NAGPUR HIGH COURT

Shamjibhai

Vs

Jagoo Hemchand

First Appeal No. 78 of 1942

(Bose, Ag. C.J. and Mudholkar, J.)

19.10.1948

JUDGMENT

Bose, Ag. C.J.

1. This is a plff's appeal in a purchaser's suit for specific performance of a contract of sale, Ex. D-49, dated 14-4-1937.

2. The property in dispute is a Nazul plot of land situate in Nagpur on which a certain cinema-house known as the Elphirstone Bioscope stood. This plot was leased by the Nazul authorities to deft. 5 the Madan Theatres Ltd. This lease has been referred to throughout the arguments and also in the judgment of the lower Court, as the head-lease, and it will be convenient to employ the same terminology.

3. The head-lessee, deft. 6 got into financial difficulties and a charge decree was obtained against it in the Calcutta H.C. A receiver was appointed and was placed in possession of its properties, among them the Nazul plot of land at Nagpur now in dispute. It is admitted that the receiver had authority of his own motion, among other things, to sub-lease or sell this property (that is, to sell the lease obtained by the Madan Theatres). At a later stage, Defendant 1 and 2 replaced the original receiver and these are two of the persons with whom we have to deal in this case. It is admitted that the joint receivers had the same power regarding sale and sub lease as the original receiver.

4. No copy of the head-lease to deft. 5 has been filed, but it is admitted that this lease contained several conditions. They are to be found in Ex. p-23, a Patwari's report to the Nazul authorities. We refer to this document not because it is evidence of the terms of the lease but because both sides are agreed that the conditions referred to there were in fact imposed. Among other things, the head lessee was to erect a cinema house on this land in accordance with an approved building plan. The building was to be insured and a garden was to be laid out in the plot.

5. It seems that these conditions were not carried out. Accordingly the Nazul authorities started proceedings to forfeit the lease. These proceedings started with the Patwari's report, Ex. P-23, to

which we have just referred. They were started on 19 6-1936. They will be found reflected in Exs. P-23, 24, 26, 27, and 28. It is not necessary to enter into details. All we need notice is that these proceedings were in being when the agreement, Ex. D-49, on which the present suit is founded, was signed. Another point to be noticed is that the documents show, and that is also admitted, that the property was sub-leased to deft. 3 Naidu some time before 19-3-1936. This lease was oral but was confirmed by a letter, Ex. 3, D-3. dated 19-3-1936.

6. During the pendency of the forfeiture proceedings, negotiations were started between one of the joint receivers and certain persons purporting to act on behalf of the Plantiff for the sale of the head-lease, and on 14-4-1937, Ex. D-49 came into being. The main question is whether this document, read with the letter of acceptance, Ex. P-3, constitutes a final and concluded contract which the parties intended to be binding, or whether it was only a part of the negotiations which were not intended to be binding at the stage.

7. The terms of Ex. D-49, which are relevant to the present purpose, are these. The document is in the form of a letter written by the plff's. solicitors to the joint receivers, Defendant 1 and 2 and runs thus. We reproduce only the relevant portions.

> "With reference to our recent interview with Shri Shah (one of the receivers, deft. 1) and our client Shri Shamji Kheta (plff) in regard to the purchase of the above property, we hereby record the agreement arrived at between Shri Shah on behalf of himself and the joint receiver and our client in regard to the said purchase .... The property is at present rented out by the Official Receiver, Calcutta High Court, to Shri N.J. Naidu (deft. 3) Proprietor Regent Talkies Nagpur on a rental of Rs. 425 monthly inclusive of Nazul rent (or a period of three years certain and three years option, no regular lease has been so far executed.
> 2. The property is agreed to be sold free from all incumbrances and subject to the above lease
> * * * * *
> The vendors will at their cost obtain a proper lease from the lessee or give vacant possession of the property.
> 3. The purchase price is agreed at Rs. 35,000 of which Rs. 5,000 are to be paid as earnest. Upon Shri Shah confirming the conditions of this agreement on behalf of the joint receivers and himself, a cheque for such payment will be made out in the name of the joint receivers and the balance will be paid on completion. . . .
> 4. The vendors (Defendant 1 and 2) are to send the title deeds to the purchasers' attorneys within three days of the execution of the formal agreement hereinafter mentioned.
> 5. The vendors are to make oat a marketable title free from all reasonable doubts to the property agreed to be sold and to every part thereof . . . . . If the title is not marketable the agreement shall be nuil and void and the earnest moneys shall be returned to the purchaser with interest . . . The vendors are to satisfy the purchaser that they have performed all the terms and conditions of the lease and that the same is valid and subsisting. The vendors are also to satisfy the purchaser that all the Municipal and Govt.

rules and regulations have been duly complied with by them

6. The sale is to be completed within two mouths from the date of the execution of the formal agreement . . .

* * * *

13. A formal agreement containing the above terms and other usual terms and conditions will have to be entered into by both parties. To enable the purchaser's attorneys to prepare the said agreement the joint receivers are to send them a copy of the lease together with a copy of the Court's order authorizing the sale by private treaty and the consent of the parties to the suit within seven days from the date hereof.

14. Upon Shri Shah (deft. 1 receiver) confirming the above terms which will thereby become binding on the vendors a cheque for Rs. 5,000 for the earnest money shall be handed by us to Shri Shah."

8. It will be noticed that this document stipulates for a subsequent formal agreement. A large part of the argument before us was directed to an elaborate examination of the law in cases of this kind. We do not, however, intend to enter into an elaborate analysis of the many cases cited, because we do not think there is any difficulty or doubt about the law. The principles are well settled, and the only difficulty is as regards their application to particular cases.

9. Many contracts, and particularly contracts for the sale and purchase of land, have three well defined stages, and it is always a matter for construction, when these three stages are present, as to which the parties intended to be the crucial stage at which both sides are to be bound.

10. The first of these stages is the period of negotiation in which suggestion and counter-suggestion are bandied to and fro. Naturally this can either be oral or by letter. When this stage is concluded, we reach the second stage at which the parties have reached agreement. At this point they can either settle the matter finally or, as is more usual in contracts of this type, reduce their points of agreement to writing and agree to have them drawn up in a formal document by their legal advisers and agree not to be bound till they have signed that formal document. The execution of the formal document is the third stage. Which of these stages is intended to be the crucial one is a matter of construction and must depend on the facts of each particular case. The decided cases do no more than enunciate the above principles in various ways. However, it is possible to deduce certain general rules, and particularly rules of construction, from these cases.

