Deep Chandra vs Ruknuddaula Shamsher Jang Nawab ... on 11 May, 1949

Equivalent citations: AIR1951ALL93, AIR 1951 ALLAHABAD 93

JUDGMENT

Seth, J.

1. This Full Bench reference is the outcome of disagreement between the learned Judges composing the Bench, which heard an appeal against a decree of the Civil Judge of Muzaffarnagar at Meerut, dismissing a suit for the specific performance of a contract for the sale of land alleged to have been concluded on 7-2-1942. The learned Judges were agreed on some of the points requiring determination, but not on all. The points of disagreement are the subject-matter of the questions referred to us for decision.

2. The case appears to have assumed importance, not because of its own merit, but because of the learning and ability, with which it had been presented before this Court. When so much learning and ability is bestowed upon a case, which does not possess any extraordinary feature, attention is apt to be diverted to side issues, which have hardly any material bearing on the crucial points involved but which only tend to cloud the issue. In such a case, it is necessary not to lose sight of the essential features of the case and the crucial points involved in it.

3. I have had the advantage of reading the very full and learned judgment, which my brother Agarwala proposes to deliver. My learned brother has reproduced the questions referred to us for decision, has stated the facts and pleadings in the case in full detail, and has also exhaustively dealt with the authorities cited at the Bar. It is not necessary, therefore, to reproduce the questions again. I do not wish to make the judgment of this Bench cumbersome and for this reason propose to be as brief as possible, in what I have to say.

4. Sometime in the last part of the year 1941, Ruknuddaula Shamsher Jung Nawab Mohammad Sajjad Ali Khan (hereinafter referred to as 'the Nawab') entertained the idea of selling the property in suit. His manager, Sardar Akram Khan (hereinafter referred to as 'the manager') gave this information to a broker named Chhater Sen in December 1941. Chatter Sen found a likely purchaser in the plaintiff, Lala Deep Chand (hereinafter referred to as 'the plaintiff') and started negotiations, in which he acted as an intermediary. These negotiations were carried on in the month of January and the first week of the month of February 1942. At first, the plaintiff was not willing to purchase the entire property in suit, but the Nawab was also not willing to sell a portion. Later, the plaintiff became willing to purchase the whole.

5. On 31-1-1942, the plaintiff told Chatter Sen that he was willing to purchase the property at the price at which the Nawab was willing to sell it, namely, Rs. 62,000. He, however, desired certain steps to be taken to avoid the sale being pre-empted. He proposed an exchange of land and execution of a thekanama of the property, to be sold, in favour of some nominee of his, before the sale took place. The object of the exchange was to make him a co-sharer in the property to be sold, to enable him to successfully resist a claim for pre-emption. The object of the thekanama was to dissuade likely pre-emptors from enforcing their claim by creating a situation in which a successful pre-emptor might not be able to obtain actual possession of the property.

6. Chhater Sen arranged a meeting between the plaintiff and the manager and the two met on 6-2-1942. The manager was not agreeable to either of the two proposals. The plaintiff then put forward a third proposal, viz., that instead of the real price an inflated price might be entered in the sale-deed, to ward off preemption. The manager replied that the proposal might be put to the Nawab himself. The plaintiff then desired to pay to the manager Rs. 5,000 by way of earnest. The manager did not accept it and said that it would be better if it were offered to the Nawab himself. He, however, suggested that Rs. 10,000 and not Rs. 5,000 only, be offered as earnest money.

7. The same night the plaintiff sent Chhater Sen and a lawyer, Babu Daya Shankar, from. Muzaffarnagar to the Nawab at Karnal, with his proposal or offer to purchase and two cheques for Rs. 5,000 each, to be handed over to the Nawab as earnest money. They were asked by the plaintiff to propose that an inflated price might be inserted in the sale deed to be executed. It was alleged by the plaintiff, but denied by the defendants that they carried a letter also from the manager to the Nawab. It has not been found necessary to ascertain the truth of this allegation, because nothing turns upon it. It may, however, be noticed that it is evident from the statements of Chhater Sen and Daya Shankar that neither of the two was authorised by the plaintiff to enter into a contract on his behalf or to assent to a variation of his proposal. They were mere messengers of the plaintiff's proposal and the carriers of two cheques. They were commissioned only to communicate the proposal and to hand over the cheques and obtain a receipt, if the proposal was accepted.

8. They met the Nawab on 7th February, and had a conversation with him. The Nawab was agreeable to sell the property for Rs. 62,000 but was not immediately agreeable to accept the proposal for the insertion of an inflated price in the sale-deed. He said that he would leave it to the option of the manager. The Nawab left both the matters to the option of the manager, viz., (1) whether an inflated price should at all be entered in the sale-deed and (2) by what amount the price should be inflated. Inasmuch as the matter relating to the inflation of the price alone had remained to be settled, the Nawab was requested to accept the cheques for the earnest money and to grant a receipt. The Nawab accepted the cheques and gave a receipt for them, which is dated 7-2-1942, the day on which the cheques were handed over, and which has been marked as 'EX. 35-G' in this case.

9. On their return from Karnal Chhater Sen and Daya Shankar communicated to the plaintiff on 8-2-1942, all that had transpired at the meeting with the Nawab.

10. The manager was then approached through Chhater Sen with the proposal for the insertion of an inflated price in the sale-deed. The manager refused to approve of it. This refusal was communicated

to the plaintiff sometime between 23rd February and 10th March 1942. While the drafts were being settled, a fresh controversy arose between the parties with regard to the insertion of a covenant of title in the sale deed. The plaintiff insisted that it should be stipulated in the sale-deed that if the property went out of the plaintiff's hands, the Nawab would be liable to return the sale consideration, while it was insisted on behalf of the Nawab that he (the Nawab) would not be liable for the return of the sale consideration in any event.

10a. These controversies were still pending when the Nawab made three transfers in quick, succession. He gave a permanent lease to the manager of a plot of land situate in the zamindari in suit on 27-3-1942; he gave a lease of three plots of land similarly situated, to Babu Dhani Ram, nephew and adopted son of his lawyer, Baru Mal, on 2-4-1942; and finally he sold the entire property in suit to Messrs. Durga Prasad and Miri Mal (hereinafter referred to as the subsequent purchasers) on 4-4-1942. These transfers hastened the suit for specific performance of contract which was instituted on 6-5-1942.

11. There is no dispute about these facts. I have taken them primarily from the deposition of the plaintiff and partly from the deposition of Chhater Sen, who is a witness for the plaintiff, in every sense of that expression, for it is evident from his deposition that he was partial to the plaintiff and was careful not to say anything that might go against him, (the plaintiff).

12. On these facts, it was contended in defence that the stage of negotiations was never crossed and that no contract was ever concluded between the parties. This was controverted on behalf of the plaintiff and it was further pleaded on his behalf that Ex. 35G is a record of a concluded contract and precludes the admission of any evidence to prove that there was no concluded contract between the parties. These contentions form the subject-matter of the first question referred to us for decision.

13. Question No. 1. During the course of arguments the question was analysed and broken into three parts, each part consisting of a distinct question : (i) Whether the receipt Ex. 35G is a record of a concluded contract? (ii) Whether, because of Ex. 35G, evidence is admissible to show that there was no concluded contract? and (iii) Whether the evidence produced in the case does not prove that a contract was concluded ? It will be convenient to refer to these three questions as the first, second and third questions respectively and to refer to the question formulated by the Bench as question No. 1 to avoid confusion.

14. The question contained in the first part is, by no means, unambiguous. It is capable of being understood as referring to the nature of the document, Ex. 35G, or as referring to the transactions evidenced by the document. In order to answer the question in the former sense, it has to be ascertained, whether Ex. 35G is a mere receipt or a memorandum. of an agreement also. In order to answer the question in the latter sense, it has to be found out whether the transaction which it purports to evidence is, in fact, a concluded contract. It appears, however, to have been addressed in the former sense, for the specific question relating to the existence of a concluded contract is contained in the third part. At the hearing also this question was so understood by the learned counsel for the parties and the arguments were addressed from the Bar on that understanding.

15. So understood, this first question is but a prelude to the second and possesses only an academic importance, as its decision either way does not affect the decision of the second question which, as between these two questions, is the crucial question requiring to be determined. I would, therefore, postpone the consideration of the first question for the time being and immediately take up the second question into consideration.

16. It was contended on behalf of the plaintiff that Ex. 35G is prima facie a record of a concluded contract, because it contains all Such terms as by themselves constitute a perfect agreement, capable of being enforced; and that, as such, it is the sole evidence to determine, whether or not contract was concluded between the plaintiff and the Nawab. It was next contended that any evidence, intended to show that no contract was concluded, other than the document (EX. 35G), is excluded by Section 91, Evidence Act, and further that evidence intended to show that any term was left unsettled is excluded by Section 92 of that Act. It was urged as a general proposition of law that, when a person is sued upon a writing signed by him, which writing purports to be a record of the terms of a contract, he is precluded from producing or relying upon evidence, other than the writing itself or its secondary evidence, where admissible, in disproof of the contract.

17. In my opinion, there is no substance in either of the contentions put forward by the learned counsel. The rule contained in Section 91, Evidence Act applies to the terms and not to the factum of a contract. It comes into operation only when the terms of a contract, or any other transaction mentioned in that section, have been reduced to writing. It makes the writing itself, or, where it is admissible, its secondary evidence, the sole evidence of those terms. Section 92 excludes evidence to contradict, vary, add to, or subtract from, those terms. The terms of a contract or any other transaction presuppose the existence of that contract or that transaction. Neither of the two sections contains anything which excludes evidence in proof of a contract, much less in disproof of it. This is plain from the language of the sections hemselves, and questions relating to admissibility of evidence have to be decided in this country, where the law of evidence has been codified, by a reference to the provisions of the Evidence Act only.

18. As already stated, the language of Section 91, leaves no room for doubt that evidence in disproof of the factum of a contract is not excluded. All doubts, that could possibly be entertained in this respect, have been laid at rest by the decision of their Lordships of the Judicial Committee in Tyagaraja Mudaliyar v. Vedathanni, 63 I. A. 126 : (A. I. R. (23) 1936 P. C. 70) wherein, after quoting Sections 91 and 92, Evidence Act, Sir John Wallis, who delivered the judgment of the Board, said :

> "....,...",.....In their Lordships' opinion, even if there were no proviso to either section, the result in the present case would be the same, because there is nothing in either section to exclude oral evidence that there was no agreement between the parties and therefore no contract."

Earlier, in that very judgment, Sir John Wallia observed :

> "When a contract has been reduced to the form of a document, Section 91 excludes oral evidence of the terms of the document by requiring those terms to be proved by

> the document itself unless otherwise expressly provided in the Act, and Section 92 excludes oral evidence for the purpose of contradicting, varying, adding to, or subtracting from, such terms. Section 92 only excludes oral evidence to vary the terms of the written contract, and has no reference to the question whether the parties had agreed to contract on the terms set forth in the document. The objection must therefore be based on Section 91 which only excludes oral evidence as to the terms of a written contract. Clearly under that section a defendant sued, as in the present case, upon a written contract purporting to be signed by him could not be precluded in disproof of such agreement from giving oral evidence. ....."

19. This authoritative interpretation of Sections 91 and 92 by their Lordships of the Judicial Committee, which is binding on all Courts in this country, renders it absolutely unnecessary to examine and discuss the Indian or English cases cited at the Bar, or to make an attempt to formulate propositions of law established by them. Whatever may have been held in those cases, we are bound to follow Tyagaraja v. Vedathanni, 63 I. A. 126 : (A. I. R. (23) 1936 P. C. 70). An examination of cases relating to the application of Section 92, Evidence Act, has been rendered unnecessary also because Mr. P.R. Das, who addressed us on behalf of the respondents, has conceded that he did not place any reliance on any proviso to Section 92, Evidence Act.

20. Tukaram v. Jaganath, A. I. R. (10) 1923 Bom. 236: (761. C. 215) and Harichand Mancharam v. Govind Luxman, 47 Bom. 335 : (A. I. R. (10) 1923 P. C. 47) may, however, be adverted to, because it is claimed for the Bombay case that it exactly covers the point and it is claimed for the decision of their Lordships of the Judicial Committee that it is in conflict with Tyagaraja's case, (63 I. A. 126 : A. I. R. (23) 1936 P. C. 70). There was no dispute in Tukaram's case, (A. I. R. (10) 1923 Bom. 236:76 I. C. 215) about the formation of a contract. It was an undisputed fact that a contract had been entered into and its terms reduced to writing. It was not contended that its operation was subject to the fulfilment of any condition precedent. The only question for decision was whether evidence was admissible to prove an alleged term of the contract embodying a condition subsequent according to which the contract was to cease to be operative on the happening of a certain contingency, such term having been left out from the writing. The case was considered only with reference to Section 92, Evidence Act, and it was held that where a writing is produced containing all the terms which would entitle it to be considered as a perfect agreement which could be enforced, parol evidence is inadmissible to alter or add to its terms unless it falls within one of the provisos of Section 92. This case is thus no authority for the proposition that in such a case evidence is not admissible to prove that a contract was never formed.

21. Harichand Mancharam v. Govind Luxman, 47 Bom. 335 : (A. I. R. (10) 1923 P. C. 47) has been fully discussed by my learned brother Agarwala. I deem it futile to discuss it again as I agree with his conclusion that the case has no application to the facts of the present case which is governed by the rule in Tyagaraja's case, (63 I. A. 126 : A. I. R. (23) 1936 P. C. 70).

22. I have thus arrived at the conclusion that Ex. 35G does not render inadmissible evidence intended to show that there was no concluded contract.

