Gostho Behari Sirkar vs Surs' Estates Ltd. on 12 May, 1960

Equivalent citations: AIR1960CAL752, AIR 1960 CALCUTTA 752, ILR (1961) 1 CAL 799

JUDGMENT

P.B. Mukharji, J.

1. This is a plaintiff's appeal from the judgment and decree of P. G. Mallick J. dismissing the plaintiff's suit for specific performance of an agreement to sell premises No. 168, Bowbazar Street, Calcutta, for a sum of Rs. 1,30,000/-.

2. The learned trial Judge dismissed the suit on the ground first that there was no concluded contract between the plaintiff and the defendant and secondly that the plaintiff as a purchaser was not acceptable to the defendant vendor. The appellant has attacked the judgment on both the grounds.

3. The case of the respective parties lies within a small compass. The plaintiff appellant's case is that on the 4th January, 1946, an agreement was concluded in Calcutta whereby the plaintiff agreed to buy and the defendant agreed to sell premises No. 168, Bowbazar Street, Calcutta, free from encumbrances and subject to the title being found good and marketable for the price of Rs. 1,30,000/-. The appellant's further case is that it was agreed that a formal document only "evidencing" the said agreement would be drawn up and executed between the parties. The plaintiff pleads that the defendant company wrongfully and unreasonably revoked the said agreement on the 7th January, 1946 and on the very same day agreed to sell the same premises to the appellant's trade rival. The appellant's case is that the property is very close to premises No. 167C, Bowbazar Street, which was purchased by the plaintiff and his brothers and was being made ready for the purpose of locating the Appellant's .

long standing business of jewellery Messrs. M. B. Sirkar and Sons, now carried on by the plaintiff and his brothers in another site nearby. The appellant wanted to purchase the property in suit for the said business,

4. The case of the defendant company is a denial of the fact that there was any agreement on the 4th January, 1946. The defendants' case is that there were only mere negotiations and that there never was any concluded agreement. The defendant admits the agreement of sale of the said premises on the 7th January 1946 with another person by the name of Kanchanlal Sirkar.

5. Neither the plaintiff nor the defendant gave evidence at the trial but their respective Solicitors, Subodh Kumar Sen and Nirmal Chandra Biswas gave evidence in Court. The petition and affidavits

of the interlocutory application made in the suit for injunction have, however, been marked as exhibits in this suit. These interlocutory papers include the petition of the plaintiff and his affidavit as well as the affidavit of his Solicitor, Subodh Kumar Sen along with the affidavits of Ram Chandra Sur, one of the principal officers of the defendant company, and its Solicitor, Nirmal Chandra Biswas. Although these petition and affidavits are exhibits and must be treated as evidence in the suit, it is unfortunate that neither the plaintiff nor the defendant was called at the trial so that their statements could be verified, checked and tested by cross-examination.

6. No formal Issue had been raised at the trial and the trial court proceeded on the grounds, I have mentioned above. The main issue on which the learned Judge dismissed the suit is the issue of concluded contract. It will be necessary, therefore, to examine the respective cases of the parties on this question of concluded contract in order to determine this issue.

7. A large part of the determination of this issue must depend on the interpretation and the effect of the correspondence exhibited in the suit. The correspondence requires close examination at some length. On the 20th December, 1945, the defendant's Solicitor gave a letter to a broker called Ahi Bhusan Majumdar to the following effect:

> "Dear Sir, Re :-- 168 Bowbazar Street.
>
> Under instructions from the owners of the above premises we hereby authorise you to negotiate for sale of the above premises at the price of Rupees One lac and Thirty thousand nett.
>
> This letter will remain in force upto 2 P. M. ot Saturday the 22nd December, 1945.
>
> Yours faithfully, Sd/- S. C. Biswas and Co."

8. On the 21st December, 1945 this broker apparently approached Messrs. B. N. Basu and Co. the Solicitors for the appellant who wrote to the defendant's Solicitor as follows :

> "Dear Sir.
>
> Re: 168, Bowbazar Street With reference to your letter of the 20th instant addressed to the broker Babu Ahi Bhusan Majumdar, on behalf of the owners of the above premises to negotiate for sale of the above premises one of our clients is willing to purchase the same free from incumbrances and the title thereof being found good and marketable, provided our client is satisfied with the area of the land and the total rent realised from the said premises.
>
> Please furnish us immediately the correct area of the land comprised in the said premises and the total rent realised from the above premises. On receipt of the above information we shall arrange to send the draft agreement for sale for approval."

9. It is noteworthy that the defendant's Solicitor's letter to the broker was an unqualified authority to negotiate for sale of the premises for the price of Rs. 1,30,000/-. There was no limitation or qualification with regard to the purchaser. The letter plainly indicates that anyone willing to pay Rs. 1,30,000/- for the said premises would be a good purchaser. The appellant's Solicitor's letter equally makes it clear that one of their clients was willing to purchase the said premises, but makes first the provision for good and marketable title which in any event would be implied having regard to the unqualified offer for sale through the broker in the letter addressed to the broker, secondly, for checking the area of the land and rents realised from the said premises, thirdly the letter of the 21st December of the appellant's Solicitor says that they would arrange to send the draft agreement for sale for approval on receipt of the correct area of the land and the total rent.

10. The defendant's Solicitor Messrs. S. C. Biswas and Co. acknowledge this letter by their reply of the 3rd January 1946. They accept the appellant's Solicitor's letter of the 2lst December, 1945, without any objection and qualification. In fact, they proceeded to comply with the request for information made in that letter. The letter of the 3rd January, 1946 reads as follows:

> "Dear Sir.
>
> Re : 168, Bowbazar Street.
>
> Yours of the 21st Ultimo.
>
> Enclosed please find herewith a list of the tenants with the respective rents paid by them. Two rooms are lying vacant.
>
> The area as appears from the relative conveyance in favour of the vendors is three Cottahs eleven Chittacks and five square feet, more or less :
>
> Please send us the relative draft agreement for sale for our approval latest by tomorrow as otherwise all negotiations herein will be treated as at an end."

11. The letter enclosed the list of tenants and the rent payable by each. In other words the letter complied with the appellant's Solicitor's request for information about the area of the land and the rents realised. Both these informations were supplied by the defendant's Solicitor's letter of the 3rd January, 1946.

12. A point is made here that in the penultimate paragraph of this letter of the 3rd January, 1946, the word "negotiations" is used to indicate that until the 3rd January, 1946 no concluded contract had been made. Whether a concluded contract has been made or not is a question of fact to be determined in each case by a consideration of all the relevant circumstances and facts and cannot be concluded by the parties 'or the Solicitors' description of the situation either as a contract or negotiation.