11. It will be noticed that we have spoken of agreement being reached at the second stage. This does not, however, mean an agreement which the parties intend to be binding. It is true, as was argued by the learned counsel for the Plantiff appellant, that in one sense it is a contradiction in terms to speak of an agreement which is not binding; but that is true only up to a point because the term 'agreement' is used in law in two different senses. This is a point which we will develop later.

12. Regarding the rules of construction to be deduced from the many cases cited, first this much is clear. The mere fact that parties stipulate at what we have termed the second stage, that their agreement shall be drawn up in a formal document does not in itself mean that they have not reached finality. That rule we get from the following Privy Council cases; *Harichand v. Govind*

Luxman[1] *Hukum Chand v. Ran Bahadur Singh*[2]*, Currimbhoy and Company Limited v. Creet*[3]*,* and *Shankarlal Narayandas v. New Mofussil Company Limited*[4]*,*

13. In view of these decisions of their Lordships, which bind us, we feel it would be bootless to enquire further except to state in passing that this matter was touched on in one of its aspects in this Court in *Imam Ali v. Priyawati Devi*[5]*,* and also in *Narayan v. Co-operative Central Bank, Malkapur*[6]*,* We will state, however, that the following cases were cited : *Whymper v. Buckle, and Co*[7] *Deviprasad Srikishna v. Secretary of State*[8]*, Krishna Jute and Cotton Mills Co. Ltd., v. J. Innes*[9]*,* and *New Mofussil Company Limited v. Shankarlal Narayandas*[10]*,* which was later reversed by the P. C. in *Shankarlal Narayandas v. New Mofussil Co. Ltd*[11]*.,* There is also Pollock and Mulla on Indian Contract and Specific Relief Acts 7 Edn. at pp. 46 and 47.

14. But though it is clear that the mere existence of a stipulation that the agreement at what we have termed the second stage is to be embodied in a formal document does not in itself conclude this question, it is equally clear from the authorities that the fact that such a clause is found in the agreement at the second stage is strong evidence to indicate that the parties did not intend the agreement at the second stage to be binding. This is to be found the cases on which the Privy Council relied in *Harichand Mancharam v. Govind* in the speech of the Lord Chancellor in *Ridgway v. Wharton*[12]*,* This was one of *Luxman*[13]*,* The principle will also be found enunciated in 29 Halsbury's Laws of England (Hailsnam Edn.) p. 238, note (k).

15. The reason why parties make this sort of stipulation even after they have reached full and complete agreement regarding the terms, but not on the vital point as to whether they are to bind themselves at that stage to those terms, is obvious. Most persons prefer to "sleep over" an important question before committing themselves finally. They want to see what it all looks like in its formal shape before deciding one way or the other irrevocably. This is explained by Lord Blackburn in *Rossiter v. Miller*[14]*,* The learned Law Lord states :

> "Parties often do enter into a negotiation meaning that, when they have (or think they have) come to one mind, the result shall be put into formal shape, and then (if on seeing the result in that shape they find they are agreed) signed and made binding; but that each party is to reserve to himself the right to retire from the contract, if, on looking at the formal contract, he finds that though it may represent what he said, it does not represent what he meant to say. Whenever, on the true construction of the evidence, this appears to be the

[1]47 Bom 335 at p. 342 [3]60 Cal 980 [5] I.L.R (1988) Nag 31 at p. 37
[2]3 Pat 626 [4] I.L.R (1946) Bom 694 [6] I.L.R (1938) Nag 604 at pp. 612 and 613
73 All 469 [9]21 MLJ 182 at p. 184 [11] I.L.R (1946) Bom 694
[8] I.L.R (1941) All 741 [10] I.L.R (1941) Bom 361 at p. 374 [12](1857) 10 ER 1287 at p. 1299
[13]47 Bom 335 at p. 342
[14](1877) 3 AC 1124 at p. 1152

> intention, I think that the parties ought not to he held bound till they have executed the formal agreement."

16. Then there are two more principles. Certain phrases have now acquired technical significance

in these cases, and if they are used, that normally concludes the matter. They are phrases like "subject to", "condition precedent" and so forth. This will be found set out in Cheshire's Law of Contract, p. 25, and also in 29 Halsbury's Laws of England pp. 237 and 238. But even then, it is a matter of construction and these words are not necessarily crucial, as will be evident from the decision of Parker, J., in *Von Hatz Feldt Wildenburg v. Alexander*[15],.

17. This decision has become the leading case and has been quoted in nearly every Privy Council and House of Lords' decision which deals with this point. The agreement in that case recited that "This acceptance is subject to the following conditions." Parker, J., held that despite the use of the word "condition" one of the four conditions set out did not go to the root of the matter and so that particular condition was not fundamental. It is clear then that in every case we have to be guided by the terms of the document, and the surrounding circumstances where there is ambiguity, and this is so even when terms which have now acquired technical significance are employed.

18. Of course, if these technical terms are used that will go a long way towards settling the matter, but if they are not used, then it does not follow that the opposite conclusion must necessarily be reached. It is a matter of construction in every case, and much more so, when no terms of technical significance are found to be present.

19. That brings us to a further principle. Every term in an agreement is not fundamental in the sense that it will afford the other aside a right of rescission if it is broken. A fundamental term is one which gives this right to the other side and is technically termed a "condition." Other terms are not so vital and in parts of the English law are called warranties. If they are broken the contract is not at an end. Their breach only entitles the other side to compensation, or damages, for the breach of that particular term, but not to put an end to the contract as a whole. Which is intended is again a matter for construction in each case, and it will be bewildering to try and reconstrue each document in the many cases cited. We must primarily depend on the document we have here and on the surrounding circumstances which we have to interpret. This also is a principle which is elementary though it was argued at length. It will be found set out in Cheshire's Law of Contract p. 91 and is also to be found in *Wallis v. Pratt*[16],

20. We turn now to the construction of Ex. D-49 with which we are primarily concerned. [After discussing the evidence, their Lordships concluded that in the circumstances of the case it hardly seemed likely that Ex. D-49 was intended to be the final binding agreement, and continued.]

[15](1912) 1 Ch 284
[16](1911) AC 394 at p. 400

21. We can hardly believe that a responsible firm of solicitors would take upon themselves the responsibility of concluding a bargain finally so as to bind a client whom they did not know in the least and whom they had never met, without even consulting him directly or giving him an opportunity of seeing the terms of the contract, on the vague and indefinite instructions of the type we have here. It is inconceivable that the solicitors should not have asked Jagmal Raja and the plff's. son regarding their authority to conclude these negotiations so as to bind the absent Plantiff, and if they did, it would not be legitimate to infer that they were told anything more than the witnesses, whose evidence we have reproduced above, have told us in the box. In these circumstances it is inconceivable that the solicitors could have intended to draw up

a document which was finally to bind the parties, including their absent and hitherto unknown client.