23. The facts necessary for the solution of the problem contained in the third question are almost undisputed and the rule of law which should determine whether they have resulted in the formation of a contract is short and simple. The facts have been set out herein before. The rule of law is deducible from the few opening sections of the Contract Act. It is very simple and may be briefly stated as, "A contract is formed by an absolute and unqualified acceptance of a proposal."

24. Whatever views may be entertained by eminent jurists on the question whether acceptance of an offer is the only way in which a contract may be formed, the theory of 'offer and acceptance' has received statutory recognition in this country, so that, every contract must originate in a proposal and every transaction to be recognised as a contract must, in its ultimate analysis, resolve itself into a proposal and its acceptance. For this reason, whenever a Court is called upon to decide whether a contract was formed, all that it has to do is to ascertain whether there was a proposal and, if so, was it accepted absolutely and without qualification.

25. It may appear at the first sight that such a simple rule should be simple in its application also. But that is not so, due to the complexity of human affairs, looseness of common speech and the difficulty of discovering that elusive element, which is known as 'the intention of the parties'.

26. My learned brother Agarwala has started the discussion of the third question by stating a general rule and three propositions of law subject to which the rule is to be applied. He has supported them by a number of authorities which include all the authorities cited at the Bar. I concur with my learned brother in his conclusions. It appears to me, however, that all these propositions are only illustrations of the application of the simple rule formulated above to varying circumstances. All the cases cited establish this proposition that, when it is a point in issue in a case, whether negotiations started, with the object of forming a contract, were still open to bargaining or had resulted in the formation of a contract, the decision should depend on the intention of the parties, to be ascertained from all the facts and circumstances of that particular case. It should, however, be borne in mind that in all cases, where the decision depends upon the construction of a particular document or upon the intention of the parties to be ascertained from the facts and circumstances of a particular case, a comparison of decided cases is apt to confuse rather than to illumine. I would, therefore, abstain from an attempt to seek light from decided cases and confine myself to the facts and circumstances of the present case.

27. In this case, the proposal was made by the plaintiff, through Chhater Sen and Daya Shankar on 7-2-1942. The plaintiff not only proposed to purchase the property for Rs. 62,000 but also proposed that an inflated price might be inserted in the sale deed, which was to be executed. The Nawab accepted the proposal in so far as it related to the purchase of the property but did not accept it, in so far as it related to the inflation of the price. He left that part to the option of the manager and when the matter was put to the manager he disapproved of it. It is thus evident that the only proposal made in this case was not accepted by the Nawab in its entirety. If, therefore, the insertion of an inflated price was a term of the proposal, no contract was formed because the proposal was not accepted without qualification. It has been mentioned about that neither Chhater Sen nor Daya Shankar had any authority to bind the plaintiff by any settlement. There is thus no possibility of a contract having been entered into at the meeting which took place on 7-2-1942, on terms other than

those contained in the proposal sent by the plaintiff through these persons. If the insertion of an inflated price was a term of the proposal sent by the plaintiff, Chhater Sen and Daya Shankar had no authority to give up that term and to conclude a contract without it.

28. It is the definite case of the plaintiff that the contract was concluded on 7-2-1942. It is, therefore, not permissible for the plaintiff to depart from his pleadings and to suggest that the contract was concluded on any subsequent date, if not on February 7. It was nevertheless suggested that the Nawab's acceptance of the proposal, after excluding the term about the inflation of the price, might be regarded as a counter-proposal by the Nawab and that a contract was formed when the plaintiff became willing to purchase the property without insertion of the inflated price in the sale deed. In my opinion, there is no substance in this suggestion, for there is no proof of plaintiff's acceptance of any such counter-proposal. The plaintiff's deposition is silent on this point, and I do not believe Chhater Sen, who is a thoroughly unreliable witness, when he says that the plaintiff had agreed that the price might not be inflated. It was contended by the learned counsel for the plaintiff that an agreement was arrived at with regard to the term for inflation also in this way, that the matter was left to the decision of the manager. It was pointed out that the term was left out when the manager refused to give his approval in accordance with this agreement. In my opinion, this argument is fallacious and the fallacy lies in the statement that it was agreed to leave the matter to the decision of the manager. As already stated above, Chhater Sen and Daya Shankar had no authority to enter into any agreement on behalf of the plaintiff and the plaintiff has nowhere stated that he ever gave his assent to any such agreement. The argument assumes that the plaintiff had consented to accept the decision of the manager about the insertion or exclusion of this term as binding upon him. There is no evidence in the case to justify such an assumption. To substantiate this contention, it was incumbent on the plaintiff to prove his consent to be bound by the decision of the manager. An ex post facto assent to the manager's decision, even if proved, could have no bearing on this contention. It could be relevant only to the contention discussed next before.

29. I have, thus, not the slightest doubt in my mind that if the insertion of an inflated price in the sale deed was a term of the proposal, the evidence does not establish the Existence of a concluded contract.

30. I would now turn to the vital question in this case, namely, whether the insertion of an inflated price was a term of the proposal. A proposal is a declaration by the proposer of his intention to be bound by an obligation if the offeree fulfills or undertakes to fulfil certain conditions. A 'term of the proposal', therefore, signifies a condition without the fulfilment of which the proposer is not willing to undertake the obligation. Whether a particular condition proposed amounts to a term of the proposal depends upon the intention of the proposer.

31. It was contended on behalf of the plaintiff that insertion of an inflated price was not a term of the proposal, and that it was a mere request or an expression of a desire as to the manner in which the transaction should go through and thus related not to the formation, of the contract but to the performance of it. On the other hand, it was contended on behalf of the respondents that the plaintiff was not willing to purchase the property without the insertion of this term in the sale deed and therefore it was an essential term of the proposal. This question is not free from difficulty. The

learned counsel for the plaintiff has relied on one set of facts favouring his contention and the learned counsel for the respondents has placed reliance on another set of facts in favour of his contention.

32. The following facts were relied on by the learned counsel for the plaintiff: (i) That the conduct of the Nawab shows that the insertion of an inflated price was not understood by him to be a term of the proposal. It is urged that, if the Nawab had so understood it, he would have relied on its non-acceptance as a reason for the non-completion of the contract It was pointed out that it has not been so relied upon either in the written statement or in the answers to the interrogatories or even in the letters which were sent on behalf of the Nawab to the plaintiff, in answer to the plaintiff's demand for the execution of the sale deed. It may be noticed, in this connection, that the appeal was contested mainly by the subsequent purchasers. It was argued on behalf of the respondents by Mr. P.R. Das alone who appeared for the subsequent purchasers only. No arguments were addressed to us on behalf of the Nawab. The conduct of the Nawab may be very relevant evidence against him. It is extremely doubtful if the conduct of the Nawab subsequent to 4-4-1942, the day on which he sold the property to the subsequent purchasers, is at all admissible in evidence against the subsequent purchasers. It was contended by Mr. Das that it is not at all an easy matter, on the facts of this case, to form an opinion as to whether a contract was concluded or not, that it is so difficult that the two learned Judges, who heard the first appeal, could not arrive at the same conclusion and that therefore no inference should be drawn against the respondents if the Nawab was under a misconception about the actual legal position. It is not possible for me to say that contentions of Mr. Das are devoid of merit. I also find that the Nawab has stated in his deposition that one of the conditions which had remained to be settled in connection with the completion of the contract was about the inflation of the amount. I do not attach much importance to the fact that the non-settlement of this term was not mentioned in the reply to certain specific questions contained in the interrogatories, (ii) That the postscript in the receipt, Ex. 35-G, clearly indicates that a contract had been concluded because no question of the cancellation of a contract could arise unless it had been formed, (iii) That the payment of earnest money itself shows that the contract was completed. It is pointed out that earnest money is never paid unless a contract has been arrived at, that the Nawab would not have received, the earnest money if he had not intended to conclude the bargain and that the plaintiff would not have allowed the Nawab to cash the cheques if he had not accepted the bargain as concluded. There seems to be force in this contention, (iv) That the plaintiff would not have entered into a transaction of exchange with a third person if he had not treated the negotiations about the insertion of an inflated price as at an end and that the conduct of the plaintiff is explicable only on the hypothesis that he regarded the contract as concluded. I am not much impressed by this argument, because the plaintiff knew very well that his proposal for the exchange of property with the Nawab as well as his proposal for a theka in favour of a nominee of his had both been rejected and the plaintiff may not have regarded an inflated price to be a sufficient safeguard. (v) That it is evident from its very nature that the insertion of an inflated price could not have been intended to be a term of the proposal for it is an undisputed matter that the price was sought to be inflated by about Rs. 10,000 or Rs. 15,000 and having regard to the value of the property in suit any likely pre-emptor could have been willing to purchase the property on payment of another ten or fifteen thousand rupees.

33. The following facts were relied on by the learned counsel for the respondents: (i) That the entire conduct of the plaintiff shows that he was anxious to avoid pre-emption and to resort to all kinds of subterfuges to attain this object and that therefore a term which had the effect of obstructing pre-emption in any degree whatsoever cannot be regarded otherwise than a serious term of the proposal. (ii) That it is evident from the plaintiff's own statement that he regarded the insertion of an inflated sale price as a term of the proposal, for he states:

> "But I sent to him a proposal for the inflation of price without expressing the actual amount of inflation."

It is further pointed out that the plaintiff nowhere says that he put forward this proposal merely as an indulgence to be granted by the Nawab. (iii) That the plaintiff continued to insist on the insertion of an inflated price even after it had been communicated to him that the manager had disapproved of this proposal. In this connection reliance was placed inter alia, on a letter sent by Chhater Sen to the Nawab on 23-3-1942 (EX. 35) and upon a draft of the sale deed, Ex. A-2 of the record, in which an inflated price has been inserted. This draft is admittedly in the handwriting of an employee of the plaintiff. There is dispute about the time when this draft was prepared. It is pointed out that according to Chhater Sen the first draft did not mention any price but left a blank at the place where the price was to be inserted and that therefore this could not be the first draft. It could not be even the second or the third draft because, according to Chhater Sen, the price specified in the second and third drafts was Rs. 62,000. The price mentioned in the draft under consideration is Rs. 85,000. It is further pointed out that Chhater Sen states that the second and third drafts were prepared near about 18th or 19th March 1942. It is then argued that the draft, Ex. A-2, must have been prepared after 18th or 19th March 1942, showing that even after those dates the plaintiff was insisting upon the insertion of an inflated price. In reply to this argument it has been suggested by the learned counsel for the plaintiff that Ex. A-2 may be the very first draft in which the space for the price was left blank and the price of Rs. 85,000 might have been subsequently interpolated at the instance of the respondents. It is significant that nobody has said that the price entered in the draft is in the handwriting of somebody other than the plaintiff's employee in whose handwriting it is admitted to be by the plaintiff. (iv) That the plaintiff has nowhere stated that he ever agreed to drop the proposal.

34. I have given these opposing facts very anxious consideration and it appears to me that when these two sets of opposing facts are put against each other on the scale the beam is inclined in favour of the respondents, but it is not so much inclined as to induce me to dissent from the unanimous opinion of my learned brothers Wanchoo and Agarwala. I, therefore, hold, though not without considerable hesitation, that the insertion of an inflated price was not a term of the proposal. Inasmuch as all other terms of the proposal were accepted by the Nawab on 7-2-1942, the result is that the contract sought to be enforced was formed between the parties on that date.

35. I will now take up the first question whose consideration I had postponed before discussing the second and the third questions. On the finding that a contract was concluded between the parties before the execution of receipt Ex. 35-G and having regard to the contents of the receipt, in particular the postscript contained therein, I am of the opinion that it was intended to serve as a

memorandum of the agreement arrived at between the parties and is a record of a concluded contract.

36. I, therefore, agree that question No. 1 should be answered in the manner proposed by my learned brother Agarwala.

37. Question No. 2.-- It appears to me that there can be only one answer to the question as formulated by the referring Bench, namely an answer in the negative, for I fail to discover how a vendor can, by his own conduct, deprive the purchaser of his right to enforce the contract by claiming its specific performance. It was realised, even at the Bar, that the question, as it stood, was not capable of argument, unless some thing more was read as implied in it, namely an insistence on the part of the purchaser to have an express warranty of title in the sale-deed.

38. Even so, there seems to be no reason why such an insistence on the part of the purchaser should be considered to be unjustified, for by so insisting the purchaser requires nothing more than to have it made explicit what, in any event, would be road in the sale deed as implied by law. Moreover, quite apart from Section 65(2). T. P. Act, the construction of which is not free from difficulty, a person who agrees to sell some property should be deemed to represent that he has a right to sell that property, so that every agreement to sell carries with it an implied warranty of title, in the absence of a contract to the contrary; and there can be nothing wrong in insisting upon that warranty of title being made explicit in the sale deed.

39. Assuming, however, that a purchaser should be content with an implied warranty of title and that he cannot compel the vendor to give an express warranty of title in the sale deed, the mere fact that the purchaser insists on having an express warranty of title does not constitute such a demand as to disentitle him from obtaining a decree for the specific performance of the contract. No machinery has been provided in India, as in England, for adjudicating upon the dispute regarding covenants to be inserted in a sale-deed. Therefore, if the Court, having cognizance of the suit for specific performance, comes to the conclusion that the insistence was not justified it should order a sale deed to be executed without such a covenant.

40. The arguments addressed to us ranged over a wide field. I do not propose to deal with all the questions discussed at the Bar, as it is not necessary to pronounce any opinion on them for the purpose of answering the question referred to us.

41. For the reasons indicated above, I agree that the question should be answered in the manner proposed by my learned brother Agarwala. I wish, however, to reserve my opinion on the point whether Section 55(2), T. P. Act, applies only to conveyances or to contracts for sale also. I would base my decision on the ground that, quite apart from Section 55(2), a person who agrees to sell some property represents, in the absence of anything to the contrary, that he is entitled to transfer that property and thus gives a warranty of title.