13. Immediately on the same day, i.e., 3/4th January, 1946, the appellant's Solicitors write to say that they have sent a copy of the letter to the appellant for verification of the particulars furnished by the letter under reply and write as follows:

"x x ' x x x We place it on record that you did not afford sufficient time to get the particulars verified and the proposal approved by our client. However, it was arranged with your Mr. Biswas over the phone that upon verification of the above particulars and the proposal approved by our client we shall send the draft agreement for sale for your approval on Saturday next the 5th instant.

In the meantime, please furnish us with the following particulars :

(1) Name of the vendors.

(2) Description of the property with boundary, holding number and the amount of revenue payable to the Collector of Calcutta."

14. The point about this letter is that the appellant's Solicitors accept the request made by the defendant's Solicitor to send the draft agreement for sale for approval by Saturday the 5th instead of the 4th, as suggested, although complaining about the shortness of time. With a view also to draft an agreement for sale, they called for the name of the vendor and description of the property which had to be included in the draft agreement for sale.

15. On the same day, the 4th January, 1946, the defendant's Solicitor replied pointing out that the time allowed under the letter to the broker had long expired and stated as follows:

"The further particulars asked for will be tilled up at the time of approval of the draft agreement.

Please note that if the agreement for sale does not reach our hands before 2 P.M. tomorrow, our client will treat all negotiations herein as at an end".

16. This is an extension certainly of time by the defendant's Solicitor for sending the draft agreement for sale. The particulars they agree to fill up at the time of the approval of the draft agreement. That seems to indicate that the contract to sell had been concluded and the approval of the draft agreement and the filling up of particulars were matters of detail. It is quite true that here again the word "negotiations" is used. But then whether at that stage it remained a negotiation or a concluded contract will depend not on the parties' description of the situation but on the true legal position at the time.

17. Pausing here for a moment, it is the appellant's contention that by this letter of the 4th January 1946, the contract to sell the above premises had been concluded. What remained was filling up of details and a draft agreement for sale only commemorative of the concluded contract or as is pleaded fn paragraph (1) of the plaint "evidencing" the agreement. At this point of time it was also apparent that there was a talk over the telephone by the respective solicitors. This is mentioned in

the letters quoted above. There is some dispute as to what were the exact talks during the telephonic conversation and it will be necessary to refer to the oral testimony of Subodh Kumar Sen and Nirmal Chandra Biswas on this point at an appropriate place.

18. What happens next is that the appellant's Solicitor on the 5th January, 1946 complies with the defendant's Solicitor's request of the 4th January 1946 and sends the draft agreement for sale for the defendant's Solicitors' approval. On the 7th January, 1946, the defendant's Solicitors write to the appellant's Solicitors as follows:

> "Dear Sirs, Re :- 168, Bowbazar Street.
>
> Yours with the draft agreement.
>
> As our clients are not willing to sell the above property to your client, the draft is herewith returned."

19. This is a significant letter. This letter does not say that the negotiations are at an end. This letter says that the defendant is not willing to sell the above property to the plaintiff. That seems to assume that without knowing the name of the plaintiff, the defendant was willing to sell the above property on the terms already agreed upon. The refusal to sell is put there only on the ground that the defendant would not sell to the particular plaintiff and not on the ground that the draft agreement for sale contains any terms not agreed upon, a case attempted to be made in the evidence at the trial. I am sure that if the draft agreement for sale contained not merely the name of the objectionable plaintiff but also other clauses not agreed to by the parties, then at the time of returning the draft agreement reference would also have been made to that effect that the agreement purported to incorporate terms not agreed upon.

20. Before dealing with the questions of law, one more fact has to be discussed. The learned trial Judge preferred the evidence of Nirmal Chandra Biswas to the evidence of Subodh Kumar Sen. In paragraph (5) of his affidavit affirmed on the 12th March, 1946, Nirmal Chandra Biswas in the interlocutory application for injunction had stated that "on the 4th January, 1946, Mr. S. K. Sen of Messrs. B. N. Basu and Co. called me over the telephone and proposed to send the draft agreement by the 5th January 1946 as their client could not verify the particulars supplied and approve the proposal to which I agreed."

Nirmal Chandra Biswas does not say in his affidavit that the draft agreement for sale contained other terms which were not agreed to between the parties or were not acceptable by the defendant. In answer to that statement Subodh Kumar Sen in paragraph 7 of his affidavit affirmed on the 15th March, 1946 stated:

> "On receipt of instruction from the plaintiff to accept the particulars furnished by Messrs. S, C, Biswas and Co. as correct over the phone on the 4th January 1946 and intimated to him that the plaintiff had accepted the particulars furnished by him on behalf of the vendors and in the course of the telephonic conversations above

> mentioned, the terms of the draft agreement for sale to be entered into were discussed between us and ultimately settled and the draft agreement for sale referred to in paragraph 11 of the Affidavit-in-opposition contains the settled terms."

21. The learned Judge has not accepted this statement of Subodh Kumar Sen in the affidavit oh the ground that Nirmal Chandra Biswas brought his Day Book in court, but the Day Book of Subodh Kumar Sen said to be in the custody of Messrs. B. N. Basu and Co. has not been produced and that no entry in support of the evidence of Subodh Kumar Sen has been tendered. The Day Book which was produced by Nirmal Chandra Biswas was a Day Book of no entry on this particular point, so that it advanced neither his case nor disproved the case of Subodh Kumar Sen. In fact the day Book of Nirmal Chandra Biswas did not even contain any reference even to the admitted telephonic conversation on that date, the 4th January, 1946. All the circumstantial factors appear in my view to support the statement of Subodh Kumar Sen and that he was right about the version of the telephone conversation that he said in his affidavit of the 15th March, 1946 quoted above which was almost within two months of the date of the conversation. There are two outstanding circumstances which compel me to accept the version of Subodh Kumar Sen in preference to that of Nirmal Chandra Biswas and to hold that the learned Judge's finding on that point is erroneous. They are :

> (1) The draft agreement for sale was admittedly received by Nirmal Chandra Biswas. It was admittedly returned by him and only on the ground that the plaintiff as a particular purchaser was not acceptable to the vendor. I cannot imagine that if those terms contained something which were not agreed to between the solicitors in their telephonic conversation, then Nirmal Chandra Biswas would remain silent on other terms in the draft which according to him were not acceptable and make his client's case more vulnerable On the point of concluded contract by risking reliance only on the personality of the plaintiff as a sufficient objection of the defendant not to sell the property.