22. This is all the more evident when we contrast this conduct with the conduct in respect of the clause regarding deft. 3's sub-lease. Complaint was made to the plff's. solicitors on behalf of the receivers about the delay on the plff's. part. The plff's. solicitors explained in their letter, Ex. D-15 dated 7-7-1937, that they were unable to reply to the receivers' solicitors because they had to consult their client. This was also their attitude at other times. We feel it would be curious to have a contract in which the solicitors have authority to bind their absent client to purchase and yet have no authority to settle a subsidiary point which, according to the learned counsel for the Plantiff, the parties did not regard as vital to the contract. After all, what was this clause in Ex. D-49 which the plff's. solicitors considered they were unable to settle on their own authority?

It was simply this :

> "The vendors will at their cost obtain a proper lease from the lessee or give vacant possession of the property."

Who would be in a better position to determine what a proper lease was but the plff's solicitors? It is said that the plff's. solicitors and those acting on behalf of the Plantiff had full authority to bind the Plantiff behind his back and without informing him about the existence of the sub-lessee on the property and to accept the sale even with the sublessee there, with no one knowing the terms or conditions of the sub-lease, and yet had no authority to draw up a formal and what the document calls, a "proper" lease without obtaining the plff's. consent.

23. The Plantiff tells us as P.W. 3 :

> "I had not known the terms on which the Nazul site had been granted to the theatre and I did not enquire about the terms before the agreement. I did not even know when entering into the agreement that the theatre had been given in possession of Naidu. About 7 or 8 days after the agreement was made I learnt that the theatre was in the poseession of Naidu I came to know about it from the copy of the agreement which my son had brought from Bombay. I then came to know that Naidu's lease was for three years from 1936 to 1939 and that he had the option to renew it for a further term of three years.
> * * * *
> About a month after the agreement my solicitors sent me a copy of the lease taken from the Govt. by the Madan Theatres and then I came to know all the terms. Before making the agreement I had not seen the lease nor ascertained the terms."

24. It will be remembered that the Plantiff was not purchasing the freehold in the land. He was purchasing the unexpired portion of a lease granted to the Madan Theatres. One would have thought that the conditions of the lease were of vital importance to a would be purchaser. It is in the last degree unlikely that solicitors would agree to bind an absent client who had not been informed about any of these conditions and yet would have no authority to draw up a purely formal document regarding a sub-lease.

25. This sort of point was stressed by their Lordships of the P. C. in *Hukum Chand v. Ran Bahadur Singh*[17], The relevant clause in the document is set out there at p. 633. It states :

> "We hereby accept the terms modified as above provided that a short agreement embodying these terms be prepared and executed by (among others) the Deputy Commissioner or such other officers, representing the Court of Wards as is authorized to assign such agreement."

The Privy Council held that that formed a condition precedent. They said at p. 634 :

> "They will assume for the moment that this alleged contract was entered into with a person entitled so to do. On that assumption they are of opinion, agreeing with that of the learned Judges, that the proviso did constitute quite clearly a condition precedent. To take the consent of the manager and the adhibition of his authority by his signature to the transaction to take that point alone, it seems beyond question that it was most natural and proper, and indeed necessary, that the agent should be personally satisfied, and after investigation, should personally approve of the merits of the transaction under which he was to dispose of a most important part of the real estate committed to his charge. It is further clear that in such circumstances it would be a misuse of language to describe his signing the contract and becoming bound as manager and in that capacity dominus of the estate, as a mere provision of a formal character and of a purely executory nature. The manager's consent, authority, and signature went to the root of the alleged bargain which had been come to."

26. It is also evident from *Lockett v. Norman Wright*[18], that solicitors are not in the absence of specific authority, agents of their clients to conclude a contract for them. In the light of this we are of opinion that Clause (13) of Ex. D 49 was intended to be and constituted an essential condition. It will be observed that mandatory expressions

[17]3 Pat 625 at p. 635

[18](1925) 1 Ch 56 at p. 62

have been employed. The clause stresses that a final agreement will have to be entered into by both parties.

27. We tarn next to Clause (5) where it is stated that the vendors are to satisfy the purchaser on two points. We can put on one side for the moment the legal consequences which would flow from an unreasonable refusal by the purchaser to be satisfied. The question at the moment is not what would happen if one side was unreasonable but what did the parties mean by a clause of this kind. When a man says, "Yes, I agree to all your terms, but before I execute a formal document you must satisfy me on two points," surely he can only mean that until he is satisfied he will not bind himself finally and who can blame a party who takes up this attitude? It is after all a very normal and reasonable precaution to take and is quite clearly the sort of precaution a solicitor would take on behalf of an absent client who admittedly knew nothing whatever about the exact nature of the property he was to purchase.

28. In our opinion, Clause (5) must be read as a whole. It refers to the vendor's title. It would be very unwise for a purchaser to buy property at sight, blindfold as it were, without even examining the title deeds, and to bind himself even if he was not satisfied about the title. It does not matter how much others may be satisfied. Would any reasonable man bind himself to purchase and say, "Even if I am not satisfied and my legal advisers are not satisfied still I bind myself to purchase in the hope that the Courts will hereafter determine in my favour, should the matter evergo that far?" The answer is that, of course, he would not. Therefore it is not unusual in contracts of this kind to stipulate that after all else is settled, the bargain is to be subject to scrutiny of the vendor's title by the purchaser's legal advisers; here, in place of the legal advisers the stipulation is that the purchaser himself is to be satisfied. We appreciate the fact that parties do not have to take this precaution. But when we find a precaution of this kind deliberately inserted in a deed we feel it can only mean what we have said above. It is the precaution of a reasonable man who does not intend to bind himself until he personally is satisfied.

29. The Privy Council indicate in *Harichand Mancharam v. Govind Luxman*[19], that this sort of position is quite a normal one which does arise in certain contracts. They refer with approval to the judgment of Parker, J., in *Hatzfeldt Wilderburg v. Alexander*[20], and state,

> "Lord (then Mr. Justice) Parker laid down that where the acceptance by the Plantiff was subject to a condition that the plff's. solicitors should approve the title to and covenants contained in the lease, the title from the freeholder and the form of contract,' the negotiations did not form a binding agreement between the parties."