42. Agarwala J. The following questions have been referred to this Bench:

> "1) Whether Ex. 35G is a record of the terms of a validly concluded contract for the sale of land between the appellant and respondent 1 and precludes the respondents from showing that the appellant and respondent 1 could not agree as to one of the terms (namely, that relating to the entering of an enhanced price in the sale deed) and that as such no completed contract existed between them ?

Does the evidence show that there was in fact no completed contract between the appellant and respondent 1?

(2) If a contract for sale of land is concluded between a vendor and a purchaser without any express stipulation as to warranty of pood title and the vendor, before the conveyance is executed, expresses his inability to give such a warranty, should the Court in a suit to enforce such a contract, pass a decree for specific performance, even though it is unable to hold that the refusal by the vendor was mala fide and invented only as an excuse to back out of the transactions ?

Does the mere refusal on the part of respondent 1 to give such a warranty in the present case disentitle the appellant to a decree for specific performance ?"

43. The circumstances in which these questions came to be referred to this Bench may be shortly stated:

44. The appellant in the appeal, Lala Deep Chand, instituted a suit for the specific performance of a contract of sale alleged to have been entered into between him and respondent 1, Ruknuddaula Shamsher Jang Nawab Mohammad Sajjad Ali Khan, on 7-2-1942, whereby respondent 1 had agreed to sell to the plaintiff certain zemindari property situated in khewat No. 4/1 of Mahal Rustam Ali Khan in village Yusufpur, pargana Muzaffarnagar, comprising of 187 bighas and 15 biswas of land out of a total area of 189 bighas, 10 biswas and 15 biswansis for the consideration of a sum of Rs. 62,000. The defendants to the suit were six persons: (1) Ruknuddaula Shamsher Jang Nawab Mohammad Sajjad Ali Khan aforesaid, who will hereafter be referred to as 'the Nawab', (2) Lala Durga Prasad, and (3) Miri Mal, persons who had obtained a sale deed of the very same property from the Nawab on 4-4-1942, for an ostensible sale consideration of Rs. 58,000, (4) Sardar Mohammad Akram Khan, the Manager of the Nawab, who will hereafter be referred to as Akram Khan, who was alleged to have taken a lease of a portion of the land on 27-3-1942, (5) Babu Dhani Earn, adopted son of Babu Baru Singh who was alleged to have taken a lease of another portion of the disputed land on 2-4-1942, and (6) Babu Baru Singh, a Vakil.

45. In the plaint it was alleged that defendant 4, Akram Khan, was the Manager of the Estate of the Nawab; that in January 1942, negotiations started between the plaintiff and Akram Khan concerning the purchase of the property in suit and that ultimately an agreement for sale of the said property was effected with Akram Khan; that Akram Khan gave a letter addressed to the Nawab, and the plaintiff sent one Babu Daya Shanker, Vakil, and a broker, Chhater Sen, with the letter along with two cheques of Rs. 5,000 each to be paid to the Nawab by way of earnest money; that the Nawab accepted the said cheques on 7-2-1942, and executed a receipt in proof thereof, and also made a note in the receipt to the effect that the plaintiff would get a sale deed executed within three

months, otherwise the agreement would be deemed as cancelled. It was alleged in para. 4:

> "That, for fear of pre-emption, it was also agreed upon as per consultation with defendant 4, that a zaid raqam (enhanced amount) in place of Rs. 62,000 the sale consideration, should be put down in the sale deed."

It was further stated in the plaint that the Nawab cashed the cheques on 26-2-1942, that a draft was later on prepared, amendments were suggested in the draft from time to time; that the plaintiff obtained a deed of exchange from a third person on 16-8-1942, and got it registered on 18-3-1942 in respect of property situated in the same Mahal in which the land in dispute was situate in order to avoid a claim from a possible pre-emptor; that Akram Khan requested the plaintiff to give him a portion of the land in dispute for purposes of construction of a bungalow, but the plaintiff adopted an indifferent attitude, with the, result that Akram Khan became displeased; that later on defendants 2 and 3, Durga Prasad and Miri Mal, who had full knowledge of the plaintiff's agreement with the Nawab, in collusion with Akram Khan first got a lease executed in favour of Akram Khan on 27-3-1942, in respect of 1 bigha and 17 biswas of land out of the property that was to be sold to the plaintiff, and then got another lease executed on 2-4-1942, in respect of 1 bigha and 11 biswas of land at a very low rent of Rs. 2 per year, in the name of defendant 5, Dhani Earn, but really for the benefit of Babu Baru Singh, defendant 6, and that on 4-4-1942, the defendants Durga Prasad and Miri Mal got executed a sale deed in their favour of the property in suit for a consideration of Rs. 72,000, though only Rs. 58,000 were shown in the sale deed as the sale consideration; that in the sale deed executed in favour of Durga Prasad and Miri Mal it was fictitiously and falsely shown that an agreement of sale had been entered into between the Nawab and the vendees on 5-2-1942, and that an earnest money of Rs. 6,000 had been paid by them on that date; that in fact the contract of sale with Durga Prasad and Miri Mal was subsequent to that entered into with the plaintiff and they having knowledge of the plaintiff's agreement were bound by the agreement of sale in favour of the plaintiff; that on 10-4-1942, the plaintiff gave a notice to defendant 1, the Nawab, for completion of the sale deed, and that in reply thereto on 15-4-1942, Akram Khan sent a cheque for Rs. 9991 returning the earnest money paid to the Nawab on 7-2-1942, but that this cheque the plaintiff did not cash; that later, on 22-4-1942, the plaintiff gave to Akram Khan a notice, a copy of which was sent to the Nawab, and the plaintiff also sent separate notices to Durga Prasad and Miri Mal for the specific performance of the agreement of sale; that Akram Khan sent a false reply on 29-4-1942, and refused to comply with the plaintiff's demand. Hence the suit.

46. The relief claimed by the plaintiff was that in fulfilment of the contract of sale, dated 7-2-1942, the Nawab be ordered to get executed and registered the sale deed of the property and that the plaintiff be put in possession of the property as against all the defendants; in the alternative, if the plaintiff be not deemed entitled to obtain specific performance of the agreement of sale, a decree for Rs. 15,000 as compensation may be awarded to him on account of the non-fulfilment of the agreement of sale.

47. All the defendants filed written statements. The Nawab's defence was that Durga Prasad and Miri Mal applied to his Manager, Akram Khan, indicating their desire to purchase the property in suit on 24-11-1941 for Rs. 50,000; that the Nawab consented to this upon condition that they

enhanced the price offered by them by Rs. 8,000 and paid Rs. 6,000 as earnest money; that Chhater Sen broker, who was acting as plaintiff's agent, on the one hand lulled Durga Prasad and Miri Mal in the belief that if they did not make hurry about the sale they would get the property cheap, and, on the other hand, misrepresented to the Nawab's employees that Durga Prasad and Miri Mal were not ready to enhance the price; but that ultimately Chhater Sen's tactics were discovered and Durga Prasad and Miri Mal accepted all the terms of the Nawab and on 5-2-1942, deposited Rs. 6,000 as earnest money in the Nawab's treasury at Muzaffarnagar and obtained a receipt in respect thereto; that thereafter Chhater Sen went to the Nawab himself on 7-2-1942, at Karnal, where the Nawab used to live, without informing the Nawab's employees at Muzaffarnagar and falsely misrepresenting to him that he had come to see him after consulting his Manager, Akram Khan, offered Rs. 62,000 for the property in dispute, and under the influence of this misrepresentation the Nawab accepted the earnest money which Chhater Sen paid on behalf of the plaintiff and executed a receipt; that when he executed this receipt he was under the impression that Durga Prasad and Miri Mal did not want to take the sale and that Chhater Sen was making a higher offer, which may be accepted. At the same time the Nawab directed Chhater Sen to ascertain all the particulars from his Manager, Akram Khan, and settle all the terms and finish up everything in three months and that after the expiry of three months "the promise shall stand cancelled"; that on 9-2-1942, the Nawab came to know that defendants 2 and 3 had already deposited Rs. 6,000 by way of earnest money on 5-2-1942, in the Nawab's treasury at Muzaffarnagar and had obtained a receipt for it; that it was then that Chhater Sen's fraud came to light and the Nawab instructed his Manager, Akram Khan, that the plaintiff's offer being higher than that of Durga Prasad and Miri Mal, attempts should be made to persuade Durga Prasad and Miri Mal to take back their earnest money, but since Durga Prasad and Miri Mal did not agree to the cancellation of their contract the sale deed and the deed of exchange were executed in their favour and the earnest money advanced by Chhater Sen on behalf of the plaintiff was returned to the plaintiff; that the Nawab sold the property to Durga Prasad and Miri Mal for Rs. 58,000 and not Rs. 72,000 as alleged by the plaintiff; that later on Chhater Sen, on behalf of the plaintiff, had raised his offer to Rs. 72,000, but that it was not acceptable to the Nawab, and that, therefore, (a) the agreement of sale with defendants 2 and 3 being prior, the plaintiff could not maintain a suit for specific performance of his agreement, (b) there was no concluded contract between the Nawab and the plaintiff, (c) if the plaintiff's allegation that the plaintiff wanted to inflate the price in the sale deed be found to be true, which allegation the Nawab did not admit, then the agreement between the plaintiff and the Nawab was void, as opposed to public policy under Section 23, Contract Act, (d) the suit was bad for misjoinder of unnecessary parties and multifariousness of causes of action, (e) the plaintiff having received the cheque sent to him in return of his earnest money was not entitled to maintain the suit, and (f) the leases executed in favour of Akram Khan and Dhani Ram were valid and binding.

48. It will be observed that the Nawab did not admit the plaintiff's allegation that there was an agreement about inflation of the sale price and further that he did not state in the written statement as to what details or particulars remained to be settled after 7-2-1942, when the Nawab accepted Rs. 10,000 as earnest money in respect of the agreement of sale of the property in dispute for a sum of Rs. 62,000.

49. The written statement of defendants 2 and 3, Durga Prasad and Miri Mal, was a joint one and was on the same lines as that of the Nawab. They averred that they had offered to purchase the property for Rs. 50,000 but that the Nawab wanted Rs. 58,000; that they were willing to pay that sum, but could not pay the earnest money before 5-2-1942, on account of the fraudulent tactics of Chhater Sen and that when his tactics were discovered they paid a sum of Rs. 6,000 on 5-2-1942, in acceptance of the terms of the Nawab and got a sale deed executed in their favour on 4-4-1942. The other pleas were similar to the pleas of the Nawab.

50. The written statement of Akram Khan, defendant 4, was on the same lines as that of the Nawab. He averred that the lease executed in his favour on 27-3-1942, was valid.

51. In their written statements, defendants 5 and 6, Dhani r Ram and Baru Singh, averred that the lease was really executed in favour of defendant 5, Dhani Ram and was genuine and binding on the plaintiff and that defendant 5 had no knowledge of the agreement of sale with the plaintiff.

52. The learned Civil Judge framed several issues, of which the following are relevant for our purposes :

> "(1) Was there any agreement between the plaintiff and defendant 1 for the sale of the land in dispute prior to the transfers in favour of defendants 2 to 5 and can the plaintiff get it specifically enforced against the defendants ? What were the terms of that agreement ?
>
> (2) Had defendant 1 agreed to sell the land in dispute to defendants 2 and 3 before the agreement of sale with the plaintiff was made ? If so, how does it affect the suit ?
>
> (3) What was the correct sale consideration of the sale deed dated 4-4-1942 ?
>
> (4) Whether the agreement of sale in favour of the plaintiff was obtained under fraud as alleged by the defendants ?
>
> (7) Is the agreement between the plaintiff and defendant 1 void under Section 23, Contract Act, and as such unenforceable ?"

53. The learned Civil Judge did not attempt to clear up the defence about the contract not being concluded with the plaintiff under the powers conferred upon him under Order 10, Rule 2, Civil P. C. He discussed all these issues together, and came to the conclusion that : (1) there was no concluded contracb between the plaintiff and the Nawab, inasmuch as certain material terms were never finally settled, these terms being inflation of price in the sale deed and warranty of title to be given by the Nawab, (2) the Nawab had agreed to sell the land in dispute to defendants 2 and 3 before negotiations with the plaintiff were started, (3) the ostensible sale consideration of the deed dated 4-4-1942, in favour of defendants 2 and 3 was Rs. 58,000, and that, although there was evidence to justify a remote inference that the real consideration was Rs. 72,000 the evidence was not sufficient to prove the matter to the hilt, (4) the promise obtained by Chhater Sen, which led to

the execution of the receipt, Ex. 35G, on 7-2-1942, was obtained by misrepresentation and concealment of true facts, and (5) that the agreement, if any, between the plaintiff and the Nawab was void under Section 23, Contract Act, and as such was unenforceable. "It is unnecessary to mention his findings upon the other issues which he had framed. In the result he dismissed the suit, but ordered the parties to bear their own costs.