> (2) The evidence of Nirmal Chandra Biswas on this point, I find, is difficult to accept, at least in preference to that of Subodh Kumar Sen. It will be necessary to analyse some of the relevant questions and the most significant answers given by Nirmal Chandra Biswas. In answer to Court's question 15 Nirmal Chandra Biswas says definitely that he had no conversation with Mr. Sen. That was obviously untrue. The learned Judge who was putting the question realised it. He, therefore, gave him another chance in Q. 16 to look at the correspondence. Immediately the correspondence as shown to him Mr. Biswas started remembering. He says : "I now remember he only told me on the phone that he was sending the draft tomorrow". After having said that there was no conversation at all then for him immediately thereafter to remember so much that he only told him that he was sending the draft agreement and nothing else does not impress me. This becomes a little difficult to accept when in the further question of the Court in Q. 17 he said that Mr. Sen said nothing more than that, thereby meaning that he was sending the draft by tomorrow. That is not the end of this aspect of Mr. Biswas's testimony. AH this was happening during examination-in-chief and not in answer to counsel but in answer to questions

by the Court. In cross-examination, particular attention of Mr. Biswas was drawn to paragraph 5 of his affidavit which I have quoted above, where he definitely admits that at any rate the telephonic conversation included the assertion by Mr. Sen over the telephone that the client could not verify the particulars supplied and approve the proposal. In Q. 47 the cross-examining counsel drew Mr. Biswas's attention to the telephonic conversation referred to in his affidavit. In fact the question is significant and the reply still more. It is necessary therefore to set out the same. They are :

"Q. 47. You remember there was a telephonic conversation to the effect which you stated in your affidavit that there was discussion between you and Mr. Subodh Kumar Sen of Messrs. B. N. Basu and Co., as regards the terms to be incorporated in the draft agreement. You remember that. A. (no reply)."

22. If the telephonic conversation did not discuss the terms to be incorporated in the draft agreement as a subject of the conversation, I cannot imagine how Mr. Biswas stood in the witness box silent and speechless to this significant question. It his case was right, I have no doubt in my mind that he would have vigorously protested and denied in his answer that that was not so.

23. Lastly, it appears to me unsafe to rely on Mr. Biswas's testimony not only because of the answers which he has given and which I have quoted above, but also because he was an ill man at the time and in fact was lying on his bed on that date and when he was rung up he came to Court in a taxi. This is what Mr. Biswas says in answer to Q. 23 :

"Q. 23. Before you came into the witness box you realised that you have got to look into the Day Book to find out as to whether there is any entry in connection with the transaction. Did you not?

A. I was very ill. I was just this day rung up while I was lying on bed and I ran to this Court in a taxi."

24. On such a state of facts I would much rather rely on the memory of Mr. Subodh Kumar Sen about the telephonic conversation supported by a reasonably contemporaneous affidavit made within two months from the date of the conversation than on the memory of Mr. Biswas who at first even totally denied that he had any conversation at all with Mr. Sen on the 4th.

25. I, therefore, hold that the learned Judge was wrong in rejecting the testimony of Mr. Subodh Kumar Sen and in preferring the evidence of Mr. Nirmal Chandra Biswas.

26. Then it is contended that Mr. S. K. Sen was an interested witness because he was a tenant of his client but then that was in 1952 (Q. 18- S. K. Sen) which was long after the transaction in suit and long after his affidavit in the interlocutory application in the suit where the fact had already been stated by him. This was not an objection taken before the learned trial Judge. In any event, a Solicitor is always an interested person for his client but that is not enough ground for rejecting his evidence. If that were so, the evidence of Mr. N. C. Biswas is equally to be condemned.

27. I also hold on the facts of the correspondence and the testimony that there was in fact a concluded contract to sell 168, Bow Bazar Street, Calcutta at the price of Rs. 1,30,000 on the 4th January, 1946, as pleaded in paragraph 1 of the plaint by the appellant.

28. On behalf of the respondent, three main points have been urged in support of the judgment. The first contention is that there should be no specific performance in this case because the contract was subject to a formal agreement for sale. Secondly, it is contended that non-disclosure of the purchaser's name until the draft agreement for sale was sent, was a sufficient ground on which the vendor could reject. Thirdly, the defendant's solicitor had no authority from his client to enter into a concluded contract for sale.

29. I will take up first the argument about nondisclosure of the purchaser by name. The learned trial Judge came to the conclusion that because the intending purchaser was not disclosed, therefore, the contract was not a concluded contract and therefore, when it was disclosed, the vendor could refuse on the ground that the purchaser was not acceptable to the vendor. In support of this proposition reliance was placed on the well known decision of Hussey v. Horne-Payne, (1879) 4 AC 311. That case lays down the celebrated proposition that where a Court has to find a contract in a correspondence and not in one particular note or memorandum formally signed, the whole of that which has passed between the parties must be taken into consideration.

30. The observations of Lord Chancellor Earl Cairns at p. 317 of that Report on three certainties of price, property and purchaser have been relied upon as indispensable requisites for a concluded contract of which the Court will enforce specific performance. The whole question is whether there is any vagueness or uncertainty about a purchaser it his name is not disclosed by his solicitor. Nobody for a moment disputes the proposition that in order to be a contract for sale of immovable property, there is to be a party definite, a price definite and a property definite.

31. It is essential to emphasise before passing away from this decision of the House of Lords that (1879) 4 AC 311, is an authority on the English Statute of Frauds in relation to English contracts. The learned Lord Chancellor made it quite clear at p. 316 of the Report that the two questions that came up for decision in that case were the question whether there was a concluded contract between the parties and whether there was a note or memorandum in writing of that contract sufficient to satisfy the requirements of the Statute of Frauds. This point, I think, is essential to emphasise in this connection because it is not often borne in mind in India that the Statute of Frauds on which this decision is based is a statute which does not operate in India. Therefore, the Federal Court of India in Jai Narain Lundia v. Surajmal Sagarmal, 85 Cal LJ 34: (AIR 1949 FC 211), expressly mentioned this case and B. K. Mukherjee, J., at p. 42 (of Cal LJ): (at p. 215 of AIR), observed :

> "We do not think that the principle of law enunciated in that case, and about the correctness of which there could hardly be any doubt, is of any assistance to the appellants. In (1879) 4 AC 811, there was an action for specific performance of a contract for sale of land. To prove the contract in accordance with the requirement of Statute of Frauds, the plaintiff relied on two letters which seemingly concluded a contract of sale in the sense that the property to be sold was specific and the price to

be paid as well as the names of the vendor and purchaser were mentioned."

32. The essential point of this branch of the law is that the identity of the purchaser must be ascertainable. It is not necessary to utter the actual name, unless the personality is an essential part of the contract. In this case, a well known firm of solicitors, B. N. Basu and Co., expressly writes to say on 21st December 1945, quoted above, "one of our clients is willing to purchase the same." This I think sufficiently identifies a purchaser and the name need not be mentioned unless the contract is of such a nature that the personality of the contracting party is material to the formation of the contract and its due purpose. In an ordinary contract to sell immovable property the personality ol the party is not usually material. The learned editor of Chitty on the Law of Contract, 20th edition, at pages 391-393 states the law in the fallowing terms :

> "Normally all that is requisite is that the parties shall be clearly ascertained by the contract, but not necessarily by name; so, in the sale of land a description of name as "owner" or "proprietor"; "trustees for sale" or even "personal representative" will suffice. Unless the contract was made upon a consideration personal to the purchaser, it may be enforced in favour of a solvent nominee. This applies even where the real purchaser knew that the vendor would refuse to sell to him if he disclosed his identity, unless his personality was material to the contract."