The position here is similar except that in this case it was not the plff's. solicitors who had to be satisfied but the Plantiff himself, and very naturally because he had not up to that moment seen the terms of the bargain or been informed of the exact nature of the property he was buying. By "nature" we mean, this being a lease, the terms of the

[19]47 Bom 335 at p. 342
[20](1912) 1 Ch 284

lease, whether there had been breaches, whether there was a forfeiture clause whether there was livelihood of forfeiture and so forth.

30. In the case with which Parker, J., was dealing, and to which their Lordships refer, the letter of acceptance said that the acceptance was "subject to the following conditions". Then four conditions were enumerated. Parker, J., held that the fourth condition was only a term and not a condition within the technical significance of that term in law even though in had been described as a condition in the agreement. But he held that the second term was a condition within the technical meaning of the term. The second term was as follows :

> "That Her Serene Highness's solicitors approve the title to, and covenants contained in the lease, the title from the freeholder and the form of contract."

Parker, J's judgment on this was to this effect :

> "The second condition must therefore, at any rate as to this, be treated as a real condition.

It does not in terms compel the vendor to shew the freehold title, but unless he does so to the satisfaction of the purchaser's solicitors he cannot hold the purchaser to her bargain."

31. So here. The satisfaction of the Plantiff stands, in our opinion, on the same footing. He was, as we have said, purchasing not a freehold but the unexpired portion of a lease. The conditions in a lease relating to forfeiture and the like are vital. They go to the root of the bargain. Therefore it would be right and proper, and usual, for a purchaser to stipulate that before he can be bound he must be satisfied that he is not buying property which is liable to forfeiture because of some breach in the conditions of the lease.

32. It was argued on behalf of the Defendant that Ex D-49 shows on the face of it that it, that is to say, the document, was not the real contract between the parties. The real contract was reached orally between other persons, at any rate as to one of the parties, at another place and at another time. Only one of the contracting parties was a party to Ex. D-49 read with Ex. P-3. The other, the Plantiff was not a party at all. The document is not signed by him. It is not signed by any of those who, according to the arguments, were authorized to represent him. It is not signed by his solicitors for and on behalf of their client, and all that the document does is to set out on the authority of a person who has not been called, namely, the plff's son and on the admission of only one of two contracting parties on the other side, what these persons told the solicitor who drew up Ex. D-49 were the terms which other parties had agreed upon at another place and another time. Therefore Ex. D-49 does not purport to be the effective contract but was only intended to record, as a mere matter of record, the terms of an agreement which had already been reached at another place and another time by other persons. The argument is founded on the following clause in Ex. D-49.

"We hereby record the agreement arrived at between Shri Shah on behalf of himself and the joint Receivers and our client in regard to the said purchase."

'Our client' is shown in an earlier sentence to be the Plantiff and not any of the persons who were present before the solicitor. We do not intend to enter into this very deeply because it was never objected till this stage that Shri Shah (one of the receivers) had no authority to act on behalf of his fellow receiver. But it is clear that Ex. D-49, is not, and cannot be taken to be, the effective agreement, that is to say, the document which in itself effects the transaction. It is only a record of what has already occurred in the past. But facts, (1) that the Plantiff was not there, (2) that those who represented him have not signed, (3) that the solicitor does not purport to act for and on behalf of the Plantiff but only to record what other people told him the Plantiff had agreed to, and (4) that only one of the two receivers was present and signed the letter of acceptance, Ex. P 3, are strong to indicate that none of the parties could have intended that Ex. D-49 should form the crucial and binding stage. This is particularly the case when in fact Ex. D-49 is not the effective contract but only a record of a past agreement and when we know from the evidence we have quoted that the Plantiff never had the slightest notion of the terms of the head-lease, nor indeed of the fact that there was a sub-lease on the property. How then could he possibly agree to the terms we find in Ex. D-49. It is to be observed that Ex. D. 49 does not say that the terms are the ones agreed to by representatives on behalf of the Plantiff

but that they are the terms agreed to by the absent Plantiff himself. In the circumstances it is abundantly evident that Ex. D-49 cannot have been the final and binding engagement.

33. The learned counsel for the Plantiff applt. relies strongly on the following (actors for his contention that Ex. D-49 was intended to be binding. First, he points out that Ex. D-49 calls itself an agreement in more than one place; and according to him, an agreement means a concluded agreement and can mean nothing else. That, however, loses much of its force when we find that Ex. D-49 is not in fact the agreement which effected the transaction but is only a record of a past agreement, and when we know that that past agreement, in the terms we have in Ex. D-49, was not and could not have been assented to by the Plantiff because, on his own showing, he knew nothing about many of the vital matters which are set out in Ex. D-49 - this, quite apart from the legal interpretation of the term 'agreement', to which we shall refer in a minute.
34. The second point on which the learned counsel for the Plantiff-applicant relied was that the receiver Shri Shah, who accepted Ex. D-49 by his letter Ex. P-3, admitted in the witness-box that Ex. D-49 embodied all the material terms agreed upon and that no further term which could be regarded as material was left for settlement; also on the fact that Exs. P-20 and P-21, the two drafts of the formal agreement which were contemplated by Ex. D-49 have not differed in any material particular from Ex. D-49. As a matter of fact, this is not quite accurate. We will deal with this later, but at the moment we will assume that to be the case.

35. In our opinion, none of these facts necessarily settle the matter. This is clear from the observations of Lord Blackburn in *Rossiter v. Miller*[21], which we have already quoted. It is also clear from the decision of Parker, J., in *Hatzfeldt-Wildenburg v. Alexander*[22], to which we have also referred.
[21](1877-78) 3 AC 1124
[22](1912) 1 Ch. 284

36. Taking first the use of the word 'agreement'. We have it from the decision of Lord Greene in *Branca v. Cobarro*[23], that that does not necessarily mean a concluded agreement which is to be binding in law. The learned Master of the Rolls states :

> "There are one or two preliminary points to which I may refer about this document. First, it is expressed as an agreement. The provision for payment by the purchaser is worded in this way :
> "Alfredo Brance undertakes to pay, and in the concluding clause the word "agreement" is used to describe the document. It is perfectly true that words such as "agree" are by no means conclusive of the question whether the parties were intending a contract or had only arrived at a stage of negotiation. Too much weight must not be attached therefore, to the words I have mentioned, but I think that in the particular context of this document they are not without importance."