54. Against this decree the plaintiff came up in appeal to this Court. The appeal was heard by a Bench consisting of our brothers Harish Chandra and Kaul JJ. The learned Judges agreed that defendants 2 and 3, Durga Prasad and Miri Mal, were not bona fide purchasers; that there was no contract of sale with them prior to 7-2-1942, when, the receipt in favour of the plaintiff was executed; that the plaintiff's contract, if any, was not vitiated by fraud--this plea was given up by the defendants before the Bench in arguments --that there was no prior contract of leases executed in favour of defendants 4 and 5; that the sale consideration of the sale-deed executed in favour of defendants 2 and 3 was Rs. 72,000 and not Rs. 58,000; and that the term about warranty of title was not one of the term's left outstanding on 7-2-1942, but was a matter of dispute that cropped up at a later stage. The learned Judges, however, could not agree as to the following matters:(1) Whether there was a concluded contract which could be enforced--Harish Chandra J.'s view being that there was, while Kaul J. considered that inasmuch as the term about the inflation of the price in the sale deed was not settled there was no concluded contract. (2) Whether the receipt, Ex. 35G, dated 7-2-1942, was a record of a concluded contract --Harish Chandra J.'s view being that it was, while Kaul J. considered that it was not (3) Whether in view of the receipt, Ex. 35G, dated 7-2-1942, oral evidence was admissible to show that the parties could not agree as to one of the terms (namely, that relating to the entering of an enhanced price in the sale deed) and that as such no completed contract existed between them,--Harish Chandra J.'s view being that no evidence was admissible, while Kaul J. was of opinion that it was. (4) Whether the refusal of the Nawab to enter a warranty of title in the sale deed was a bona fide refusal or not,--Harish Chandra J. being of opinion that it was not bona fide while Kaul J. said that he could not hold that it was not bona fide. (5) Whether the refusal on the part of the Nawab to give a warranty of title in the sale deed disentitled the appellant to a decree for specific performance, -- Harish Chandra J. -- being of opinion that it did not disentitle the plaintiff, while Kaul J. held that it did.

55. In this state of affairs the questions referred to at the inception of this judgment were formulated by the learned Judges and the record was placed before the Hon'ble the Chief Justice for such orders as he may deem fit to pass. The Hon'ble the Chief Justice ordered that the questions be listed before this Bench for answers.

56. Question No. 1.--The first question formulated by the Bench consists of three parts : (i) Whether the receipt Ex. 35G is a record of a concluded contract ? (ii) Whether evidence is admissible to show that it is not a completed contract ? and (iii) If evidence is admissible, was there a completed contract in fact in the present case ?

57. Now the receipt, Exhibit 35G, is in the following terms:

> "Received this 7th of February 1942, a sum of Rs. 10,000 by two cheques Nos. 20006 and 20007 dated the 6th February 1942, on the Imperial Bank of India as earnest money out of Rs. 62,000 for the contract of sale of 187 bighas and 15 biswansis of land entered in the Khewat at No. 4/1, in Mahal Nawab Mohammad Rustam Ali Khan, mauza Yusufpur, from Lala Dip Chand, Rais of Muzaffarnagar, through Babu Chhater Sen and executed a receipt. 7th February 1942.
>
> It is further declared that the sale deed would be executed within three months and in default, the contract would be deemed cancelled.
>
> Signature of S. Ali.
>
> Signature of Sajjad Ali Khan."

The execution of this receipt was admitted by the Nawab in his statement on commission. On the face of it, the receipt speaks of a "contract of sale." It also gives details of the property about which the contract of sale was made:

> "187 bighas and 15 biswansis of land entered in the Khewat at No. 4/1 in Mahal Nawab Mohammad Rustam Ali Khan, Mauza Yusufpur."

It also tells us that the executant has received by way of 'earnest money' Rs. 10,000 by means of two cheques, earnest money being for the "contract of sale." It also tells us the total sale price, namely, Rs. 62,000, out of which Rs. 10,000 was the earnest money. It also tells from whom this earnest money was received--it was received from Lala Deep Chand, Rais of Muzaffarnagar, plaintiff, through Babu Chhater Sen. Then there is a postscript and there is a declaration by the Nawab that the sale deed would be executed within three months and that in default the "contract" would be deemed cancelled. In this postscript also a "contract" is spoken of.

58. Confining ourselves to the receipt alone, it is evident that the receipt tells us about a contract of sale and records the terms of that contract. Whether they were all the terms or part of the terms is a different question.

59. Ordinarily a receipt is not intended to be a record of the terms of a contract. It is intended to evidence the receipt of what it says has been received by the executant. But in some cases, no doubt a receipt may be a record of the terms of an agreement between the parties. It depends upon the intention of the parties and upon the fact whether any separate document has been executed. Where no separate document has been executed, a receipt may be intended to be a record of the terms agreed upon between the parties. The law does not prescribe any particular form for a record of the terms of an agreement.

60. In Evans v. Prothero, (1852) 42 E. R. 674 : (1 De G. M. & G. 572) there was a document in the following terms :

> "Received this 25th August 1927, of Mr. Jankin Richards now and before the sum of twentyone pounds being the amount of the purchase of three tenements sold by me adjoining the River Taaffa: received the contents. Witness John Swaine, Evan Richards."

This document was not originally properly stamped as a receipt. The Lord Chancellor held that the document possessed : "all the requisites to constitute it a valid evidence of an agreement," for it contained the names of the parties who were the buyer and the seller and it distinctly specified both the property and the consideration money for that property, and that, therefore, the document in question was receivable as evidence of an agreement. It is true that in the present case it was not the plaintiff's case in the plaint nor was it specifically stated in the statement made by him in Court that the contract was entered into by means of Ex. 35G. The plaintiff referred to it as a receipt both in the plaint and in his statement and not as a memorandum of agreement. It is further true that the plaintiff refers to an oral agreement (not mentioned in the document Ex. 35G) with regard to inflations of price in the sale deed, and it is further true that the receipt, EX. 35G, is described as a 'receipt' and not as a 'memorandum of agreement.' It is, however, to be seen from the contents of the document EX. 35G, whether it reduces to the form of a document the terms of the contract between the parties.

61. As I have observed above the document does mention that there was a contract of sale between the parties and it does mention certain terms of that contract. The postscript mentioning the time within which the sale deed was to be executed is significant. Normally a term relating to the time during which the sale deed was to be executed does not find a place in a pure receipt. The document, therefore, is more than a receipt and there can be no doubt that the postscript was added because it was intended that the agreement about the terms mentioned in the document should be evidenced by that document. The fact that it was described as a receipt in the document itself and that it is also called a receipt by the parties is, in my opinion, not of much value having regard to the contents of the document. The contents unmistakably show that the document was intended to be a record of certain terms of the agreement of sale. I use the word 'certain' advisedly, because at the moment I am not considering whether it is a record of all the terms or of some of the terms, and also at the moment I am not considering whether it is a record of a concluded agreement or of an agreement which is not concluded.

62. Now the defence case is that there was no concluded contract between the parties inasmuch as certain terms were not settled between the parties and were left outstanding without an agreement having been reached thereon at any time.

63. On behalf of the plaintiff it is urged that in view of the execution of the document, Ex. 35G, it was not open to the defendants to adduce oral evidence in order to show that there was no concluded contract or that some of the terms were left unsettled. In support of this argument reliance is placed upon the terms of Sections 91 and 92, Evidence Act, and upon certain authorities. Section 91 runs as follows: "When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all oases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such

contract, grant or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained." Section 92 is in the following terms:

> "When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:
>
> Proviso (1).--Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law. Proviso (2). --The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.
>
> Proviso (3).--The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.
>
> Proviso (4). --The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.
>
> Proviso (5). -Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, maybe proved;
>
> Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.
>
> Proviso (6). -Any fact may be proved which shows in what manner the language of a document is related to existing facts."

64. It will be observed that Section 92 comes into operation only when the terms of any contract grant or other disposition of property, as are mentioned in Section 91, have been proved according to that section; and Section 91 comes into operation only "when the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document."

Thus, in order that Sections 91 and 92 should operate it must be proved (1) that there was a contract, or a grant or other disposition of property, and (2) that the terms of such contract, grant or other disposition of property were reduced to the form of a document. If either of these conditions is not fulfilled, the application of these sections is not attracted. The defence plea being that there was no concluded contract between the parties, neither of these sections can be said to bar the defence from proving their plea by oral evidence.

65. In 'Fry on Specific Performance,' 5th Edn., para. 278, at p. 187, it is stated:

> "Parol evidence is admissible to show that, although there is what purports to be a signed agreement, the parties in truth never came to an agreement at all. The admission of evidence to show that does not contravene the rule of law that evidence is not admissible to vary the terms of an agreement in writing."

In support of this proposition Fry cites two cases; Pym v. Campbell, (1856) 6 El. & Bl. 370"' at p. 373 : (25 L. J. Q. B. 277) and Puttle v. Hornibrook, (1897) 1 Ch. 25 at pp. 30 and 31 : (66 L. J Ch. 144).

66. In Pym v. Campbell, (1856-6 El. & Bl. 370 : 25 L. J. Q. B. 277) there was an action for specific performance of an agreement of sale. The defence was that there was no concluded contract. At the trial the plaintiff produced and gave in evidence a paper of which the following is a copy:

> "500 pounds for a quarter share. 300 pounds for one-eighth, and 50 pounds to be paid to Mr. Sadler. No other shares to be sold without mutual consent for three months. London, 17th January 1854.
>
> One-eighth. R.J.R. Campbell. John Pym.
>
> One-eighth J.T. Mackenzie.
>
> One-eighth R.P. Pritohard.
>
> With reference to the above agreement and in consideration of the sum of five pounds paid me I engage, within two days from this date, to execute the legal documents, to the satisfaction of your solicitors, to complete your title to the respective interests against your names in my Crushing, Washing and Amalgamating Machine.
>
> John Pym.
>
> London, 17 January 1854."

67. The defence to the suit was that in the course of the negotiations with the plaintiff, they had got so far as to agree on the price at which the invention should be purchased if bought at all, and had appointed a meeting at which the plaintiff was to explain his invention to two engineers appointed

by the defendants, when, if they approved, the machine should be bought. Since one of the engineers appointed by the defendants did not approve, there was no bargain. It was held that oral evidence was admissible in support of the defendants' plea.

Erle, J.

observed:

> "The point made is that this is a written agreement, absolute on the face of it, and that evidence was admitted to shew it was conditional; and if that had been so it would have been wrong. But I am of opinion that the evidence shewed that in fact there was never any agreement at all. The production of a paper purporting to be an agreement by a party, with his signature attached, affords a strong presumption that it is his written agreement; and, if in fact he did sign the paper animo contrahendi, the terms contained in it are conclusive, and cannot be varied by parol evidence; but in the present case the defence begins one step earlier: the parties met and expressly etated to each other that, though for convenience they would then sign the memorandum of the terms, yet they were not to sign it as an agreement until Abernethie (one of the engineers) was consulted. I grant the risk that such a defence may be set up without ground; and I agree that a jury should therefore always look on such a defence with suspicion : but, if it be proved that in fact the paper was signed with the express intention that it should not be an agreement, the other party cannot fix it as an agreement upon those so signing. The distinction in point of law is that evidence to vary the terms, of an agreement in writing is not admissible, but evidence to shew that there is not an agreement at all is admissible."

68. In Pattle v. Hornibrook, (1897) 1 ch. D. 25 :(66 L. J. Ch. 144), the plaintiff, a spinster, having signed an agreement for the lease of a house to her by the defendant, the defendant subsequently signed it, and handed it to his solicitor with instructions not to part with it except on condition that the plaintiff obtained some responsible person to join in the lease--a condition which the plaintiff declined to fulfil. It was held that evidence was admissible to show that no agreement was come to between the parties, and that the true effect of the transaction was that the defendant declined to enter into an agreement on the terms of the written document, but at the. same time made a counter offer which was rejected, and that there was no agreement. Pym v. Campbell, (1856-6 El. & Bl. 370 : 25 L. J. Q. B. 277), (ubi supra) was followed.

69. In Pertap Chander v. Mohendranath, 17 Cal. 291: (16 I. A. 233 P. C.), a lease was executed containing a term that the defendants could be ejected in certain contingencies. The landlord sued for arrears of rent placing his claim upon the lease. It was in evidence that the term regarding khas possession was not intended to be acted upon, but was merely put in to keep the tenants subdued. Their Lordships of the Privy Council held that:

> "If there is any stipulation in the kabuliyat which the plaintiff told the tenants would not be enforced, they cannot be held to have assented to it, and the kabuliyat is not

> the real agreement between the parties, and the plaintiff cannot sue upon it."

70. In Tyagaraja Mudaliyar v. Vedathanni, 63 I. A. 126: (A. I. R. (23) 1936 P. C. 70), a Hindu widow had signed an agreement at the instance of her husband's brother three days after her husband's death stating therein that her husband and her husband's brother were members of an undivided Hindu family and that if she ever lived apart from her husband's brother she would be content to enjoy for her life the income of the lands mentioned in the deed, and that in consideration of this provision she relinquished her claim for maintenance. It was found that the income of the lands set apart for her was between Rs. 2,000 and RS. 2,500 only per year. The widow filed a suit for recovery of arrears of maintenance at the rate of Rs. 10,000 a year alleging that the said agreement was not intended to be acted upon and was merely taken by her husband's brother in order that it may serve as evidence of the undivided status of the family, and that the provision with regard to the maintenance was merely entered into, to strengthen the colour which was given to the document. It was contended by the defendants that the plaintiff could not be allowed to give evidence to show that the agreement was not the real agreement between the parties. Sir John Wallis, who delivered the judgment of the Board, after citing Sections 91 and 92, Evidence Act, observed as follows:

> "There being no proviso in either section making oral evidence to show that there was no agreement and therefore no contract, inadmissible, their Lordships will consider, in the first place, whether there is anything in the sections themselves to render it inadmissible, and, secondly, whether the terms of proviso 1 to Section 92 are not wide enough to make it admissible under that proviso.
>
> When a contract has been reduced to the form of a document, Section 91 excludes oral evidence of the terms of the document by requiring those terms to be proved by the document itself, unless otherwise expressly provided in the Act, and Section 92 excludes oral evidence" for the purpose of contradicting, varying, adding to, or subtracting from such terms. Section 92 only excludes oral evidence to vary the terms of the written contract, and has no reference to the question whether the parties had agreed to contract on the terms set forth in the document. The objection must therefore be based on Section 91, which only excludes oral evidence as to the terms of a written contract. Clearly, under that section, a defendant sued, as in the present case, upon a written contract purporting to be signed by him, could not be precluded in disproof of such agreement from giving oral evidence that his signature was a forgery. In their Lordships' opinion oral evidence in disproof of the agreement (1) that, as in Pym v. Campbell, (1856) 6 El. & Bl. 370 : (25 L. J. Q. B. 277), the signed document was not to operate as an agreement until a specified condition was fulfilled, or (2) that as in the present case, the document was never intended to operate as an agreement, but was brought into existence solely for the purpose of creating evidence of some other matter, stands exactly on the same footing as evidence that the defendant's signature was forged."