33. I think this passage represents the correct view of the law. Highest judicial authorities support the same view.

34. In Dyster v. Randall and Sons, (1926) 1 Ch 932, Lawrence, J., at p. 938 sets out the three grounds on which specific performance was resisted in that case. The learned Judge observed at p. 938 of the report:

> "The defendants contended that the plaintiff is not entitled to specific performance on three grounds viz. first, because the plaintiff deceived the defendants in regard to the person with whom they were contracting and therefore there was no contract; secondly, because the plaintiff is an undischarged bankrupt; and thirdly, because the plaintiff has committed a breach of the agreement by not submitting plans for approval of the defendants' architect before commencing the erection of the bungalow.
>
> In considering the first ground it is essential to bear in mind that the agreement which the plaintiff seeks to enforce is not one in which any personal qualifications possessed by Crossley formed a material ingredient, but is a simple agreement for sale of land in consideration of a lump sum to be paid on completion. It is an agreement which the defendants would have entered into with any other person. It is well settled that the benefit of such an agreement is assignable and that the assignee can enforce specific performance of it."

In deciding this point Lawrence J., at p. 939 observed :

> "In my judgment mere non-disclosure as to the person actually entitled to the benefit of a contract for the sate of real estate does not amount to misrepresentation, even though the contracting party knows that, if the disclosure were made, the other party would not enter into the contract; secus, if the contract were one in which some personal consideration formed a material ingredient: see Nash v. Dix, (1898) 78 LT 445 and Said v. Butt, (1920) 3 KB 497 at p. 501. In (1898) 78 LT 445, North, J., held that the ostensible purchaser was acting on his own account and not as agent, but it appears to me that the learned judge would have arrived at the same conclusion if the alleged agency had been established. In (1920) 3 KB 497, McCardie J. relied entirely on the personal consideration which entered into the contract and would obviously have decided otherwise if the personal element had been absent. I therefore hold that the first ground relied upon by the defendants does not afford a good defence to the plaintiff's claim to specific performance."

35. This view also finds support from the well-known decision of the House of Lords in Rossiter v. Miller, (1878) 3 AC 1124. The learned Lord Chancellor Lord Cairns enunciates the law on this point at pages 1140-41 in the following terms :

> "My Lords, the other two points in the case really are very small. As to the use of the term 'proprietors', I own I was somewhat surprised to hear that question argued, for I am sure your Lordships have frequently seen conditions of sale not merely by auction but by private contract, in which it is stated that the sale is made, sometimes by the owners and sometimes by the mortgagees, and a form of contract is annexed in which an agent signs for the vendors, and no other specification upon the vendor's part is inserted, and I never heard up to this time that a contract under those circumstances was invalid. In point of fact, my Lords, the question is, is there that certainty which is described in the legal maxim id certum est quod certum reddi potest. If I enter into a contract on behalf of my client, on behalf of my principal, on behalf of my friend, on behalf of those whom it may concern, in all those cases there is no such statement, and I apprehend that in none of those cases would the note satisfy the requirements of the Statute of Frauds. But if I, being really an agent, enter into a contract to sell Blackacre, of which I am not proprietor, or to sell the house No. 1, Portland Place, on behalf of the owner of that house, there, I apprehend, is a statement of matter of fact, as to which there can be perfect certainty, and none of the dangers struck at by the Statute of Frauds can arise; and I should be surprised if any authority could be found, and certainly none has been produced to say that a contract under those circumstances would not be valid."

36. Lord O'Hagan, another member of the House of Lords in that case at page 1147 expressed himself on this point in the following manner :

> "The parties to a contract in writing must, no doubt, be specified, but it is not necessary that they should be specified by name. The whole course of decision and practice shews that it is not. If they are so indicated, by description or by reference, as

> to be ascertained, or certainly ascertainable, the exigency of the Statute in that respect is satisfied."

37. Lord Romilly, M. R., in Hood v. Lord Barrington, reported in (1868) 6 Eq 218 at p. 222, expresses the same principle in these terms :

> "In this case it is certain that the principals are now known, and that the agency is not disputed. The principal is bound by the acts of his agent, and all the observations to be found in the modern books about the inconvenience of allowing an agent to act for an undisclosed principal are inapplicable, because in this case the principals are now disclosed, and the contract is between the principals on each side. In fact, it is scarcely possible to look at an auction list without seeing property sold by a mortgagee, or by executors, or by trustees, without the name being disclosed and bought by somebody, whose name is not given until the conveyance is prepared. It is the ordinary practice, and it is impossible that I can set aside a contract because the name was not given, or because at the time the vendors had not completed their title as executors in this country."

38. The learned Editors of Fry on Specific Performance, 6th Edition, at page 162 refer to this maxim and to these observations of Lord Romilly, M. R., and put the proposition succinctly in this way :

> "The contracting parties may be indicated by descriptions instead of by name provided the description is sufficient to preclude any fair dispute as to the identity."

39. On these authorities, I am satisfied that when a reputed and well known firm of Solicitors of this Court like Messrs. B. N. Basu and Co., writes to say that one of their clients is willing to purchase the property, there is no scope for dispute about the identity of the purchaser and there is no difficulty in ascertaining as to who the purchaser is so as to either make the contract uncertain on that ground or unenforceable by specific performance.

40. A reference may be made in this connection to the case of Lovesy v. Palmer, reported in (1916) 2 Ch 233, although this case is concerned with Section 4 of the Statute of Frauds and the question was how far it operated against an agent. There are remarks in the judgment of Younger, J., at pages 240 and 242 about the effect of the words "client" in the singular or "clients" in the plural but then that was only in respect of and in the light of requirements of the Statute of Frauds.

41. The second point of the respondent in support of the judgment was that this was not a concluded contract on the ground that it was subject to an agreement for sale. The essential question on this branch of law is to find out whether the formal document is of such a nature that it was the very condition of that contract or whether it was merely commemorative of the evidence on the point. The actual pleading in the plaint is that it was to "evidence" the agreement and nothing more. The memorandum of agreement in this case is the usual memorandum of agreement for sale containing the usual terms. The price was stated, investigation of title was provided for and a payment of earnest money stipulated. It represents only the modus operand of carrying out the contract of sale

already concluded. It is neither the conveyance nor the sale deed.