The Privy Council also explained in *Harichand Mancharam v. Govind Luxman*[24], that the word 'agreement' can mean either a provisional arrangement or a concluded bargain, which, is a matter for construction and must be decided according to the facts of each particular case. This is also dealt with in *Winn v. Bull*[25], Then, in India, we have the Contract Act which indicates in the

definition of 'agreement' in Section 2, Clause (g) and (h) that an agreement can be either one which is not enforceable by law - in which case it is said to be void agreement-or one which is enforceable by law - which is called a contract. It is evident then from these authorities that the word 'agreement' is used in two senses, and whether it is intended to be the one or the other mast depend on the context in which the word occurs and when there is ambiguity, on the surrounding circumstances as well.

37. Then as regards the other point. Even if all the terms of a contract are settled and nothing further remains to be done regarding settlement of the terms, that in itself does not necessarily conclude the matter : see Salmond and Winfield on Contracts, pp. 121 and 199, and Pollock's Principles of Contract (Edn. 13), at p. 34. That is also evident from the cases which we have cited earlier.

38. The learned counsel for the pltf. next relied on the following clause in Ex. D-49 relating to the payment of earnest money. The clause runs :

> "The purchase price is agreed at Rs. 35,000 of which Rs. 5,000 are to be paid as earnest. Upon Shri Shah confirming the conditions of this agreement on behalf of the joint receivers and himself a cheque for such payment will be made out in the name of the joint receivers."

Also on clause (14) which states,

> "Upon Shri Shah confirming the above terms which will thereby become binding on the vendors a cheque for Rs. 5,000 for the earnest money shall be

[23](1947) 2 All England Reporter 101 at p. 102 [25](1877) 7 Ch D 29
[24]47 Bom 335 at p. 342

> handed by us to Shri Shah."

39. According to the learned counsel's contention, it would be most unusual for an agreement to require the payment of earnest money before there was a concluded contract. That has considerable force, but it is by ho means a conclusive factor, because there are cases where the earnest money has been paid before there has been any binding engagement. That this can be so is adverted to in 21 Halsbury's Laws of England, p. 238, note (i). The learned authors state, "the payment and acceptance of a deposit is not conclusive." The case on which they rely is *Chillingworth v. Esche*[26], Pollock M.R. Stated,

> "Mr. Luxmoore says that the result of such a finding is that the money paid on deposit is recoverable, on the ground that there never was a contract, and I think that prima, facie he is right, and that the deposit is recoverable and ought to be repaid to the pltfs."

The document there recited that the pltfs.-purchasers agreed to purchase from the deft. vendor for the sum of #4,800. The purchasers signed this document and the vendor added the following :

> "I hereby confirm the above sale and acknowledge receipt of #240 above mentioned."

It was held that the contract was not a concluded and binding one and that the deposit which had been made ought to be returned. The term 'deposit' has been used. It is what we in India call earnest money. We have already quoted the decision of the Master of the Rolls. Warrington, L.J. said :

> "But where, as here, there is no binding contract where the whole matter is left indefinite, it seems impossible to say that the purchasers pay the deposit as a guarantee to carry out the bargain, when by the document they have entered into they have not bound themselves to carry out any bargain."

So also, Sargant, L.J., said :

> "Then on the basis that the contract is conditional, what is the result of the payment of the deposit? One obvious object of such payment was that it should form a deposit in the ordinary way if and when the contemplated definite contract was subsequently signed and exchanged. Is it necessary to assume any additional object, such as that the purchaser was giving an interim guarantee that he would enter into a reasonable contract? In my judgment that is not common sense. The parties were not agreeing that they would enter into a reasonable contract, but that they would enter into such a contract, if any, as they might ultimately agree and sign, 1 look on the whole payment as being sufficiently explained as being an anticipatory payment intended only to fulfil the the ordinary purpose of a deposit if and when the contemplated agreement should be arrived at."

[26](1924) 1 Ch 97 at p. 106

In our opinion, this is also the position here.

40. Now it will be observed that Clause (14) says that payment of the earnest money will bind only one side, namely, the vendors. It does not say that the purchaser will also be bound. That, in our opinion, is significant. The clause is as follows :

> "Upon Shri Shah confirming the above terms which will thereby become binding on the vendors a cheque...."

41. Attempts were made on behalf of the Defendant to take us through the subsequent conduct of the parties as evidence of their intention in Ex. D-49. This was strenuously opposed by the other side, and support for the view of the pltf.'s learned counsel is to be found in the observations of Lord Shaw in *Walks, Son and Wells v. Pratt and Haynes, (1911) AC 394 at p. 400(SUPRA).* On the other hand, in some of the decisions cited, including one of the Privy Council, subsequent conduct has been looked to. We need not decide this question here because we are of opinion that quite apart from any evidence of subsequent conduct, the words of the document, read in the light of the surrounding circumstances to which we have adverted, are sufficient to justify the conclusion that Ex. D-49 was not intended to be a binding engagement. We, therefore, exclude all evidence of subsequent conduct from our consideration in this part of the case and base our decision on the words of the document coupled with the surrounding circumstances.

42. On a careful consideration of the document, read as a whole in the light of the surrounding circumstances, we conclude that the parties did not intend to be bound at that stage. On this view, it is not necessary to decide the other points in the case, but as this is an important case which is likely to go further we feel it proper to enter into the other points as well.

43. The first point of the remaining points which we will consider is whether, assuming Ex. D-49 to be a binding agreement, the Plantiff is entitled to specific performance.

44. One of the essential factors in a case of this kind is that the Plantiff must first allege and then if the matter is traversed, prove, (a) that he has performed all the conditions which under the contract he was bound to perform, and (b) that he has been ready and willing at all times from the time of the contract down to the date of suit to perform his part of the contract. This principle is set out succinctly Section 24 (b), Specific Relief Act, but it has been expanded by judicial decision. Their Lordships of the Privy Council hold that though the matter of specific relief is governed in India by the terms of the Specific Relief Act, nevertheless as the Act is founded on the English law it is permissible, on matters with which the Act does not deal specifically, to refer to the English law. That was decided in *Ardeshir Mama v. Flora Sassoon*[27], So far as the present points are concerned, their Lordships hold at p. 619.

> "In a suit for specific performance on the other hand, he treated and was

[27]52 Bom 597 at p. 618

> required by the Ct. to treat the contract as still subsisting. He had in that suit to allege, and if the fact was traversed, he was required to prove a continuous readiness of willingness, from the date of the contract to the time of the hearing, to perform the contract on his part. Failure to make good that averment brought with it the inevitable dismissal of his suit."

And again at p. 602 their Lordships say,

> "But that right of the Plantiff would be dependent upon his having been himself up to the date of decree ready and willing to perform the contract on his part and in para 9 of his plaint be alleged that he had throughout been so ready and willing : an allegation which imports a continuous readiness and willingness up to the time of the hearing."

