs executed a contract to sell property at a price much below its market value, which was calculated to mislead him.

The two learned Judges of the Calcutta High Court, who from their intimate acquaintance with Hindu modes of life are in a better position than their Lordships to draw the proper inferences as to some matters of conduct arising in the case, have given forcible reasons in separate but concurring judgments for holding it proved by reliable evidence and by inferences arising from the conduct of the defendants themselves that Kali Narayan at the time he executed the *bainapatra* was not an imbecile dotard incapable of sufficiently understanding what he was doing, and their Lordships are not prepared to say they were wrong in acting upon this evidence rather than on medical opinion possibly influenced by all sorts of unproved allegations going to show that he could not have at the time in question been sufficiently able to understand what he was doing. In these circumstances, their Lordships are unable to differ from the conclusion of the learned Judges that the defendants have failed to establish the main defence they set up.

As to the further defence that the contract itself is bad for uncertainty, they entirely agree with the learned Judges that there is no substance in it. They are therefore of opinion that the appeal fails and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

In the Privy Council.

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DELIVERED BY SIR JOHN WALLIS.

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