42. The law on this point is to be found in the trilogy of cases in Harichand Mancharam v. Govind Luxman Gokhale, 50 Ind App 25: (AIR 1923 PC 47); Currimbhoy and Company, Ltd. v. Creet , and Shankarlal Narayandas Mundade v. New Mofussil Co. Ltd. . Harichand's case in 50 Ind App 25: (AIR 1923 PC 47), lays down the proposition that documents may upon their true construction, amount to a binding contract for sale and purchase of immovable property, enforceable by specific performance, although they provide for the preparation of a contract by a lawyer and that provision with other terms of the agreement is described in the translation of the documents as a condition. The Judicial Committee in that case distinguished the principles laid down in Von Haizfeldt Wildenburg v. Alexender, (1912) 1 Ch 284. At pages 30 and 31 of that report (Ind App): (at p. 49 of AIR), in Harichand's case 50 Ind App 25: (AIR 1923 PC 47), the Judicial Committee enunciated the law as follows :

> "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 on the occasion when the negotiations take a concrete shape. As observed by the Lord Chancellor (Lord Cranworth) in Ridgway v. Wharton, (1857) 6 HLC 238 at pp. 263, 264, the fact of a subsequent agreement being prepared may be evidence that the previous negotiations did not amount to an agreement, but the mere fact that persons wish to have a formal agreement drawn up does not establish the proposition that they cannot be bound by a previous agreement."

43. In Currimbhoy's case in , no new principles were laid down, but the observations in Harichand's case, 50 Ind App 25: (AIR 1923 PC 47), were reiterated at page 301 (of Ind App): (at p. 31 of AIR), by Lord Thankerton. Finally, the Privy Council in Shankar-lal's case in , redefined the position almost on similar terms. Lord Du Parcq at pages 108, 109 (of Ind App): (at Pp. 99, 100 of AIR), of that report observed :

> "But apart from the objection that the point was taken too late, their Lordships, with all due respect for the Judges of the High Court, are satisfied that it is without substance. In their Lordships' opinion, the facts do not support the inference that the parties intended to be bound only when a formal agreement had been executed. On the contrary, their Lordships consider that there was ample evidence to prove that both parties intended to make, and believed that they had made, a binding oral agreement. Their desire and intention to put that agreement into formal shape does not affect its validity."

44. Some argument at the Bar was advanced on the ground that in this case because there was more than one reference to the draft agreement for sale in the correspondence, therefore, it is to be regarded as mere a condition and on that ground it is to be distinguished from these cases. I am not convinced that it is so. In particular it was exactly the kind of point that Lord Du Parcq discussed and disposed of in , where his Lordship laid down the law in the following terms:

> "It was contended by counsel for the respondents that the agreement was necessarily incomplete because it had been left to the solicitors to settle some of its terms and because (as counsel rightly submitted) a solicitor has no implied authority to make a contract on his client's behalf. Their Lordships are of opinion, however, that no question as to a solicitor's implied authority arises in this case, in their Lordships' view, it is a fair inference from the evidence that Sir Shapurji authorized Mr. Manekshaw to put before the appellant for his acceptance the 'usual' terms. In the circumstances which have already been explained, this seems to their Lordships to have been a very natural and businesslike course for Sir Shapurji to take, and necessarily resulted, when the appellant accepted the terms, in the formation of a binding contract."

Before leaving this point a relevant fact may here be stated. Attempt was made in the evidence, although not in the written statement, to suggest that Nirmal Chandra Biswas, the solicitor, had no authority to settle the terms. This again was the answer of the witness to Court's Q. 8. But then it was forgotten that long prior to the evidence, Nirmal Chandra Biswas in paragraph 7 of his own affidavit of the 12th March, 1946 had stated "My clients enquired of me if the agreement for sale had been concluded between them and the plaintiff." It is difficult to imagine why his clients would make that enquiry if his solicitor had no authority to conclude the agreement for sale.

45. On the facts of this case I do not read the contract to sell in this case to be subject to any formal agreement of this nature as to preclude the conclusion or inference that there was already a concluded contract for sale. The letter of authority to the broker did not make such a stipulation. It was only the appellant's solicitor who suggested that he would send a draft agreement for approval. No doubt it is true that it was suggested in the correspondence and said that unless that draft agreement for sale was sent within a certain time, the negotiations would be put to an end. But on the authorities I have discussed above, such a kind of draft agreement for sale does not displace the contract already concluded. Such agreements for sale are very often a precursor to the actual conveyance. But if the actual sale or the contract to sell had already been concluded, then this kind of agreement for sale is not such a document as to males the contract to sell itself indeterminate. It is noteworthy that what the appellant seeks to enforce in his plaint is an agreement that he has pleaded in paragraph 1 of his plaint and which I think he has proved and not an agreement according to the draft agreement for sale. These agreements for sale spoken of in the correspondence between solicitors are ancillary and are not fundamental to the main contract to sell. These agreements for sale are for the purposes of working but the contract for sale of an immoveable property. Indeed they are more common in cities and between solicitors and they are merely an agreement recording the interlocutory steps to be taken and recording the manner and mode of giving effect to the contract of sale already concluded. In Branca v. Cobarro, (1947) 1 KB 854, the English Court of Appeal reversing the decision of Denning J., came to the conclusion that "on a true meaning of the words This is a provisional agreement until', the agreement remained effective until the fully legalised document was drawn up and signed. The drawing up and signing of the fully legalised agreement was not a condition of the agreement entered into so as to prevent there being a concluded agreement meanwhile."

46. On this point, apart from the observations of the Judicial Committee which I have set out above, it may not be out of place to recall the relevant observations from the decisions of the House of Lords already cited on another point, namely, (1878) 3 AC 1124. Lord Heatherley at page 1143 observed :

> "It has been established for far, too long a time, and by some precedents in your Lordships' House, that if you can find the true and important ingredients of an agreement in that which has taken place between two parties in the course of a correspondence, then, although the correspondence may not, set forth, in a form which a solicitor would adopt if he were instructed to draw an agreement in writing, that which is the agreement between the parties, yet, if the parties to the agreement, the thing to be sold, the price to be paid, and all those matters, be clearly and distinctly stated, although only by letter, an acceptance clearly by letter will not the less constitute an agreement in the full sense between the parties, merely because that letter may say. We will have this agreement put into due form by a solicitor. If it is stated in so many plain and express terms (and in Chinnock v. Marchioness of Ely, (1865) 4 De G. J. and Section 638, that was the ground on which that case proceeded) that one of the very terms of the agreement itself was that it should not be concluded by the agent employed in the first place to enter into the negotiation, and that it should not be a concluded agreement until a solicitor intervened and drew a formal agreement; if you find that to be a term of the agreement itself, well and good, if not, the agreement stands. Both parties may desire that it shall be put into a formal shape by a solicitor who, in that case, will not be able to vary the agreement either on one side or the other, but only to put into a more formal and professional shape the agreement which had been completely formed with unity of purpose with reference to the sale and purchase by the two parties to the contract."