45. One of the conditions in Ex. D-49 is this.

> "The vendors will at their cost obtain a proper lease from the lessee or give vacant possession of the property."

It will be seen that this gives the vendors the option, but if the vendors did not choose to give vacant possession then a duty was cast upon them of obtaining a "proper" lease from the sub lessee, deft. 3. Exactly what is meant by the words "proper lease" is not explained in the document. This led to disagreement. The plff's. case on this point, as set out in the plaint in para. 5 (b) is that

> "The vendors undertook to deliver to the purchasers a duly executed and registered lease-deed in respect of a lease in favour of the deft. 3 .... and in the absence of such lease-deed to deliver vacant possession of the properties to the purchasers."

It was then said that the vendors in collusion with deft. 3 attempted to frustrate this agreement by preparing a draft lease which was not a proper one because it made the Plantiff liable for higher insurance than is proper. The Defendant denied these allegations and said that they actually sent the Plantiff a draft of the lease which deft. 3 was always ready and willing to execute.

46. We pause to observe here that there has been a scandalous disregard of the rules of pleading in this case. Not only are the pleadings discursive and argumentative but the parties have been allowed to put in as many written statements and rejoinders as they wanted. That was improper, and the learned Judge should have exercised a more rigid control of the case at that stage.

47. Certain dates will show the history of this part of the dispute and its sequal. Ext. D-49, it will be remembered, is dated 14-4-1937. The first step towards the implementation of that document was the preparation of a draft of the formal agreement of sale. One was prepared and was examined by both sides. It was prepared by the plffs. solicitors and the draft was sent to the defts'. Bombay solicitors on the 14-6-1937 along with their letter Ex. D-4. This draft was evidently Ex. P-20 though Ex. 20 is dated 21-6-1937. That must have been one of the blanks which Ex. D-4 refers to and which the defts'. solicitors were asked to fill in after approval.
48. It will be convenient at this stage to set out the various lawyers who represented the parties. The Plantiff resides at Nagpur but his solicitors are a Bombay firm, Pereira Fatalbhoy and Co. The receivers have three sets of legal advisers, (1) a Calcutta firm of solicitors, Mukerjee and Biswas, (2) a Bombay firm of solicitors, Dady Burjor and Co. and (3) Rustomji an advocate at Nagpur.

49. The draft eventually reached the receivers and they approved it on 18-6-1937 in Ex. D-43, subject to a few alternations which they asked the purchaser's solicitors to approve. It was then returned to the plff's. solicitors with an endorsement of the receivers' Bombay solicitors regarding their approval on it. Thereupon the plff's. solicitors drew up a f AIR copy of the draft on a stamp paper. This copy is Ex. P-21.
50. The draft, Ex. P-20, had in it the following clause regarding deft's. 3 sub-lease :

> "The vendors hereby agree to obtain at their own cost a proper lease in writing duly stamped and registered from the said N.J. Naidu in favor of the purchaser and to hand over the same to the purchaser before completion or to give vacant possession of the said land hereditaments and premises."

51. It will be observed that Ex. D-49 is silent as to the person in whose favour the sub-lease from deft. 3 is to be executed. All it says is that the vendors will obtain a proper lease. This of course can be interpreted to mean a proper lease in favour of the vendors, but it would also be possible to construe that as meaning that the vendors undertake to obtain a proper lease in favor of the purchasers direct when the purchase was put through. But however that may be, it is to be seen that the draft. Ex. P-20, stipulates that the lease shall be in favor of the purchaser. The pltff's

learned counsel argued at one stage that this was a material variation of Ex. D-49 because, according to him Ex. D-49 stipulates that the sub-lease by deft. 3 will be executed before the sale, while Ex. P-20 postpones the matter till after the sale is complete, and he contended, no lease can be executed in favor of a purchaser who has not yet purchased in favor of a purchaser who has not yet purchased. In this reply, however, the learned counsel stated that he did not attach much importance to this.

52. We are not impressed with the argument put forward in the opening stage of the case because (a) the draft. Ex. P-20 was drawn up by the plff's. own solicitors and was sent for approval to the defts' solicitors, and (b) it was approved by the legal advisers of both sides, otherwise the plff's solicitors would clearly not have drawn up Ex. P-21 on a stamp paper with this term engrossed on it; and also because (c) this is not a matter of which complaint is made either in the plaint or in the voluminous subsequent pleadings of the Plantiff But however that may be, it is evident that the Plantiff did not want deft. 3 on the premises. His reasons may be good or bad, but the fact is there. It is also evident that the Plantiff was in no hurry to get on either with the formal agreement which Ex. D-49 contemplates or with the sale itself.

53. The defts' title deeds, that is to say, a copy of the head-lease together with a copy of the Court's order authorising the sale, reached the plff's solicitors early in May 1937 and as we have seen, the draft agreement for sale was returned to them after approval by the Defendant side about the middle of June. Clause 6 Ex. D-49 stipulated that the sale was to be completed within two months from the date of the execution of the formal agreement. As no further progress was evident from the plff's side the receivers' Bombay solicitors wrote to the Plantiff complaining of the delay on 7-7-1939 (Ex. D-16). This produced a double reaction from the plff's. side.

54. On 1-7-1937 the plff's. broker Vijaysingh, who had negotiated the matter with one of the receivers Shah, wrote direct to the receiver. His letter is Ex.D-51; and on the same day the pltf's. solicitors wrote to the defts' Bombay solicitors their letter is Ex. D-57. The broker's letter contains the following :

> "I understand that the draft agreement for sale is ready, but the same is not completed for clearing the question of Naidu's agreement.....Naidu is a very troublesome fellow and my client does not wish that his agreement should be completed.....You cancel Naidu's agreement, as he has failed to carry out the terms of the lease, otherwise it would be very troublesome for the purchaser, owing to Naidu's negligence in carrying out the terms of the lease with the Govt. which would even terminate the lease agreement with the Govt."

55. The letter from the plff's solicitors (Ex. D-57) states that the Plantiff had discovered since the execution of Ex. D-49, that certain proceedings were then pending in the Court of the Nazul Officer for cancellation of the head-lease which the Plantiff had agreed, under Ex. D-49, to purchase. The letter complains that its important fact had been suppressed. Then follows this important clause :

> "In the circumstances our client is unwilling to purchase the property except on the basis that vacant possession thereof is given to him at completion of the purchase. Kindly let us

know immediately whether your clients agree to give such vacant possession failing which our client will consider termination of the present arrangement and demand the return of the earnest money with interest thereon."