His Lordship then referred to Pym v. Campbell, (1856-6 El. & Bl. 370 : 25 L. J. Q. B. 277) and observed:

> "The Indian Legislature has thought well to give statutory effect to the decision in Pym v. Camvbell, (1856-6 El. & Bl. 370 : 25 L. J. Q. B. 277) in proviso 3 to Section 92 : the existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract .... may be proved:"

and after referring to Mottayappan v. Palani Goundan, 38 Mad. 226 : (A. I. R. (2) 1915 Mad. 855) where Benson and Sundara Ayyar JJ. had expressed the opinion that oral evidence to show that a document was never intended to operate according to its terms, but was brought into existence as in the case before their Lordships, solely for the purpose of creating evidence about some other matter was admissible under proviso 1 to Section 92: "any fact may be proved which should invalidate any document" stated:

> "This may well be so, but in their Lordships' opinion, even if there were no provisos to either section, the result in the present case would be the same, because there is nothing in either section to exclude oral evidence that there was no agreement between the parties and therefore no contract."

In the course of arguments in Tyagaraja Mudaliar's case, 63 I. A. 126: (A. I. R. (23) 1936 P. C. 70) counsel referred to a decision of this Court reported in Lachman Das v. Ram Prasad, 49 ALL. 680: (A. I. R. (14) 1927 ALL. 422). Their Lordships' apparently disapproved of that decision.

71. As against the above, learned counsel for the appellant strongly relied on Harichand Mancharam v. Govind Luxman, 47 Bom. 335 : (A. I. R. (10) 1923 P. c. 47). In that case there was a suit for specific performance of a contract of sale of immovable property. The agreement recited the terms agreed as conditions, and one of the conditions was that "the bargain paper in respect of the sale of the said immovable property shall be made through a Vakil within two days from this date."

The defence was that the document, was intended to be a provisional arrangement only conditioned to the preparation by a Vakil of a formal document evidencing the contract, and that there was no completed contract. At the trial the defendant attempted to tender some oral evidence to show what actually took place on the occasion when the parties entered into the agreement. The trial Judge refused to admit oral evidence. Mr. Ameer Ali delivering the judgment of the Board held that the trial Judge was right, under Section 92, Evidence Act, in rejecting the evidence. In the course of the judgment it was observed :

> "Whether an agreement is a completed bargain or merely a provisional arrangement depends on the intention of the parties as deducible from the language used by the parties when the negotiations take concrete shape."

This case therefore merely lays down that where a contract is alleged to be a provisional arrangement and not a completed contract on account of an express term in the written document itself to the effect that the contract was entered into subject to a formal document being prepared, then oral evidence is not admissible to show what actually took place on the occasion when the parties entered into the agreement as the matter, has to be decided upon the construction of the

document itself. But where the alleged term, which is alleged to make the agreement tentative is not to be found in the agreement, as in the cases of Pym v. Campbell, (1856-6 El. & Bl. 370 : 25 L. J. Q. B. 277) and of Tyagaraja, Mudaliyar, (63 I. A. 126 : A. I. R. (23) 1936 P. C. 70), then certainly oral evidence is admissible to prove that the agreement is not a concluded contract.

72. Thus where a document has been produced recording certain terms of a contract and the plea is that there was no concluded contract between the parties, a review of the authorities establishes the following propositions : (a) Where the contract was to be a binding contract only if a certain condition was fulfilled, e. g. approval of somebody, then the plea of no concluded contract amounts to a plea of the agreement being subject to a condition precedent as provided in proviso 3 to Section 92. Oral evidence is admissible : Pym v. Campbell, (1856) 6 El. & Bl. 370 : (25 L. J. Q. B. 277), Pattle v. Hornibrook, (1897) 1 ch. 25 : (66 L. J. Ch. 144) and Tyagaraja Mudaliyar v. Vedathanni, 63 I. A. 126 : (A. I. R. (23) 1936 P. C. 70). (b) Where the ostensible contract was not intended to be a contractual obligation at all, but was intended to serve some other purpose, then it may be either taken as falling under proviso 1 to Section 92, or as a plea to which Sections 91 and 92 have no application at all. Oral evidence is admissible: Tyagaraja Mudaliyar v. Vedathanni, (63 LA. 126: A.I.R. (23) 1936 P. C. 70) (ubi supra), (c) Where the contract is said to be subject to the preparation of a formal document, then if this condition is entered in the document itself oral evidence is not admissible. The matter is one of construction of the terms embodied in the document.

73. In the present case the plea of the defendants is that though some of the terms were settled there was one term, that relating to the inflation of price in the sale-deed, which was not settled, and, therefore, there was no concluded contract. This plea may be taken either to fall under proviso 3 to Section 92 as a plea to the effect that the agreed terms were to be binding only on condition that the remaining term about the inflation of price was agreed upon, or it may be taken to be a plea not covered by Section 92 at all, namely, that in the course of negotiations certain terms were settled while others were left outstanding with the result that there was no contract at all. In both cases oral evidence would be admissible in support of the plea. Thus there being no such condition precedent embodied in Ex. 35G the present case does not fall within the mischief of the rule deducible from Harichand Mancharam's case, (47 Bom. 835: A. I. R. (10) 1923 P. C. 47) but falls rather within the rule laid down in Tyagaraja Mudaliar's case, (63 I. A. 126 : A. I. R. (23) 1936 P. C. 70).

74. In my opinion, therefore, the document Ex. 35G does not preclude the respondents from showing that the appellant and respondent 1 could not agree as to one of the terms in the sale-deed and that as such no completed contract existed between them.

75. This leads us to a consideration of the evidence on the record to find whether there was in fact no completed contract between the appellant and respondent 1 in the present case.

76. Now, before we proceed to examine the evidence it is necessary to bear in mind certain principles of law which are well established.

77. The general rule is that in order to be a binding agreement or contract there ought to be an unqualified acceptance of all the proposals made by one party or the other, or in other words, that

the parties must be ad idem on all matters concerning the agreement. It is immaterial that some of the terms of the proposal or the counter proposal are important or unimportant, major or minor. If the proposal on even a minor term is not accepted, the parties cannot be said to be ad idem and there cannot be a concluded contract.

78. This general rule is to be understood in the light of three other propositions which are equally well established.

79. First, that the general rule cannot apply to a case in which there is an agreement in regard to the essential terms of a contract and nothing is said about the minor terms which are usually attached to such contracts by the practice of lawyers or usage of trade or implication of law. Such contracts are called 'open contracts' and the usual terms are implied therein. If there is no express agreement about these usual terms the contract cannot be said to be unconcluded.

80. Second, where all the terms of a contract are agreed upon, but the parties desire that the contract shall go through the form of a formal document, then the mere fact that there is no agreement upon the shape that the formal document should take will not render the agreement inconclusive. Where, however, parties expressly declare that the agreement is "subject to a formal contract" it has been held that these words indicate not merely the desire of the parties that the terms already agreed upon shall be put down in the shape of a formal document, but that they indicate something more, namely, that the parties will have further to make up their minds in regard to the minor terms of the contract and that the contract will not be deemed to be concluded till then. This is the effect of decided cases with regard to the implications of the special formula 'subject to a formal contract'.

81. Third, a proposal or a statement may be made only by way of a special request to bet acceded to by the other party or not at his will, and not intended to be taken as the foundation of the contract. In such a case merely because there was no agreement with regard to such a proposal or request it cannot be said that the agreement was not concluded.

82. The general rule follows from the provisions of Sections 2 and 7, Contract Act. The well known case of Winn v. Bull, (1878) 7 Ch. D. 29: (47 L. J. ch. 139) is authority for the general rule as well as the first two propositions mentioned above. In that case there was an agreement of lease which was expressly made 'subject to the preparation and approval of a formal contract'. Jessel M. R., observed as follows :

> "I am of opinion there is no contract. I take it the principle is clear. If in the case of a proposal for sale or lease of an estate two persons agree and say, 'we will have the terms put into form,' then all the terms being put into writing and agreed to, there is a contract.
>
> If two persons agree in writing that up to a certain point the terms shall be the terms of the contract, but that the minor terms shall be submitted to a solicitor, and shall be such as are approved of by him, then there is no contract, because all the terms have

not been settled."

Jessel M. R., further observed :

> "When you bargain for a lease simply, it is for an ordinary lease and nothing more, that is, a lease containing the usual covenants and nothing more ; but when the bargain is for a lease which is to be formally prepared, in general no solicitor would, unless actually bound by the contract, prepare a lease not containing other covenants besides, that is, covenants which are not comprised in or understood by the term 'usual covenants'. It is then only rational to suppose that when a man says there shall be a formal contract approved for a lease he means that more shall be put into the lease than the law generally allows." In Van Hatzfeldt Wildenburg v. Alexander, (1912) 1 Ch. 284: (81 L. J. ch. 184), Parker L. J. observed :
>
> "It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the law does not recognise a contract to enter into a contract, in the latter case there is a binding contract and the reference to the more formal document may be ignored." The matter has come up before the Privy Council in Indian cases and the same doctrine as was laid down by Lord Parker has been applied; vide Harichand Mancharam v. Govind Luxman Gokhle, 47 Bom. 338: (A.I.R. (10) 1923 P. C. 47), Hukum Chand v. Ban Bahadur Singh, 3 Pat. 625 : (A. I. R. (11) 1924 P. C. 156), Currimbhoy & Co. Ltd. v. Creet, 60 Cal. 980 at p. 985: (A. I. R. (20) 1933 P. C. 29) and Shankerlal Narayan Das v. New Mofussil Co. Ltd., 73 I. A. 98 at p. 107 : (A. I. R. (33) 1946 P. C. 97).

83. The matter has come up in this Court also before a Full (sic) Bench* in Deviprasad Srikrishna Prasad Ltd. v. Secretary of State, I. L. B. (1941) ALL. 741 at p. 756 : (A. I. R. (28) . 1941 ALL. 377) and the same view has been adopted. I may also refer to two cases of the Calcutta High Court in which the same view has been followed: Bijoya Kanta v. Kailash Chandra, 46 Cal. 771: (A. I. R. (6) 1919 Cal. 369) and Gopal Shreedhar v. Sashibhushan, 60 Cal. III : (A. I. R. (20) 1933 Cal. 109).

84. The third proposition, to my mind, is axiomatic. A proposal may consist of several parts. One part may form the basis of the contract without which the contract will not be taken by the party proposing and the other term may be just a mere request to be accepted by the other party or rejected at will. Where the essential terms of a contract are agreed upon between the parties, but one of the parties desires the other party to grant a special favour to the former and makes it clear expressly or impliedly, that even if the favour is not granted the contract will still remain binding, there can be nothing in law to prevent the contract being enforced even if the special request is disregarded by the other side. The distinction between a term of a contract and a mere re quest is

fine but real and the question in every case will have to be determined upon the intention of the parties.

85. Bearing these principles in mind, how do matters stand in the present case? That there was an agreement between the parties with regard to the property that was to be sold and the price for which it was to be sold is not disputed before us. Indeed, Ex. 35G, and the evidence of the parties amply establishes it. It is further agreed that the plaintiff made a proposal to the Nawab that the price to be shown in the sale-deed may be inflated. The plaintiff's case is that this proposal was, in the first place, a mere request to be granted or not to be granted by the Nawab and did not form the basic term of the contract without agreement on which the contract was not to be considered concluded; that in the second place, the term related to the mere form of the sale-deed and was merely a desire that the contract should take a certain form and a disagreement on such a term could not affect the conclusiveness of the contract ; that in the third place, there was, in fact, an agreement even about this term, inasmuch as the Nawab had agreed that the request should be granted if Akram Khan agreed to it, and since the matter was left to the sole arbitration of Akram Khan and he decided that the sale-deed should not show any inflation of price the matter was concluded and the term was to be left out : and that, in the fourth place, in any event this was a term which was intended solely for the benefit of the plaintiff and that he could waive it and enforce the contract without it.

86. On the other hand, the defendants' case is that the term relating to inflation of price was one of the essential terms of the contract, that it was left outstanding in the course of the negotiations, that no agreement could ever be reached upon it between the parties and, that, therefore, there was no concluded contract. They bring their case within the purview of the general rule mentioned above, and rely strongly on the case of Winn v. Bull, (1878-7 ch. D. 29: 47 L. J Ch. 139) (ubi supra).

87. Now, what was the intention of the parties in this case with regard to the proposal about inflation of price ? How did the parties understand it ? Did they understand it to be an integral part of the contract without which the contract was not to be entered into or completed, or did they take if to be an incidental matter not affecting the binding character of the agreement on the terms mentioned in the receipt Ex. 85-G ?

88. For the following reasons I have come to the conclusion that the plaintiff's contention is right and the defendants' contention is wrong.

89. In the first place the Nawab never mentioned in his written statement that the non-agreement about the proposal regarding inflation of price was the reason why the contract between the parties remained inconclusive. It will be remembered that the plaintiff mentioned this matter in para. 4 of the plaint. The plaintiff mentioned that there was an agreement between him and the Nawab that the price will be inflated subject to the approval of defendant 4. This clause was simply 'not admitted' by the Nawab. He did not admit even that there was any such proposal.