Applying this test which the House of Lords has laid down I have no doubt in my mind that here the contract to sell was already concluded. The agreement that is mentioned in the correspondence is not at all fundamental to the contract to sell and was intended merely to be ancillary arrangement for effectuating the sale, and recording the manner and mode of carrying it out. The observations, therefore, of Lord Heatherley would apply with greater force to such agreements for sale.

47. Of similar import are the observations of Lord O'Hagan in the same case in (1878) 3 AC 1124, at page 1149 where the learned Lord said :

> "We have had a great deal of ingenious reasoning, founded on the statement in Mr. White's letter of) the 24th April, that he had requested Messrs. Hart and Marten to forward 'the agreement for purchase'. It has been said that until the execution of that agreement the transaction was inchoate and not complete. And, undoubtedly, if any prospective contract involving the possibility of new terms, or the modification of those already discussed, remains to be adopted, matters must be taken to be still in a train of negotiation, and a dissatisfied party may refuse to proceed. But when an agreement embracing all the particulars essential for finality and completeness, even

> though it may be desired to reduce it to shape by a solicitor, is such that those particulars must remain unchanged, it is not, in my mind, less coercive because of the technical formality which remains to be made".

48. I am, therefore, of opinion that the fact that the solicitors in the correspondence had suggested and stipulated for execution of such a draft agreement for sale did not make the contract any the less concluded in this case which, as I have held, was concluded on the 4th January, 1946;

49. It now remains only to say that the two cases of Coope v. Ridout, (1921) 1 Ch 291 and Chillingworth v. Esche, (1924) 1 Ch 97, referred to in the judgment are entirely distinguishable both on the facts and on the law. There in the first case the contract stipulated 'subject to title and contract', and in the latter case the arrangement was 'subject to a proper contract to be prepared by the vendor's solicitor'. It is not necessary to say any more on these two cases having regard to the decisions of the higher and binding authorities of the Judicial Committee of the Privy Council and the House of Lords on this subject.

50. It has also been contended on behalf of the respondent that the respondent refused to sell it to the plaintiff on the ground that about a year ago the plaintiff had negotiated for purchase of this property at the price of Rs. 1,55,000 and then had arbitrarily refused to enter into an agreement for sale after long drawn discussions. This is what is stated in paragraph 7 of the affidavit of Nirmal Chandra Biswas affirmed on the 12th March 1946. This, however, is completely denied in paragraph 9 of the appellant's affidavit affirmed on the 15th March 1946. This also is a point not taken at all in the written statement of the defendant or in any correspondence. On the law as I have discussed above, even then this is not a ground on which the vendor can refuse because it is not a consideration in which the personality of a contracting party is an essential ingredient of the performance of the contract.

51. It will also not be inappropriate to refer in this connection that an agent in India can contract on behalf of an undisclosed principal under Section 231 of the Contract Act. That section provides for the rights of parties to a contract made by an agent. The first paragraph of that section appears to limit that case only to the instance of a contract where the agent makes the contract with a person who neither knows nor has reason to suspect that he is an agent. Here there was no doubt about this that the solicitor was acting for his client. Therefore, the basic consideration for the attraction of Section 231 of the Contract Act is absent. On the second part of Section 231 of the Contract Act, it is said that if the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfil the contract, if he can show that, if he had known who was the principal in the contract, he would not have entered into the contract. The second paragraph of Section 231 appears in the context of the first paragraph of Section 231 and the expression 'if the principal discloses himself before the contract is completed', must be read in the context where the agent made the contract with a person who did not know or had reason to suspect that he was an agent. See also in this connection the decision of a Division Bench of the Bombay High Court consisting of Sir Lawrence Jenkins C. J. and Batchelor, J., in Lakshmandas Narayandas v. Anna R. Lane, ILR 32 Bom 356 and in particular the observations of Batchelor, J., at pages 361 to 363 on the expression, 'the principal discloses himself', in Section 231 of the Contract Act.

52. It is, therefore, clear that Section 231 of the Contract Act cannot be attracted to impugn the contract. I must, however, emphasise that the ground on which the respondent put his argument was that there was no concluded contract because the principal's name was not mentioned and it was not the case of the respondent either in the pleading or before the learned trial Judge that the contract having been made by an agent under the first paragraph of Section 231 of the Contract Act, it could be refused to be fulfilled on the ground that the principal disclosed himself before the contract was completed.

53. At some stage it was attempted to be said that there was a limitation to start with in the authority of the broker by virtue of the words 'to negotiate for sale' in the letter of 20th December 1945. The argument was that this did not give the broker authority to enter into a binding contract for sale. Having regard to the decision of the Supreme Court in Abdulla Ahmed v. Animendra Kissen this point was not pressed by the learned Advocate for the respondent. Besides in any event the matter on the facts here passed out of the hands of the brokers to the solicitors where terms of authority appear from the correspondence discussed.

54. For these reasons we allow the appeal and set aside the judgment and decree of the trial Judge. There will be a decree in terms of prayers (a) and (b) of the plaint. The appellant is entitled to the costs of this appeal here and in the Court below. The appeal is certified for two counsel. The claim for damage was not pressed and is not allowed. BOSE, J.:

55. The principal question in controversy in this appeal is whether a concluded contract was entered into between the parties of which specific performance could be decreed by this Court, and the decision of the appeal depends mainly on the construction of the correspondence that passed between the parties and upon the proper assessment of the oral evidence adduced by the solicitors of the parties.

56. The first fetter to be considered is the letter of 20th December 1945 which was written by the solicitors for the defendant in favour of the broker who was employed for the purpose of negotiating the safe of the property. It appears from this letter that the broker had been given unrestricted authority to negotiate the sale of the above premises for the specific price of Rs. 1,30,000 nett and this authority was to continue in force till 2 p.m. of 22nd December 1945.

57. The next letter is the letter of 21st December 1945 written by the solicitor for the plaintiff to the solicitor for the defendant. By this letter the defendants' solicitor was informed that one of the clients of B, N. Basu and Co., was willing to purchase the property free from encumbrances provided the client wag satisfied as to the area of the land and the total rents realised in respect of the premises in question. The last paragraph of the letter is material on the question at issue and reads as follows :

> "Please furnish us immediately the correct area of the land comprised in the said premises and the total rent realised from the above premises. On receipt of the above information we shall arrange to send the draft agreement for sale for approval".

58. The last sentence of this paragraph indicates that the plaintiff's solicitor was making it clear that after the required information was furnished, a draft agreement for sale would be prepared by them and this would have to be approved. In other words, the preparation of a draft agreement and its approval was in contemplation from the very beginning.

59. The next relevant letter is the letter of 3rd January 1946 written by the defendants' solicitor to Mr. S. K. Sen, the solicitor acting for the plaintiff. Along with this letter a list of the tenants was furnished and the particulars of the area of the premises were furnished to the solicitor. The concluding paragraph of the letter is as follows :

> "Please send us the relative draft agreement for sale for our approval latest by tomorrow as otherwise all negotiations herein will be treated as at an end."