56. It will be observed that this contains an important variation in the terms of Ex. D-49 Under that document the option was with the vendors either to obtain a lease from deft. 3 or to give vacant possession. This letter takes away the option from the vendors and insists on vacant possession.

57. The reaction from the defts' side is contained in Ex. P-17 dated 23-7-1937. That is a letter from the receivers' Calcutta solicitors to the plff's solicitors in Bombay. They said (1) that the plft. was aware of deft. 3's existing sub-lease (2) that deft. 3 was not responsible for the breaches in the head-lease of which the Nazul authorities were complaining but that those breaches were committed by the original lessee, Madan Theatres, and (3) that the Defendant were ready to carry out the terms of the agreement, Ex. D-49; and then come these passages :

"We hereby call upon your clients, through you to complete the agreement forthwith. It is needless to point out that the agreement had been approved and returned so far back as on 19-6-1937. (The letter states 'May' but every one is agreed that this is a slip for 'June')..... Our clients are not prepared to agree to any variation of the terms of the agreement as already agreed upon and they insist on the said terms being strictly carried out."

58. The receivers replied in the same strain to Vijaysingh on 28-7-1937 (Ex. D-52). On the same day the receivers' Bombay solicitors wrote to the plff's solicitors in Bombay and gave them an ultimatum requiring performance of the agreement within one week. The ultimatum is couched in the following terms and is contained in Ex. D-
59 :

"We have to request you not to delay further the execution of the formal agreement and to send us the engrossment thereof for our clients' signature in the course of this week without fail. In any event our clients will not consent to any variation of the original agreement."

59. As nothing further happened for nearly three weeks the Defendant' Bombay solicitors again wrote to the plff's solicitors on the 11-8-1937 (Ex. D-22). They say,

"We have to invite your immediate attention to the letter of the 23rd ultimo.... and our reminder of the 28th idem which so far remain unattended to, though more than a fortnight has passed since then.

By reason of your client's abnormal delay in the execution of the formal agreement, our client has been obliged to come down to Bombay from Calcutta at heavy expense. Our clients have waited enough and they cannot allow this matter to be prolonged indefinitely. Our clients hereby assure your client that they are even now prepared to make out a marketable title in terms of the agreement of the 14th April last and since all the terms of

the said agreement have been agreed upon they hereby call upon your client to complete the formal agreement without any further delay. Please treat this as urgent."

60. The plff's solicitors replied the same day by Ex. D-23. This letter was written "Without prejudice". They did not say that there client was willing to carry on the bargain, and they did not withdraw their ultimatum of 19-7-1937. They, however, asked whether a formal lease deed had been executed by deft. 3, and if so asked for a copy. In addition they wanted particulars of the breaches, which the Defendant' solicitors admitted bad been committed by the head lessee, the Madan Theatres, and they asked for copies of any notices which may have been served upon the receivers by the Nazul authorities of Govt.

61. The Defendant' Bombay solicitors replied on 13-8-1937 by Ex. D-24 and pointed out that the receivers had the option of either getting a lease from the deft. 3, or of giving vacant possession. They repeated the assurance that the Nazul proceedings had been compromised and said that the Plantiff would be furnished with copies on completion of the formal agreement but not before. Then they added,

> "It is enough for your client's purpose that our clients will either obtain from the lessee a proper lease or give your client vacant possession of the property, as provided under the agreement of 14-4-1937.... our clients will make out a marketable title before the sale is completed. In any event your client cannot avoid or delay the execution of the formal agreement for any reasons whatsoever in spite of being repeatedly called upon to do so .... Our clients' interests are also being prejudiced by reason of your client's delay in the execution of the formal agreement and in the completion of this matter and your client will be held responsible for the consequences thereof.

Under the circumstances, we are once more instructed to call upon your client which we hereby do to execute a formal agreement forthwith and to make an immediate appointment for the purpose."

62. Nothing further happened on the plff's side for nearly two months, and then, on 5-10-1937, one of the receivers wrote to the plff's broker, Vijaysingh. The letter is Ex. D-61. He said,

> "We have written so many letters but it seems your client Shri Kheta has no intention to "carry out the agreement he has entered into with us. Under the circumstances we shall have no other alternative but to resort to other actions open to us. As you know, we cannot hold on indefinitely in the matter. We have always been prepared to carry out our part of the agreement and we have waited patiently so long with a hope that you would induce your client to complete the sale as early as possible. We are making once more this last request to you to get your client to complete the sale without any further delay, and we trust you will give your immediate attention to this matter."

63. On the following day, namely, 6-10-1937, the plff's solicitors wrote to the receivers' Bombay solicitors replying to their letter of the 13th August, that is to say, the reply to that letter was sent

after a delay of nearly one month and three quarters. They wrote (Ex. D-25) as follows :

> "We have now received our client's instructions for a reply to your letter of the 13th August last."

They then repeated their demands for the information they had asked for on 11-8-1937 and added,

> "Our client insists upon having the above information before he can decide to incur further costs and failing your giving such information to us within a week from the receipt hereof by you our client will have to consider determination of the present agreement and demand the return of his earnest money with interest and costs."

64. The receivers' Bombay solicitors replied to this on 8-11-1937 by Ex. D-30. They answered the questions put and said,

> "We are, therefore, instructed to repeat that our clients are prepared to carry out whatever terms were mutually agreed upon when the said letter was signed. In fact draft of the proposed lease has already been approved by Shri Naidu and the same can be completed at any moment. A copy thereof can also be inspected by your client at any time by previous appointment ..... At all material times our clients have been prepared to give your client a marketable title to the said property .... your client has deliberately refused to complete the sale and in view of the attitude adopted by him our clients have now no other alternative but to pursue such remedies in law as are open to them. Please, therefore, now note that unless your client performs his part of the agreement within a week from the receipt hereof our clients will now positively proceed further in the matter at your client's risk as to costs and consequences."

65. The Plantiff's solicitors replied on 11-11-1937 (Ex. D-31), stating that they were consulting their client, and added.

> "Meanwhile please send us the draft of the proposed lease of Shri Naidu for our perusal. This should not, however, be understood to mean that our client agrees to any lease to Shri Naidu."

66. It will be observed that even at this stage they had not withdrawn their ultimatum of 19-7-1937. On the contrary they indicate here four months later that the ultimatum still stands, though they state that they are prepared to consult their client.