90. In the second place, in the interrogatories served upon the Nawab for his examination on commission by his own counsel no specific mention was made with regard to this matter. The only

interrogatories that can remotely refer to this matter are Nos. 9, 12 and 19.

Interrogatory No. 9 : Please state under what circumstances did you accept the sum of Rs. 10,000 by cheque given by L. Chatter Sen ?

Replied : L. Chatter Sen represented that he was sent by my agent, S. Akram Khan and he came to me on S. Akram Khan's suggestion. (No mention of inflation).

Interrogatory No. 12 : Under what circumstances was the earnest money so given returned to L. Deep Chand and through whom ?

Replied : It was returned through S. Akram Khan who suggested that Lala Durga Prasad's claim was a prior one and Lala Durga Prasad was not prepared to have back his money. S. Akram Khan informed me after having taken legal advice and I also sought legal advice to the effect that I would have to return back the extra money which I would get from Lala Deep Chand. (Again no suggestion that the earnest money was returned on account of the contract with the plaintiff not having been concluded as the term about inflation was not settled.) Interrogatory No. 19 : Did you direct Lala Chatter Sen to settle all the terms and conditions with Sardar Akram Khan or did you decide everything then and there in this connection yourself with Lala Chatter Sen?

Replied : Yes. I directed Lala Chatter Sen to settle all terms and conditions with Akram Khan. No. I did not settle any term or condition with Lala Chatter Sen.

Both the learned Judges who have referred the case are agreed that the terms about the property to be sold, the person to whom it was to be sold, and the price for which it was to be sold, namely, the terms mentioned in Ex. 35-G were in fact settled. That these terms were settled and were not left outstanding has not been challenged by the learned counsel for the respondents before us. The point, however, is that even here the Nawab did not state anything about the proposal regarding inflation of price. It was only in the questions that were put to the Nawab by counsel for defendants 2. and 3, Durga Prasad and Miri Mal, that he stated :

> "He (Lala Chatter Sen) had said that he had settled the transaction at Rs. 62,000 and that he had come to deposit money, as desired by my Manager, but the sale-deed would have to be executed for Rs. 72,000. I had raised an objection also and inquired of him why he had not brought the Manager with him. I further said that I was not prepared to get the inflated sum of Rs. 72,000 entered as long as I had no talk with my Manager and had not taken legal advice. On this, he assured me that, in the first instance, all the conditions would be settled to my satisfaction and, in case off failure of negotiations, he would take back his money. He requested me to keep the money with me for the time being."

In cross-examination the Nawab admitted :

> "..... Chatter Sen had also said at the same time that Rs. 72,000 would have to be noted in the sale-deed. But I had not agreed to it. This matter was also to be settled through the manager whether it (the sum of Rs. 72,000) should be entered or not ..... Had I received legal advice that I could keep Rs. 62,000 of Lala Deep Chand and that I would not have to shoulder any responsibility and that I would not have to refund any amount, I would have certainly kept the amount and got the sale deed executed in their favour ultimately as I had received their offer of Rs. 72,000 also through Chatter Sen."

This last statement leaves no doubt in one's mind that the Nawab's mind was not affected by the non-settlement of the proposal regarding inflation.

91. In the third place, prior to the institution of the suit neither before the execution of the sale deed in favour of defendants 2 and 3, nor after its execution did the Nawab ever put forward the plea that the contract with the plaintiff was not concluded, nor does it appeal that the plaintiff ever put forward this proposal in any other form but as a request to be granted by the Nawab at his pleasure or not at all.

92. Now, on 7-2-1942, Chatter Sen goes to the Nawab. All the terms which are essential in a contract of sale of land are settled and embodied in the document Ex. 35G. Even the term relating to the time during which the sale deed was to be completed is entered there in unmistakably pointing to the fact that all the terms that the parties considered to be material at the time were made a record of. The proposal regarding inflation of price is not mentioned in the document Ex. 35G at all. The receipt mentions a contract of sale as having been entered into between the parties and it also talks of its completion by the execution of a sale deed. All this shows that the parties never intended that non-agreement regarding the proposal of inflation of price was to affect the binding nature of the contract or was to affect its conclusiveness. The evidence on behalf of the plaintiff consists of three persons the plaintiff himself, Chatter Sen and Daya Shanker. On behalf of the defendants it consists of the statements of the Nawab and Akram Khan. Chatter Sen stated :

> "Deep Chand agreed to this but he also said that if it would be possible the consideration to be shown in the dead should be somewhat inflated from the actual consideration. Defendant 4 replied that he would not offer any opinion on it, and that it would be left to defendant 1. Lala Deep Chand then offered a cheque for Rs. 6,000 as earnest money to defendant 4. He said it would be better if it were offered to defendant 1 direct, and that instead of Rs. 5,000, Rs. 10,000 should be offered as earnest money. Defendant 4 was asked by the plaintiff to go along with him to defendant 1. Defendant 4 said it was not necessary for him to go and that the plaintiff could proceed to defendant 1 with a letter from defendant 4.
>
> He gave him a letter to defendant 1. I and Babu Daya Shanker Vakil went to Karnal to defendant 1 in the same night. Babu Daya Shanker presented the letter and two cheques for Rs. 5,000 each to defendant 1. Defendant 1 granted receipt Ex. 35G (of the Commissioner). The contract was completed and settled with defendant 1.

> Defendant 1 was asked to inflate the price in the sale deed. He replied that if upon legal advice defendant 4 considered that it could be done it will be done; but it would not affect the contract itself."

Babu Daya Shanker, an advocate practising at Muzaffarnagar, stated :

> "I went to defendant 1 to offer the two cheques and to obtain a receipt about the earnest money. I handed over the letter and the two cheques to defendant 1 and he gave me the receipt Ex. 35G (of the Commissioner). The contract was fully completed with defendant 1 and nothing else remained to be settled after the receipt had been given. I told defendant 1 that Lala Deep Chand desired me to convey to him that if the price were inflated in sale deed it would help him in warding off pre-emption. He did not express any opinion on it, and said that Akram Khan would see to it after taking proper legal advice."

Mr. Daya Shanker is an advocate of standing and there is absolutely no reason to disbelieve him.

93. The plaintiff in his statement stated :

> "I met defendant 4 in the afternoon of 6-2-1942. I explained my proposals to him, but he was unwilling to agree to these two proposals of mine (execution of a thekanama and a deed of exchange). I then suggested that the sale consideration in the sale deed should be inflated to ward off pre-emption. He said the matter may be put to defendant 1. I told defendant 4 that I agree to purchase the property for Rs. 62,000 and asked him to proceed to Karnal and obtain the signature of defendant 1 on the receipt for the earnest money. The earnest money was settled to be Rs. 10,000. Defendant 4 said that his going was not necessary and that he would give a letter which would serve the purpose. Defendant 4 then gave me a letter to defendant 1 saying that I agreed to pay Rs. 10,000 as earnest money and that a receipt may be granted. I had taken a cheque for Rs. 5,000 to defendant 4. I sent Babu Daya Shanker Vakil to Karnal with that letter and with two cheques for Rs. 10,000. Chatter Sen broker also went along with him. They went to Karnal in the night of 6-2-1942. They brought to me receipt Ex. 350 dated 7-2-1942, (marked by the Commissioner in this suit) which was granted by defendant 1. The contract was completed with defendant 1 on 7-2-1942, by this receipt."

94. It is true that the plaintiff did not in so many words say that this proposal regarding inflation of price was made as a mere request, but on reading his statement as a whole no doubt is left in my mind that this was the nature of the proposal and that he had left it to the pleasure of defendant 1 who again had left it to the decision of defendant 4 and that defendant 4 having refused to accept the proposal there was an end of the matter. It was never again insisted upon by the plaintiff. The defendant's statement, which has already been quoted, is very much in line with the statement of the plaintiff's witnesses :

> "But Chatter Sen had also said at the same time that Rs. 72,000 had to be noted in the sale deed if defendant 1 agreed to it. This matter was also to be settled through the manager whether Rs. 72,000 should be entered or not."

Defendant 1, therefore, is here clearly indicating that the matter relating to inflation was left to the discretion of defendant 4, implying that the matter was treated by the parties concerned as merely incidental and not affecting the agreement already arrived at.

95. Strong reliance has been placed by the respondents on a letter of Chatter Sen written by him to the Nawab on 23-3-1942. In this letter he pressed the Nawab to expedite the settlement of the draft of the sale deed and inserted the following sentence :

> "Besides this you must have thought over the matter about which I had spoken to you, i.e., entering Rupees 72,000, as the amount of consideration."

Here again in this letter Chatter Sen mentions this matter as one depending upon the will of the Nawab and does not mention it as a term without which the sale-deed would not be taken.

96. The Nawab replied to this letter by Ex. 42 in these terms :

> "Your letter to hand. I am going to Delhi tomorrow, owing to an urgent piece of business. I intend to go to Allahabad from there. On return from Allahabad I shall send a detailed reply to your letter. I am myself anxious but I have received no information from the manager as yet. Hence I am helpless."

There is not a word about inflation here. No further detailed reply as promised in this letter was ever sent.

97. Then without any notice to the plaintiff, the Nawab executed a sale-deed in favour of defendants 2 and 3 on 4-4-1942. When he heard of this, the plaintiff at once wrote to the Nawab on 9-4-1942, a letter in which he insisted upon the draft of the sale-deed being completed. He mentioned that he had heard a rumour that the Nawab had executed r sale-deed in respect of the property in favour of some one else and expressed his belief that the rumour may not be true.

98. What did the Nawab say to this in reply? Defendant 4, on behalf of the Nawab wrote to the plaintiff on 15-4-1942, a letter enclosing a cheque for Rs. 9,991 on account of the earnest money paid by the plaintiff to the Nawab. He simply stated that he was returning this amount-- made no mention as to why he was returning the amount and made no reply to the plaintiff's letter of 9th April. The plaintiff was not satisfied with this. Therefore, on 20-4-1942, he again wrote another letter, stating that he had received the letter of 15th April, enclosing a cheque for Rs. 9,991, but expressing his surprise as to how the Nawab could repudiate the agreement of sale and refuse to complete the conveyance as agreed upon and said that he would hold him responsible for the completion of the sale-deed at the stipulated price within the specified period of three months fixed in the original agreement.

99. Did the Nawab even now tell the plaintiff that there was no contract with him (the plaintiff), and that the plaintiff had been insisting upon the inflation of the price in the sale-deed and that the Nawab could not agree to it, and that, therefore, the matters had fallen through ? Nothing of the kind. Defendant 4 replied on behalf of the Nawab by a letter, dated 29-4-1942. In this letter he admitted that there was a promise relating to the execution of a sale-deed of the property of mauza Yusufpur, but added that this promise was obtained on misrepresentation, that the negotiations relating to the deed of exchange and sale-deed which had been carried on with Lala Durga Prasad and Miri Mal had come to an end. The reason why the sale-deed could not be executed in favour of the plaintiff was stated to be the fact that prior agreement had been entered into with Lala Durga Prasad and Miri Mal. There was not the slightest reference to non-completion of the agreement with the plaintiff on account of the proposal regarding inflation not having been agreed upon.

100. Thus, it appears that neither the plaintiff nor the Nawab considered the matter of inflation of price as a vital matter affecting the binding nature of the contract. Both of them thought that the agreement with the plaintiff was complete, the Nawab, however, putting forward the excuse that it could not be performed on account of prior agreement with defendants 2 and 3.

101. In this connexion Mr. P.R. Das on behalf of the respondents has invited our attention to Ex. A-2, a draft of a sale-deed sent by the plaintiff to the Nawab, in which the sale price is entered as Rs. 85,000. It has been argued that the plaintiff at one stage offered to purchase the property for Rs. 72,000 and that for that reason he submitted the draft of a sale-deed containing an ostensible sale price of Rs. 85,000. Defendant 4 stated that this draft was sent to him last of all. I am, however, not prepared to accept the statement of defendant 4 on this point. It appears that this document was filed at a very late stage of the case during the course of cross-examination of Chatter Sen. The plaintiff was re-called and he was shown this draft. He stated that the draft was in the handwriting of his karinda, but that he could not say if he got this draft prepared and sent to defendant 1. It was not put to him whether this draft was the last draft. It was only fair that this question should have been put to him. In the circumstances, having regard to the fact that the document was put in at a very late stage I do not think it would be fair that an inference against the plaintiff should be drawn.

102. An argument has been built upon the following statement of Chatter Sen :

> "The draft was at first prepared by Lala Deep Chand and given to me. I do not know who prepared that draft. In that draft the price was not entered. By this: 'I mean that till then it was not settled what sum was to be entered in the sale-deed as the price..... Thereafter one or two other drafts of sale-deeds were prepared, one on each side. I saw the two drafts and they differed only on the question of return of the sale consideration. In both the subsequent drafts the price was specified, as Rs. 62,000. These two drafts were of the end of March 1942 probably of 18th or 19th March 194-2."

It has been urged that since no price was entered in the first draft and the price entered in the second and third drafts was Rs. 62,000 the draft Ex. A 2 must have been the fourth draft or the last draft. But there is a fallacy in this argument. When Chatter Sen said that in the first draft price was

not entered he explained immediately what he meant by it. He said :

> "By this I mean that till then it was not settled what sum was to be entered in the sale deed as the price."

It is quite possible that the draft Ex. A-1 was the first draft in which the price of Rs. 85,000 was entered and in the later drafts only Rs. 72,000 was entered. I do not think that the defendants have succeeded in establishing that this draft Ex. A-2 was the last draft and that the plaintiff ever offered Rs. 72,000 for the property.

