

Privy Council Appeal No. 74 of 1914.

Bengal Appeal No. 7 of 1912.

**Narottam Das, since deceased (now represented
by Manu Bibi)** - - - - - *Appellant,*

v.

Kedar Nath Samanta and Others - - - - - *Respondents,*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 14TH DECEMBER, 1916.

Present at the Hearing:

THE LORD CHANCELLOR.

LORD ATKINSON.

LORD WRENBURY.

MR. AMEER ALI.

[*Delivered by LORD WRENBURY.*]

The appellant plaintiff sues for specific performance of a bainapatra, or contract for sale, dated the 19th February, 1905. The persons named respondents to the appeal are his vendors, and two persons who were subsequent purchasers under a kobala dated the 1st April, 1905, and registered the 3rd April, 1905, purporting to convey the property to the respondent Samanta, who was benami for his co-respondent Uttam Charan Ghosh. A suit by the vendors to set aside the kobala on the ground of duress and fraud has failed, but upon this appeal their Lordships are not concerned with the merits or demerits of the purchasers under the kobala. Samanta, who alone appears, admits that if as between the appellant plaintiff and his vendors the plaintiff is entitled to specific performance, he is equally entitled as against the second purchasers, that the second purchasers cannot rely on the registration of the kobala, and that they took with notice of the plaintiff's earlier contract. The existence and validity of the plaintiff's contract is again not in dispute. The vendors do not appear on the appeal. The only respondent who contests the plaintiff's right to judgment is Samanta. As already stated, he was benami for Ghosh. Ghosh has not filed a case and does not appear. The appellant's

counsel put forward the contention that under these circumstances the appeal must, in any case, succeed. Their Lordships do not think it necessary to consider this contention further, inasmuch as in their judgment the appeal succeeds on the merits.

The bainapatra of the 19th February, 1905, was an agreement for the sale by Srimati Khetramoni Dasi, widow of Madhab Chandra Ghose, and Nibarau Chandra Banerji, his executor, of certain maurashi mokorari lands, in consideration of 2,500 rupees, of which 51 rupees were paid as earnest money; and it was provided that if the vendors should require money before the execution and registration of the kobala the plaintiff would pay them the said money upon their asking for the same and would take from them separate receipts for the same.

As regards the pleadings, it suffices to state (a) that one matter in issue was whether, as the plaintiff alleged, the vendors on the 20th February, 1905—representing that they were in need of money for expenses on account of litigation then pending—asked for, and the plaintiff paid them, 1,500 rupees out of the 2,500 rupees consideration for the sale, in compliance with his obligation under the bainapatra to pay them money on request; and (b) that it is not pleaded that the widow was a pardanashin woman, and no issue was raised upon that subject, or as to her requiring or not having had advice or assistance of friends.

The Subordinate Judge found all the facts, including those as to the payment of the 1,500 rupees, in favour of the plaintiff, and gave judgment for the plaintiff with costs.

The High Court reversed that decision and dismissed the suit. The plaintiff appeals. The only question for their Lordships' decision is whether as between the plaintiff and his vendors the plaintiff is entitled to specific performance.

The judgment of the High Court dwells upon three questions. *First*, whether the 1,500 rupees were paid—upon this, one of the two Judges, differing from the Subordinate Judge on the question of fact, finds that it was not—assigning reasons with which their Lordships will deal presently. The other of the two Judges agrees in this, for at the conclusion of his judgment he says that the allegation that the plaintiff has paid the bulk of the purchase money is false. *Secondly*, whether it was open to the present respondent to raise the question of pardanashin woman. The one Judge holds that it was not, the other that it was open. *Thirdly*, whether 2,500 rupees was a fair price. The one Judge finds the evidence as to value too indefinite to justify a decided conclusion that the consideration was inadequate, the other holds that it was grossly inadequate. *Fourthly* (reproducing the first), both Judges hold that the false plea (as they find it to be) that the plaintiff had paid the 1,500 rupees disentitles him to relief.

The third of these their Lordships at once put aside. There was no issue of under-value at the trial. The Subordinate

Judge states in his judgment what the issues tried were—this is not among them—and the Subordinate Judge, as might be expected in such circumstances, says nothing about it. The respondent could not subsequently raise and succeed upon that contention.

The second for the like reason is not open. The respondent had not suggested it in the pleadings, the issues, or the grounds of appeal to the High Court. Their Lordships agree with that which Coxe, J., said upon this point.