60. This last paragraph may be construed as suggesting that the sending of the draft agreement and its approval were considered by the defendants' solicitor as condition precedent to the bargain becoming binding and the matter was thought to be in a stage of negotiation,

61. The next letter which need be referred to is the letter written by B. N. Basu and Co., to the defendants' solicitor dated 3rd/4th January 1946 In this letter, which was in reply to the earlier letter referred to above, the plaintiff's solicitor complained of the fact that sufficient time had not been given to their clients to verify the particulars which had been furnished and for the proposal to be approved by their client. The letter also records the fact that an arrangement had been entered into over the phone that upon verification of the particulars and upon the proposal being approved by the client, the solicitors for the plaintiff would send the draft agreement for sale for the approval of the defendants' solicitors on Saturday next, the 5th instant. The letter concluded with the following words :

> "In the meantime, please furnish us with the following particulars :
>
> (1) Name of the vendors.
>
> (2) Description of the property with boundary, holding number and the amount of revenue payable to the Collector of Calcutta."

62. The expression 'proposal approved' shows that there had not been an unconditional acceptance of the offer of sale even at this stage and that the fact that stress was being laid again and again on the preparation of a draft agreement for sale and its approval, may very well lead to the inference that it was thought that until the draft was prepared and approved by the vendor's solicitor, the agreement for sale would not become final and binding. Even at this stage further particulars were being collected for preparation of draft, such as the name of the vendors and the description of the property and its boundary.

63. The next letter to be considered is the letter written by the defendants' solicitors to the plaintiffs solicitors and dated 4-1-1946 in which it was pointed out that the time allowed under the letter of

authority to the broker had expired and the further particulars which had been asked for would be filled up at the time of approval of the draft agreement. The last paragraph of the letter reads as follows :

> "Please note that if the agreement for sale does not reach our hands before 2 p.m. tomorrow, our client will treat all negotiations herein as at an end."

64. So, this letter shows that the vendor's solicitor did not furnish the particulars asked for but they state that they would themselves fill in the particulars at the time of the approval of the draft and they emphasised the fact that if the agreement for sale did not reach them before 2 p.m. the negotiations for sale would be put an end to. It appears from this letter that the question of preparation of a draft and its approval were still uppermost in the vendor's solicitors' mind.

65. The next letter is the letter of 5-1-1946. It was written by the plaintiff's solicitors to the, defendants' solicitors. The material portion of the letter was as follows :

> "We received your letter of the 4th instant today at about 2 p.m. It is beyond our comprehension, that being in the profession how you could limit time, within which it is a great hardship to complete the draft. If your "letter had come yesterday noon, we could have completed the draft agreement without much hardship. However, we are sending herewith a draft of the agreement for sale for your approval."

66. Along with this letter the draft agreement was sent to the defendants' solicitors but by the letter of 7-1-1946 written by the defendants' solicitors to the plaintiff's solicitors it was stated that "as our clients are not willing to sell the above property to your client, the draft is herewith returned".

67. This finishes the relevant correspondence which has bearing on this particular issue. It may be pointed out at this stage that the specific case which has been made in para 1 of the plaint was that at the time the agreement for sale was concluded between the plaintiff and the defendant company acting through their solicitors Messrs. S. C. Biswas and Co., it was further agreed that a formal document evidencing the said agreement would be drawn up and executed between the parties.

68. In the case of Winn v. Bull, (1877) 7 Ch D 29, where the defendant agreed to take a lease of a house for a certain term at a certain rent 'subject to the preparation of a formal contract' and no such contract was prepared, it was held that there was no final agreement of which specific performance could be enforced against the defendant. Sir George Jessel, M. R. at p. 30 made the following observations:

> "I am of opinion there is no contract I take it the principle is clear. If in the case of a proposed sale or lease of an estate two persons agree to all the terms 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. It 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."

It may be pointed out that there is no such wording such as 'subject to the preparation of a formal contract' to be found in the correspondence which is alleged to constitute the agreement between the parties, before us.

69. In the case of Honeyman v. Marryatt, (1857) 6 H. L.C. 112 the purchaser's solicitor offered 25,000 for the purchase of an estate which the defendant's agent accepted 'subject to the terms of a contract being arranged between his (the vendor's) solicitor) and yourself. The Court considered this to be a contract to enter into a contract with respect to which some terms were already agreed upon and the rest were to be settled by future arrangement and if they could be agreed upon this was to become a valid contract, but such a contract never having been come to, the Court dismissed the purchaser's suit for specific performance.

70. The next case which may be taken up for consideration is that of Rossdale v. Denny, (1921) 1 Ch. 57 in which the relevant clause was as follows:

> "This offer is subject to a formal contract to embody such reasonable provisions as my solicitors may approve, and to the lease containing no unusual provisions or covenants."

Lord Sterndale, M. R. dealt with this clause at page 67 in the following words :

> "I rest my decision on this that looking at the whole transaction and considering the clause in the plaintiff's letter which says 'this offer is subject to a formal contract ..... etc.' coupled with the expression 'I am prepared to pay 7500 deposit on signing of formal contract', which. I think cannot be entirely disregarded, Russell, J, was right in saying that, whatever be the view that may be taken of these words, the result is that the formal contract may contain other terms than those which appear in the letter. If the appellant's construction is right --reversing the position he might have forced upon him - as he is trying to enforce it now - a contract or a lease which did not contain the provisions which his solicitors thought were reasonable and ought to be inserted, and I think that that is the proper interpretation of the letter."

71. Warrington, LJ, described the clause as amounting to a conditional offer.

72. The next case which may be referred to is the case of Coope v. Ridout reported in the same volume of (1921) 1 Ch. 291. There the wording was altogether different and it was to the following effect 'subject to title and contract' and it was held that even assuming that all the terms of the agreement had been settled one by one and embodied in the draft, the condition contained in the offer required that a written agreement made inter partes should be formally entered into and in the absence of such a document there was no enforceable contract.

73. The next case which need be referred to is the case reported in (1924) 1 Ch. 97. In this case the material clause was 'subject to the proper contract to be prepared by the vendor's solicitor' and Pollock M. R. in interpreting this clause referred to the leading case of (1912) 1 Ch 284 at p. 289 and the case of (1921) 1 Ch 57 and made the following observations :

> "I think when you look at the words here used that what was intended was that the whole document should be conditional on the execution of a proper contract, to be prepared by the vendor's solicitors. I think it is not possible to hold that those words were! merely the expression of a desire for a further contract. In my opinion, the word 'proper' must be given its full meaning, and I think that the intention of the parties was that the full conditions should be considered in a further contract, and that until that further contract was executed there should be no binding contract for the purchase of the property." Warrington, L. J. at page 109 observed as follows :
>
> "It has been held over and over again that where you have a document relating to the sale and purchase o land framed in these terms the object of inserting those words is to avoid binding the parties unless and until the contract referred to has been prepared and signed by both parties. The two most recent decisions on that point, both of which were decided by this Court, are (1921) 1 Ch. 57 and (1921) 1 Ch 291.