103. In the fourth place the payment of earnest money of Rs. 10,000 by the plaintiff and its acceptance by the Nawab is a significant fact though not conclusive. It shows that there was part performance of the contract offered by one party and accepted by the other. Part performance of a contract usually follows a concluded contract and not an inconclusive negotiation. If the plaintiff had intended that the proposal regarding inflation of price was one of the conditions of taking the contract then since Chatter Sen had left the matter at the sole discretion of defendant 4, the plaintiff would have at once stopped payment of the cheques if he did not agree to the action of Chatter Sen or questioned his authority in acting as he did. He did not do so. The cheques were cashed by the Nawab on 26-2-1942.

104. In the fifth place, the fact that the plaintiff proceeded to get a deed of exchange for the same Mahal in which the property was situated in order that the sale by the Nawab may not be liable to pre-emption, also shows that he was considering the contract with the Nawab as a concluded contract, and not depending upon the settlement of the proposal regarding inflation. The plaintiff states that defendant 4 had refused to enter the inflated price in the sale deed between 5th and 10th March 1942. The plaintiff took the deed of exchange on 16th March, and got it registered on 18th March. He would not have taken the trouble of getting this deed of exchange if he did not consider that his contract with the Nawab was a concluded one.

105. In the sixth place, the very nature of the proposal regarding inflation shows that it is hardly a term which would be considered by any party to affect the binding nature of the contract. The price was to be inflated at the most to Rs. 72,000. It is in evidence that the property in dispute was on the outskirts of the abadi of the town and fit for building purposes and that its value was much more than Rs. 85,000 even. The inflation of the price to Rs. 72,000 could not prevent pre-emption, as Rs. 72,000, (upon the findings of the learned Judges of the Bench of this Court) was actually paid by defendants 2 and 3 to the Nawab. Any pre-emptor would have been much too glad to have the property for Rs. 72,000. It hardly stands to reason that the plaintiff would let go the bargain simply because the Nawab could not agree to inflate the price by merely Rs. 10,000. The purchase of the property for Rs. 62,000 was obviously far more advantageous to the plaintiff than making the bargain dependent upon the Nawab's agreement about the inflation of the price. The plaintiff would, therefore, not think of making this term a basic term of the contract.

106. For all these reasons I am of opinion that the proposal regarding inflation of price was put forward by the plaintiff and was understood by defendant 1, as a request to be accepted or not by

defendant 1 or his agent, defendant 4. Its non-acceptance or non-settlement did not make the transaction an inconcluded one.

107. Again, the matter can be looked at from another aspect. According to the plaintiff's witnesses it was agreed on 7-2-1942, between Chatter Sen and the Nawab that the price was to be inflated in the sale deed or not to be inflated according as defendant 4 would decide. This would imply that there was an agreement even with regard to this term as between the plaintiff, through Chatter Sen, and defendant 1. Defendant 4 having rejected the proposal its rejection was in fulfilment of the agreement of 7-2-1942, and did not unsettle what had been settled on that date. There is no evidence that the plaintiff insisted upon the inclusion of this term after it had been rejected by defendant 4. In this view of the matter, it can be said that even the proposal with regard to the inflation had been agreed upon between the parties and that there was no inconclusiveness in the contract.

108. On behalf of the appellant, it has been further urged that the term relating to inflation related to the mere form of the sale deed, and the case, therefore, fell within the rule laid down by Lord Parker in Von Hatzfeldt; Wildenburg v. Alexander, (1912) 1 ch. 284 : (81 L. J. Ch. 184), and by their Lordships of the Privy Council in the cases already referred to. In my opinion it is not necessary to decide this aspect of the case. It is also not necessary to decide whether even if the term was not merely an incidental term, but was one of the essential terms of the contract it could be given up by the plaintiff because it was solely for his benefit.

109. Question No. 2 : The facts necessary to mention in order to answer question No. 2 are these : The plaintiff sent drafts of the proposed sale deed to defendant 4 in the month of March 1942. One of these drafts is printed in the paper book at p. 140. This draft contains the following clause :

> "If per chance any partner and co-sharer of me, the executant, come forward and set up any claim of ownership or interfere in the possession of the vendee. I, the executant, shall be liable for setting up the defence. The vendee shall apprise me, the executant, of it in writing. If on account of the possession aforesaid or any act of me, the executant, the entire property or a part thereof passes out of the possession and occupation of the said vendee or if the mutation of name is not effected and the vendee does not obtain actual possession, the vendee aforesaid shall, under such circumstances, be competent to recover the sale consideration with interest at the rate of Rs. 6 per cent, per annum from the person, and property sold and other properties of me, the executant."

This clause in the sale deed gives a warranty of title to the vendee as is contemplated in Sub-section (2) of Section 55, T. P. Act. It is the common case of the parties that the Nawab did not agree to give this warranty of title. It has been argued before us that in refusing to give this warranty of title the Nawab was not acting mala fide. In my view this question is not material for the decision of the question referred to us. As, however, there is a difference of opinion between the learned referring Judges I may say at once that it appears to me that the refusal of the Nawab was not bona fide.

110. It will be observed that the Nawab never grounded his breach of contract with the plaintiff upon the plaintiff's insistence in requiring the Nawab to insert a clause relating to warranty of title in the sale deed. There is no mention of it in the written statement. Thereafter the Nawab was examined on interrogatories and in answer to interrogatory No. 12, the only reason why he did not execute a sale deed in favour of the plaintiff mentioned by him was that Lala Durga Prasad's claim was a prior one. The Nawab did mention the question of liability for the refund of the amount as one of the questions that was left over to be decided on 7-2-1942. This statement, however, has been found by both the learned referring Judges to be untrue. On 7-2-1942, no question was raised regarding the liability for the refund of the amount, or, in other words, warranty of title. The Nawab did not give any reason why he refused to give this warranty of title, nor does Akram Khan throw any light upon it beyond saying that the Nawab was not agreeable to give warranty of title. The plaintiff has given a reason why the Nawab refused to inflate the price. He stated that Chatter Sen told him that defendant 4 did not agree to inflation as it involved legal difficulty and the insertion of an inflated price was likely to cause monetary loss to defendant 1, because a claim as against that property might prevail against defendant 1 by his brother as there was some apprehension of a dispute about partition affecting this property along with other property. Though this was given as a reason for not agreeing to the inflation of price, it may be taken as a reason advanced for not agreeing to a warranty of title also. But there is no suggestion on the record that there was any real apprehension in the mind of the Nawab. As I have stated already, the Nawab does not say so in his statement. I have no doubt that this ground was advanced as a mere pretext in order to get out of the contract somehow as the Nawab by that time had been in communication with defendants 2 and 3 who had offered him a higher price for the property.

111. The next question is whether the refusal of the Nawab to give a warranty of title was justified.

112. Now, Section 55(2), T. P. Act clearly embodies a warranty of title. It is now beyond question upon the authorities that this sub-section embodies an absolute warranty of title. Unless there is an agreement to the contrary every sale implies this warranty of title. In the present case it is admitted that there was no express agreement excluding the warranty of title. It, therefore, follows that the sale in the present case would imply the warranty of title. What has been argued before us by Mr. P.R. Das on behalf of the respondents is that though this warranty of title may be implied in the sale deed, if executed, the plaintiff had no right to have it expressly mentioned in the sale deed. According to him the plaintiff was not justified in insisting upon an express mention of the warranty of title. I fail to appreciate the force of this reasoning.

113. If the law says that a seller shall be deemed to give a warranty of title to the buyer there can possibly be no objection in making explicit what the law implies in a transaction In this view of the matter, it is unnecessary to determine whether this warranty of title is implied in the contract of sale also as it is admittedly implied in a sale deed.

114. In the present case the plaintiff seeks the execution of a sale deed and if he can get the sale deed executed in his favour whether warranty of title is expressly stated in it or not, he will get it. It is not a case of the plaintiff seeking damages on the ground that the defendant had failed to make good his warranty of title implied in the contract of sale in which case alone would the question be really

relevant whether warranty of title though implied in a conveyance is also implied in a contract of sale. As, however, the question has been argued before us I will express my opinion on the point.

115-117. To my mind the warranty of title embodied in Section 55(2), T. P. Act, attaches to and is implicit in every contract of sale, assuming, of course, there is no contract to the contrary. I arrive at this conclusion for two reasons: First, that the language of Section 55(2) is applicable both to a conveyance as well as to a contract of sale, and second, that even if the language applies to conveyances alone, in the very nature of things the warranty of title implied in a sale deed will be implied in a contract of sale also.

118. I will deal with these two aspects separately : Is the language of Section 55(2), confined merely to the stage when a sale deed has been executed? I think the language of Section 55(2), refers both to contracts of sale as well as to sale deeds. In the first place it will be observed that in the entire Section 55, the words 'buyer' and 'seller' are used as referring both to the stage when the sale deed has been executed and to the stage before the execution of the sale deed. Clauses (a) to (e) of Sub-section (1) of Section 55, refer to the liabilities of the seller. They are all liabilities which have to be performed before the sale deed is actually executed. Hence the words 'seller' and 'buyer' include both a person who has agreed to sell and agreed to buy, and a person who has actually sold and actually bought. In Sub-section (2) of Section 55, for the words 'seller' and 'buyer' we can substitute the words 'a person who has agreed to sell' and 'a person who has sold" and 'a person who has agreed to buy' and 'a person who has bought'. Similarly, the word 'sell' in the sub-section may also be replaced by the words 'agreement of sale' or 'conveyance of sale'. If we make these substitutions the section is perfectly intelligible.

119. It has been suggested that the words 'professes to transfer' in para, (1) of Sub-section (2) can properly be applied only to a case where a transfer deed has been already executed. This was the view taken by Sir Sadasiva Ayyar J., in Adikesavan Naidu v. Gurunatha Chetti, 40 Mad. 338 : (A. I. R. (5) 1918 Mad. 1315 F.B.). Sir Abdul Rahim J. in the same case took the oppsite view. Napier J. in the same case did not express any decided opinion. I respectfully agree with the view taken by Sir Abdul Rahim J.

120. To my mind, the expression 'professes to transfer' can be legitimately applied to a person who agrees to transfer. 'To profess' means 'to make open declaration of, to avow, to acknowledge, to confess, to own or admit, to make pretence to' : Websters Dictionary. When a man agrees to transfer he avows to transfer, he declares his intention to transfer, he makes a pretence of transferring.

121. It was urged that when a man agrees to transfer, he says he will transfer, whereas 'professes to transfer' speaks of the present tense. To my mind, both the present and the future are sometimes implied in a phrase like 'professes to transfer'. For instance, when a person agrees on a bet to run at the rate of ten miles an hour we can say of him that he professes to run at the rate of ten miles an hour. Or, let us take another instance : a man agrees to scale the Alps if he is paid £5000, we can say 'he professes to scale the Alps' on that condition.

122. In Jyoti Prasad v. H. V. Low & Co. Ltd., 57 Cal. 1189 : (A. I. R. (17) 1930 Cal. 561), Sir George Rankin expressed the opinion that this clause perhaps refers to executed sale deeds and not to mere contracts, because the third paragraph of the clause refers to a case when the sale deed has been already executed.

123. Paragraph 3 of Clause (2) undoubtedly refers to a case when the sale deed has already been executed because in that paragraph the benefit of the contract mentioned in the rule is said 'to be annexed and to go with the interest of the transferee.' The word 'transferee' is significant. You cannot use that word in respect of a person who has merely agreed to take the transfer. No interest in the property is created till the sale deed is actually executed. The third paragraph was enacted in order to make the contract regarding warranty of title run with the land so that it may be enforced by subsequent transferees of the property. But the fact that the third paragraph refers to the rights of a transferee after sale does not affect the question that the first paragraph annexed the right regarding warranty of title both to the contract of sale as well as to a conveyance of sale.

124. Sir Sadasiva Ayyar J.'s opinion has been expressly dissented from by Devadoss J. of the same Court in Kathamuthu Pillai v. Subramaniam Chettiar, A. I. R. (13) 1926 Mad. 569 : (94 I. C. 56l) where it was held that the covenants in Section 55, applied to contracts of sale as well as to conveyances of sale. The same view was held in the following cases : Arunachala Aiyar v. T. Ramasami Aiyar, 38 Mad. 1171: (A. I. R.(2) 1915 Mad. 742); Sri Ram v. Kidari Parshad Chhedi Lal, 6 Lah. 308: (A. I. R. (12) 1925 Lah. 48l) and Raghubir Saran Das v. Kunj Bebari Lal, I.L.R. 1942 ALL. 120 : (A.I.R. (29) 1942 ALL. 39).

125. Great reliance has been placed by Mr. P. R. Das on the Privy Council case reported in Bindeshri Prasad v. Jai Ram Gir, 9 ALL. 705 : (14 I. A. 173 P. C.), There was, in that case, an agreement to sell certain property. Nothing was mentioned about warranty of title, but the nature of the property and the circumstances in which it was agreed to be sold led the High Court to the conclusion that the seller had agreed to sell not the property but his right, title and interest in the property, whatever it was, or, in other words, that he had excluded the warranty of title by an implied agreement to the contrary. Counsel for the purchaser before the Privy Council admitted that his client was not entitled to the warranty of title. On this admission the Privy Council had no option but to come to the conclusion that the absolute warranty of title demanded by the purchaser could not be given to him and, that, therefore, he was not entitled to specific performance of the contract. Before the suit for specific performance was filed, there were certain letters exchanged between the buyer and the seller with regard to the exact scope of the warranty of title that was to be incorporated in the sale deed. The purchaser wanted absolute warranty of title. The seller objected to this, but was agreeable to give the following warranty :

> "Should any kind of dispute arise, whether now or hereafter on my part, or that of my heirs or assigns, in the property sold, I, the vendor, and my heirs will be responsible therefor."