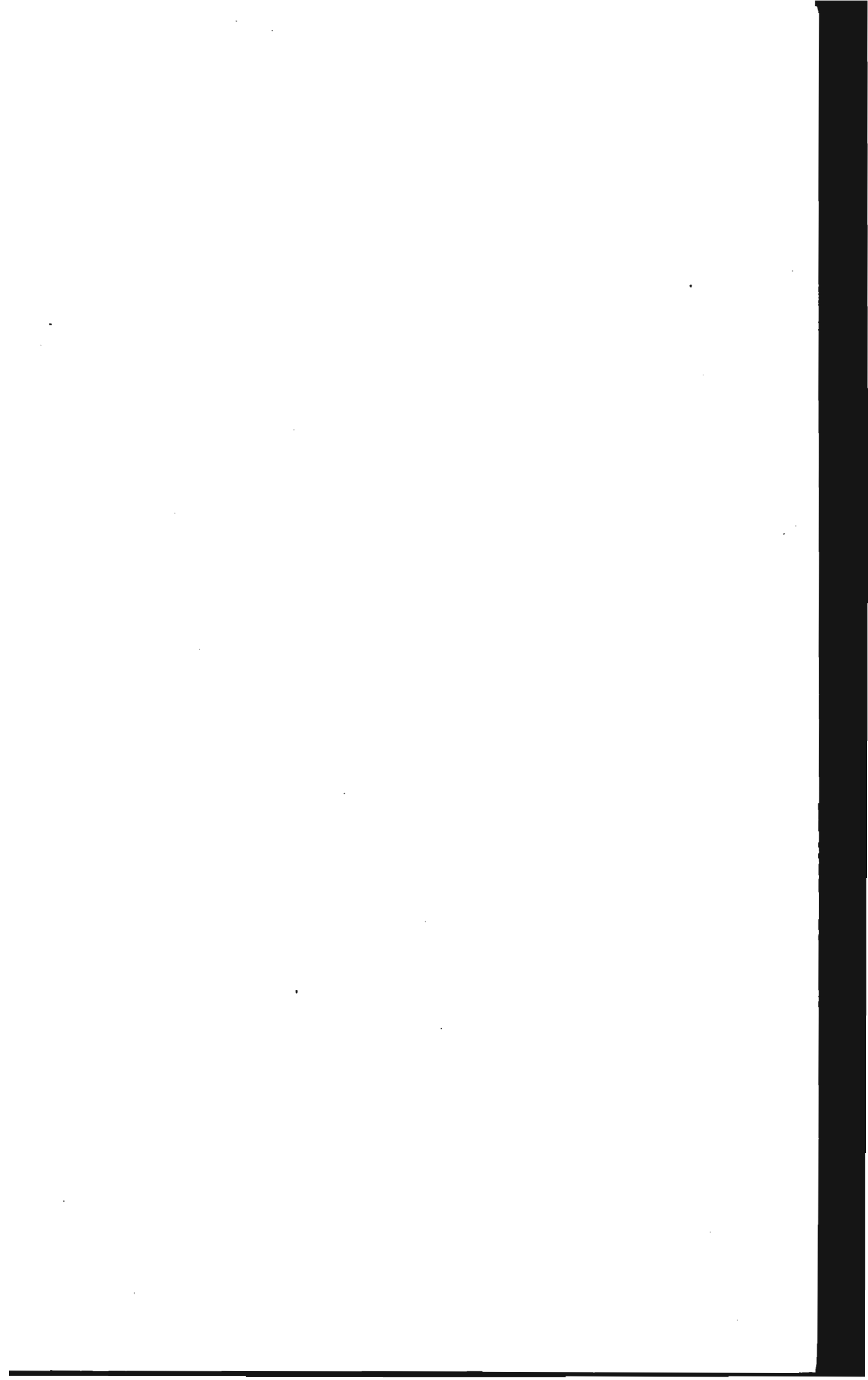
The only remaining question is as to the payment of the 1,500 rupees. As to this, Coxe, J., says :—

“ But with regard to the payment of the sum of 1,500 rupees out of the consideration, we are not prepared to agree with the learned Subordinate Judge. This payment is not supported by the evidence of Naresh Mitra, and it appears to us quite irreconcilable with the plaintiff's deposition in the criminal case which followed the execution of the defendant's *kobala*. It is not likely that the plaintiff would be willing to advance so large a sum before the execution of the conveyance, and on the whole evidence we feel no doubt that this money was never paid.”

Their Lordships are unable to agree with this view. The learned Judge appears to have overlooked the fact that, under the contract, the plaintiff was contractually bound to advance if asked to do so, and that a consideration “ whether he would be willing to advance so large a sum ” is out of place. The evidence upon which the Subordinate Judge acted is quite plain, and there is, in fact, no evidence the other way. Naresh Mitra, the pleader, speaks to it, and says he sent his clerk, with the vendors, to see the plaintiff about obtaining the money. The clerk, Chakravarti, says that the money was paid in his presence. The entries in the plaintiff's *Khata* book bear out the story. The Subordinate Judge found, and their Lordships find, no reason to doubt the genuineness of these entries. Their Lordships cannot find in the plaintiff's deposition in the criminal case anything irreconcilable. The plaintiff's deposition made before the Deputy Magistrate on the 7th September, 1905, does not, in their Lordships' opinion, support the view that it is irreconcilable with the payment of the 1,500 rupees. The deposition was taken in proceedings in which the real issue related to the making of the contract and not to the question of how much of the consideration had been paid. The plaintiff speaks as to the payment of 50 rupees and says that this was for “ executing a sale of the house and some lands,” and adds that the receipt is contained in the *bainapatra*—all this being strictly in accordance with the facts, except that the payment was 51 rupees, not 50 rupees. He continues that this money has not been returned and is still on deposit, and adds : “ I have not got back yet the 50 rupees advanced. I do not wish to realise it by Court.” It is chiefly on this statement that the assumption is drawn that the 1,500 rupees could not have been

advanced, but this conclusion depends on regarding the answer already quoted as meaning that the 50 rupees was the total advance, and not only is there no statement to this effect, but there is nothing to show that any question was asked to which such an answer was required. He was asked nothing about the 1,500 rupees.

For these reasons their Lordships find themselves unable to agree with the conclusions of the High Court. They will humbly advise His Majesty that this appeal ought to be allowed, the judgment and decree of the High Court set aside and the decree of the Subordinate Judge restored, with costs against the respondent Samanta in the High Court and before this Board.



In the Privy Council.

NAROTTAM DAS

v.

KEDAR NATH SAMANTA
AND OTHERS.

DELIVERED BY LORD WRENBURY.

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