74. In the case of Spottiswoode Ballantyne and Co. Ltd. v. Doreen Appliances Ltd., (1942) 2 All E.R. .65 an offer by the defendants to take a lease of premises was accepted on behalf of the plaintiffs subject, inter alia "to the terms of a formal lease to be prepared by their solicitors". The defendants were let into possession and a draft of the agreement was sent to them. A fortnight later the plaintiffs wrote to the defendants indicating that they were not willing to proceed with the agreement. They brought an action to recover possession and the defendants counterclaimed, for specific performance. It was held that upon the proper construction of the offer there was no binding contract until a formal agreement had been executed. Since this had not been done, the defendants were not entitled to specific performance.

75. In a decision of this Court reported in 20 Cal WN 66 : (AIR 1916 Cal 1) (FB), Hyam v. Gubbay a Bench presided over by Jenkins C. J., Woodroffe, J. and Mookerjee, J., had to consider a plaint filed in respect of a suit for specific performance which contained inter alia the following averment:

> "An agreement was made on or about 13-11-1912 between the plaintiff through his representative and the defendant through his broker whereby the plaintiff agreed to sell and the defendant to buy the property in question upon certain terms and conditions set out in the plaint."

The plaint also pleaded that this agreement was confirmed by the defendant before the vendor's solicitor Mr. Gregory on 15-11-1912 and the plaint further stated that it was also agreed that there should be a formal written agreement drawn embodying the usual conditions of sale and purchase including the special conditions already agreed to. The learned Judges after considering the oral evidence adduced in the case and the correspondence that passed between the parties came to the

conclusion that no concluded contract had been entered into and on that ground they dismissed the suit for specific performance. Certain propositions of law were laid down in that case and it will be useful to refer to some of them in this judgment. Mookerjee, J. in dealing with the various decisions which had bearing on the question of the conclusiveness of the contract laid down the following proposition :

> "It is well settled that the fact that the parties intended to embody the terms of their contract in a formal written agreement, is strong evidence that the negotiations prior to the drawing up of such writing are merely preliminary and not understood or intended to be binding. If it is definitely expressed and understood that there is to be no contract until the formal writing is executed, there is plainly no binding agreement formed until this provision is complied with. It is also true that if all the terms of the agreement have not been settled and it is understood that these unsettled terms are to be determined by the formal contract, there is no binding obligation until the writing is executed. But if the oral agreement or written memorandum is complete in itself and embodies all the terms to be inserted in the intended formal writing, a binding obligation is fixed on the parties, unless it is understood and intended that such contract shall not become operative until reduced to writing.
>
> "The question is mainly one of intention. If the written draft is viewed by the parties merely as a convenient memorial or record of their previous contract, its absence does not affect the binding force of the contract, if however it is viewed as the con-Summation of the negotiations, there is no contract until the written draft is finally signed."
>
> "If a written draft is proposed, suggested or referred to during the negotiations it is some evidence that the parties intended it to be the final closing of the contract.

76. It will thus appear that the question in Such cases always is, did the parties intend to contract by correspondence, or were they only settling the terms of an agreement into which they proposed to enter after all its particulars were adjusted which was then to be formally drawn up and by which alone they designed to be bound.

77. Now as I have indicated already, the idea of a formal agreement for sale to be prepared and approved wag dominant in the minds of the two solicitors from the very inception of the negotiations. But it is not absolutely clear that the formal agreement for sale so to be prepared and approved was intended to be the only binding agreement between the parties.

78. It has been held that there may be a concluded agreement though a formal document is to be executed embodying its terms. Thus in a case where the parties agreed to the execution of a formal lease, the draft of which was to be approved by them, it has been held that specific performance could be enforced of the original agreement even though the draft had not been prepared and approved : Bijoy Kanta v. Kailash Chandra, ILR 46 Cal 771 : (AIR 1919 Cal 369). The Judicial Committee also as in three cases reported in 50 Ind App 25 : (AIR 1923 PC 47) and reaffirmed the

principle laid down in the leading English case reported in (1912) 1 Ch 284. It has been pointed out by the Judicial Committee that the principle as enunciated in English law applies to India. The Privy Council took pains to set out in extenso the relevant observations of Parker J. in (1912) 1 Ch 284.

79. Thus the various cases to which I have referred show that it is not at all easy to determine under what circumstances a contract may be said to be a concluded one and under what circumstances it is not so. It is possible to construe the correspondence before us as indicating that approval of a draft agreement for sale was intended to be the final closing of the contract. But as a different construction is also possible I am inclined to take the view that in the case before us the primary intention of the parties appears to have been that the main terms which were being agreed upon would be put into proper shape in all their details by the execution of a formal agreement for sale, but such, formal agreement was not made a condition precedent to the contract becoming binding. I must confess, however, that the matter is not at all free from doubt and the question of construction of the correspondence does present some difficulty.

80. The next point that is argued on behalf of the appellant is that as the solicitor for the plaintiff purported to act on behalf of an unnamed client and at no time the solicitor could sue or be sued on the contract and as there was no reference in the correspondence to the plaintiff as a contracting party and it was impossible from the correspondence to identify the plaintiff who could sue or be sued by the defendant on the alleged contract, the contract was not specifically enforceable.

81. It is true that in certain English cases where the question was whether the memorandum in question satisfied the requirements of the Statute of Fraud, it was held that a contract entered into on behalf of an unnamed client did not satisfy the requirements of the Statute of Fraud; but at the same time the English law has made it clear that such a contract would nevertheless be specifically enforceable. Reference may be made to the case of (1916) 2 Ch. 233 at pp. 242 and 244, where this question arose for determination. Younger, J. held that where a solicitor purported to act on behalf of an unnamed client the memorandum could not be regarded as satisfying the requirements of the Statute of Fraud nor could the solicitor sue or be sued on such contract not could the unnamed client sue or be sued on it.

82. This decision was approved of by the Privy Council in the case of Abdul Karim Basma v. Weekes, (1950) 2 All E. R. 146 at pages 151-152. But as has been pointed out by my learned brother, the case of (1878) 3 A.C. 1124 at pages 1140-1141 makes it clear that a contract entered into for an unnamed client is specifically enforceable. Lord Cairns' observations make the position perfectly clear. Moreover, it appears that there is nothing to prevent the unnamed client from being identified by means of oral evidence under the Indian Law as there is no statute like the Statute of Frauds prevalent in this country.

83. The other points which have been argued by the parties in this case have been dealt with by my learned brother in great detail and I do not wish to deal with them separately or to express any view thereon.

84. I agree that this appeal should be allowed.