It was with regard to this limited warranty restricted only to the actions of the vendor, his heirs or assigns and not extending to the actions of a stranger that the Privy Council observed :

> "The defendant appears to have thought that the plaintiff was entitled to this, but their Lordships are not prepared to hold that such a contract of sale as this gave the purchaser a right to insist on any formal covenants such as the practice of English lawyers has attached to an English contract of sale, if that is what was in the minds of the parties."

126. It will be remembered that the limited warranty of title which the defendant seller proposed to give to the plaintiff purchaser was on the lines of the warranty that was implied in English contracts of sale on account of the practice of English lawyers to insert such a restricted warranty in sale deeds. In the sentence quoted above, their Lordships have merely laid down that what is implied by the practice of English lawyers in English covenants of sale cannot be implied in India for the obvious reason that no such practice prevailed in India. The said observations of their Lordships cannot be interpreted to mean that their Lordships held that the absolute" warranty of title in Section 55(2), T. P. Act will not attach to contracts of sale and that a purchaser was not entitled to have the warranty of title expressly mentioned in the deed of conveyance.

127. Reliance has also been placed upon an observation of Sir D. F. Mulla in his commentary on the Transfer of Property Act at p. 294, Edn. 2. The learned author observed as follows :

> "Section 55(2) -- Covenant for title--This sub-section implies a covenant for title similar to that implied by Section 7, Conveyancing and Law of Property Act, 1861, now replaced by Section 76 and Schedule 2, Part I, Law of Property Act, 1925. But the covenant in the English Act is subject to the qualification which do not appear in Section 55(2). In a Calcutta case (referring to Jyotiprasad v. H. V. Low & Co., 57 Cal. 1189 : (A.I.R. (17) 1930 Cal. 561); Rankin C. J., observed that this clause contemplates a completed contract and corresponds to the covenant for title in an English conveyance. The Madras High Court has said that this sub-section applies to cases where the transaction has not progressed beyond the stage of contract (referring to Adikesavan v. Gurunatha, 40 Mad. 338: (A. I. R. (5) 1918 Mad. 1315 R. B.) (per Abdul Rahim J.) and the clause was referred to in a Lahore case while the transaction was still in the stage of contract (referring to Shri Ram v. Kidari Parshad Chhedi Lal, 6 Lah. 308: (A.I.R. (12) 1925 Lah. 481) but these cases it is submitted, are incorrect. Before the completion and in the absence of any express stipulation in the contract the buyer's right is to a title free from reasonable doubt."

Then the learned author gives the reasons for his view:

> "Under Section 25(b), Specific Relief Act a vendor cannot enforce specific performance unless he can give the buyer a title free from reasonable doubt. In Baku Bindeshri v. Mahant Jai Ram, 9 All. 705 : (14 I. A. 173 P. C.) the buyer sued for specific performance of a contract of sale as the seller had refused to give him a guarantee of good title, but the Privy Council dismissed the suit as the plainiff was not entitled to an absolute guarantee of title. "

So far as the case of Babu Bindeshri v. Mahant Jai Ram, (9. ALL. 705 : 141. A. 173 P. C.) is concerned I have already discussed it, and I am of opinion that it does not support the view expressed by Sir D. F. Mulla; so far as Section 25 (b), Specific Relief Act is concerned that also does not help the respondent. Section 25 (b), Specific Belief Act runs as follows :

> " A contract for the sale or letting of property, whether movable or immovable, cannot be specifically enforced in favour of a vendor or lessor : (a) ..... (b) who, though he entered into the contract believing, that he had a good title to the property, cannot, at the time fixed by the parties or by the Court for the completion of the sale or letting, give the purchaser or lessee a title free from reasonable doubt. "

This section merely lays down the circumstances in which the vendor or lessor is disentitled to specifically enforce the contract to sell or to let. It does not lay down that the vendor or lessor is entitled to enforce specific performance even though he refuses to give an absolute warranty of title.

128. Even if Section 55(2) referred to a conveyance and did not, in express language, refer to a contract of sale, I am of opinion that the contracts implied in a conveyance are implied in a contract of sale also, for, a sale-deed is nothing but the performance or execution of what was contracted. Unless there is a novation of the contract originally entered into (in which case the original contract does not stand but is replaced by different contract) the sale-deed being the execution or completion of the contract of sale must contain the same terms as have been contracted for. The two cannot differ in the scope of their terms. It follows, therefore, that what is implied by law in a conyeyance is implied by law in the contract also because the origin of the sale and of all its terms must be traced to the contract itself, and what comes to be entered in a sale-deed either because of practice or because of implication of law, must be deemed to be implied in the contract or in the words of Lord Eldon in Church v. Brown, (1808) 33 E. R. 752 : (15 Veg. Jun. 257) the contract must be deemed to carry in gremio in its bosom what would form part of the sale-deed. If this were not so great anomalies would occur. The contract which is implied by law under Section 55(2) can be excluded only by a ' contract to the contrary '. When is this 'contract to the contrary to be entered into? Is it to be entered into at the time of the execution of the sale-deed? Obviously not, because the purchaser may not agree. Then obviously it must be entered into at the time when the contract of sale was entered into. It follows that the exclusion of the warranty of title implied under Section 55(2) must be made only at the time of entering into the contract of sale. If the exclusion is to be made at that time the implied inclusion is also made at that time because the implied inclusion arises only when there is no exclusion and both must come into existence at the same time.

129. Again, seeing that Section 55 refers to a contract implied by law, it will be illogical to hold that the matter did not pertain to the. domain of contract and pertained only to the domain of conveyance. The history of the English law on this subject leads us to the same conclusion.

130. In ancient times, conveyances of land in England were principally made from a superior to an inferior, as from the great baron to his retainer, or from a father to his daughter on her marriage. The grantee became the tenant of the grantor; and if any consideration were given for the grant, it more frequently assumed the form of services or annual rent than the immediate payment of a large

sum of money. Under these circumstances it may readily be supposed that, if the grantor were ready to warrant the grantee quiet possession, the title of the former to make the grant would not be very strictly investigated; and this appears to have been the practice in ancient times, every charter or deed of feoffment usually ending with a clause of warranty, by which the feoffor agreed that he and his heirs would warrant, acquit, and for ever defend the feoffee and his heirs against all persons. Even if this warranty were not expressly inserted, still it would seem that the word give, used in a feoffment, had the effect of an implied warranty; but the force of such implied warranty was confined to the feoffor only, exclusive of his heirs, whenever a feoffment was made of lands to be holden of the chief lord of the fee. Under an express warranty the feoffor, and also his heirs, were found, not only to give up all claim to the lands themselves, but also to give to the feoffee or his heirs other lands of the same value, in case of the eviction of the feoffee or his heirs by any person having a prior title. But the right to bind the heir by warranty was found to confer on the ancestor too great a power and so Parliament restrained this power by several Acts; (Stat. 6 Edw. I, C. 3., Stat De donis, 13 Edw. I, C. 1) and the clause of warranty having been long discussed in modern conveyancing, its chief force and effect were removed by clauses of two statutes of 1833, passed at the recommendation of the Real Property Commissioners: (Stat. 3 and 4 will. IV, C. 27, Section 39; 3 and 4 Will. IV, C. 74, Section 14).

131. The old warranty of title was better suited to the transactions of the feudal times, in which it originated, than to modern dealings with land. In modern times when a transfer of land took the form of a sale for a sum of money paid down and representing the full value of the land, the vendor was bound : (1) to show good title to the land before completing the sale, and (2) to give a guarantee of compensation in case of his title afterwards proving to be defective. The duty to prove good title was satisfied by giving evidence of the exercise of acts of ownership by himself or his predecessor over the land sold for a certain number of years back, and by deducing from previous dispositions and devolution of the land a right in himself to the fee simple or other estate sold. Thus a vendor of land was bound to furnish at his own expense to the purchaser an abstract of his title to the property sold. In addition to this, the vendor of land was to give a guarantee of indemnity, in case the title should afterwards prove defective. This guarantee, however, did not follow the form of the old warranty, which bound the warrantor to give lands of equal value in default of maintaining his title, but it was contained in certain covenants for title, as they were termed, given by the party conveying the land. Formerly these covenants were five in number, and then they were reduced to four. The first covenant was that the vendor was seised in fee simple, the next, that he had good right to convey the lands, the third, that they shall be quietly enjoyed, the fourth, that they were free from incumbrances, and the last that the vendor and his heirs will make any further assurance for the conveyance of the premises which may reasonably be required. During the second quarter of the ninteenth century the first covenant went out of use, the second being evidently quite sufficient without it. Covenants for title varied in comprehensiveness, according to the circumstances of the case. A vendor was not bound to give absolute covenants for the title to the lands he agreed to sell, but was entitled to limit his responsibility to the acts of those who have been in possession since the last sale of the estate; so that if the land should have been purchased by his father, and so have descended to the vendor, or have been left to him by his father's will, covenants will extend only to the acts of his father and himself; but if the vendor should himself have purchased the lands he would covenant only as to his own acts. A mortgagor on the other hand always gave absolute

covenants for title; for those who lend money are accustomed to require every possible security for its repayment. When a sale was made by trustees, who had no beneficial interest in the property themselves, they merely covenanted that they had respectively done no act to encumber the premises. (See, Williams on Real Property, 24th Edn., pp. 716 to 734.)

132. Therefore, it was held that a contract of sale not only implied a covenant to show good title, but also the four or five covenants of title mentioned above. In the graphic language of Lord Elden already referred to above by me--

> "If a man covenants to sell a fee-simple estate free from all incumbrances, and says no more, it is clear, that covenant carries in gremio, and in the bosom of it, the right to proper covenants. Why ? because that sort of engagement has in all time been carried into execution in a form and mode, which alter most materially, substantially, and importantly, the effect of the mere conveyance."

133. It is, therefore, clear that the covenants of title were implied in agreements of sale in addition to the contract to show good title. By Section 7, Conveyancing and Law of Property Act, 1881, now replaced by Section 76 and Schedule 2, Part I, Law of Property Act, 1925, the usual covenants of title that were always written in a conveyance are now implied by law and hence their express mention in the conveyances has been rendered unnecessary. The language of Section 7, Conveyancing and Law of Property Act, 1881, and that of Section 76 and Schedule 2 of Part I, Law of Property Act, 1925, expressly and very clearly refers to the covenants of title being implied in conveyances, not in contracts, and yet who can say that the covenants that are now implied by law in conveyances have ceased to be implied in the contracts of sale as they used to be implied before 1882 ? Thus under the English law the implied covenants of conveyances as mentioned in the above enactments are most certainly implied in the contracts of sale even now, so also will they be deemed to be implied in Indian contracts of sale when we have a corresponding provision in Section 55(2), T. P. Act, even assuming for the sake of argument that the section refers to conveyances only.

134. My answers to the questions formulated are, therefore, as follows:

> Question 1.--Ex. 35-G is a record of the terms of a validly concluded contract for the sale of land between the appellant and respondent 1. It does not preclude the respondents from showing that the appellant and respondent 1 could not agree as to one of the terms (namely, that relating to the entering of an enhanced price in the sale deed) and that as such no completed contract existed between them. The evidence on the record does not show that there was in fact no completed contract between the appellant and respondent 1. On the other hand it shows that there was a completed contract.
>
> Question 2.--If a contract for sale of land is concluded between a vendor and a purchaser without any express stipulation as to the warranty of good title, and the vendor, before the conveyance is executed, expresses his inability to give such a warranty the Court in a suit to enforce such a contract, is entitled to pass a decree for

specific performance, even though it is unable to hold that the refusal by the vendor was mala fide and invented only as an excuse to back out of the transaction. The mere refusal on the part of respondent l to give such a warranty in the present case did not disentitle the appellant to a decree for specific performance.

Wanchoo, J.

135. I agree with my brother Agarwala J., and have nothing to add.

136. By the Court. -- The answers to the questions referred to this Bench are as given in the judgment of Agarwala J.

[Judgment of the Division Bench --Harish. Chandra and Agarwala JJ.] Harish Chandra, J.

137. As the Judges composing the Bench which originally heard this appeal were not agreed on certain points, two questions framed by them with respect to the points upon which they had differed were referred to a Full Bench. The Full Bench has returned its answers to those questions.

138. Mr. Pearey Lal Banerji and Mr. S.K. Katju, counsel for the parties, state that without prejudice to the parties' right of appeal to the Federal Court, they are agreed that the appeal may now be decided in terms of the order proposed by Harish Chandra J., one of the Judges constituting this Bench, who was also a member of the Bench which originally heard the appeal.

139. The appeal is accordingly allowed, the decree of the Court below is set aside and the appellant's suit is decreed in terms of relief (a) of the plaint with costs in both the Courts. The terms of the sale deed shall be as contained in the receipt, Ex. 35-G, and shall also be based upon the rights and liabilities of the seller and the buyer as laid down in Section 55, T. P. Act. The appellant shall pay a sum of Rs. 62,000 into Court within three months and on payment of such amount into Court, respondent 1 shall deliver a draft of the sale deed to the Court and after it has been approved by the Court, forthwith execute and. register a sale deed in favour of the appellant. The sale shall be unaffected by the sale deed standing in favour of respondents 2 and 3 and the leases standing in favour of respondents 4 and 5 and these transfers shall be void as against the appellant. On the execution of the sale deed the appellant will be entitled to be put in possession of the property in suit.

140. If respondent 1 neglects or refuses to obey the decree, the appellant will be entitled to get the sale deed executed and registered through Court.

141. On failure of the appellant to pay the said sum of Rs. 62,000 into Court within the period specified above his suit shall stand dismissed with costs in both the Courts.

142. The cross-objections of respondents 2 and 3 have already been dismissed with costs.

143. As the case is a very old one, the office will try and prepare the decree as expeditiously as possible.