67. The draft of the sub-lease was approved by the deft. 3 and was forwarded to the Plantiff's solicitors on the same day, namely, 11-11-1937, along with Ex. P-19, and they were asked to send an early reply to the letter of 9-11-1937 (this is probably a slip for 8-11-1937). That was the letter where the Plantiff was given a week's time for completion of the agreement.

68. This draft was sent on to the Plantiff but he gave no reply. So on 14-12-1937 the receivers' Calcutta solicitors cancelled the agreement by their letter, Ex. D-33. This cancellation was confirmed by the receiver's Bombay solicitors by their letter (Ex. D-35) dated 17-12-1937.

69. The Plantiff was asked about this when he entered the box, as P. W. 3, and admitted receipt of the draft but said he did not approve of it and so made certain corrections, and added that he was prepared to approve of the sub-lease subject to those corrections. This draft embodying the Plantiff's corrections has not been produced. But in any event his side took no further steps till 9-2-1938 on which date the Plantiff's solicitors wrote Ex. D-48.

70. In that letter they stated that the Plantiff did not approve of the deft. 3's draft lease and pointed out their objections to it. They again complained about having been kept in the dark regarding the Nazul dispute and alleged that there had been misrepresentation about a compromise. Then they added :

> "In the above circumstances our client is entitled to rescind the agreement and to recover the earnest money with interest thereon ....
> Without prejudice to our client's right and contentions our client says that upon your clients first satisfying him that all disputes with Govt. have been settled and that they are prepared to give a lease to Shri Naidu in accordance with the draft sent herewith he will reconsider the question of completing the purchase."

71. Now what is the force of the word "reconsider". If the Plantiff had always been ready and willing to complete the purchase up to this time where was there any room for reconsideration ? The use of this word, when read in conjunction with their ultimatum of 19-7-1937, can only mean that the Plantiff had repudiated the contract on that date and that his repudiation stood good. But that he was prepared to consider the repudiation should the other side fulfil certain conditions which he now demanded.

72. What we have to determine on these facts is whether the Plantiff was at any time between the date of the agreement and the date of suit unwilling to complete the purchase. It does not matter at this stage whether the Plantiff was at fault or whether he was justified in his unwillingness. The only question at the moment is whether the Plantiff was unwilling to continue. Even if the Defendant were in the wrong a wrongful repudiation of the contract by them would not relieve the Plantiff of his duty to perform his part of it. This rule was applied by the P. C. to a claim for damages in *Edridge v. R. D. Sethna*[28], It applies with equal force to cases of specific performance, as is evident from 31 Halsbury's Laws of England, p. 421. para. 504.

73. Now consider these dates and facts. The agreement is dated 14-4-1937, The deft's. title deed etc. reached the Plantiff's side in May 1937. The draft of the formal agreement was drawn up and returned to the Plantiff's solicitors, after approval by the deft's. side, about the middle of June. Nothing further happened, so the defts'. side complained of delay on 7-7-1937. On 19-7-1937 the Plantiff's side stated categorically that the Plantiff was unwilling to purchase except on the basis of vacant possession. This statement was never withdrawn. The utmost to which the Plantiff was prepared to go was that in certain circumstances he might if he was satisfied, reconsider his

attitude. This position was underlined on 11-11-1937 in Ex. D-31, and the letter of 9-2-1938, written after the cancellation by the deft. merely contains a conditional offer to "reconsider" the question of computing the purchase.

74. Next consider another set of facts and again look to the dates. We start again with the agreement dated 14-4-1937. On 7-7-1937 the Defendant' side complain of delay and on 23-7-1937 they call upon the pltf. to complete the agreement "forthwith;" and again on 28-7-1937 they give the pltf. a time limit of one week (Ex. D-59). Nothing happens for three weeks, so on 11-8-1937 (Ex. D-22) the Defendant again call on the pltf. to perform "without any further delay" and to treat the matter as "urgent." On 13-8-1937 (Ex. D-24) the Defendant again call upon the pltf. to perform "forthwith" and to make "immediate" appointment for the purpose. Nothing happens for nearly two months and then there is yet another demand from the Defendant' side as a "last request" to complete the sale "without any further delay." Three months later, on 8-11-1937 (Ex. D-30) the pltf. is given an ultimatum to perform "within a week" or else
[28]58 Bom 101 at pp. 109 and 110
the Defendant will pursue such remedies as they have at law -one of which of course is to rescind the agreement and sell to another person. Again the pltf. makes no move except to ask for a copy of the deft. 3's draft. lease. That is sent on 11-11-1937 (Ex. D-31). Once more there is no move from the pltf 's side. So the agreement is cancelled by the Defendant on 14-12-1937 (Ex. D-33). Even then the pltf. makes no move for nearly two months and does not reply till 9-2-1938 (Ex. D-48). Even at this stage be does not withdraw his ultimatum of 19-7-1937 (Ex. D-57) and does not express an unconditional willingness to perform his part of the agreement. We repeat, it does not matter at this stage whether the pltf. was justified or not. The fact remains that it is abundantly evident from the letters and from his conduct that he was not willing to perform.

75. The repudiation by the pltf. need not be express. It can be inferred from his conduct : see 31 Halsbury's Laws of England, p. 393, para. 455; also p. 398, para. 462.

76. The question next arises whether Ex. D-57 was a repudiation. The agreement gave the vendors the option of getting a lease from deft. 3 or of delivering vacant possession. In Ex. D-51 the pltf.'s side expresses its unwillingness to have deft. 3 on the premises and insists on vacant possession, that is to say, it was indicated that the pltf. was not prepared to carry on except on his own terms, which were that the vendors' option should be taken away from them.

77. In was very strenuously argued on behalf of the pltf. that Ex. D-57 was not an ultimatum and that there was no repudiation of the contract in it. It was said that this was only a suggestion and the pltf. never said that he would terminate the agreement. All he said was that he would consider the matter.

78. It is true the repudiation is not as direct and specific as it might have been, but it is equally evident that the letter is not couched in the form of a request. It is an unmistakable demand, and as to the rest, in a suit for specific performance the question is not so much whether the pltf. has expressly rescinded the contract by direct words, except, of course, where there are direct words, but whether he has indicated his unwillingness to perform. The pltf. gives no hint that he is ready and willing to go on if the Defendant do not agree. On the other hand he indicates with unmistakable plainness that he is very unwilling. However, in any case, repudiation does not have to be in express terms. It can be inferred from conduct, and this letter, coupled with the

subsequent conduct we have set out, can only indicate an unwillingness to perform save on his own terms.

79. As a matter of fact that is also the impression which the pltf. intended to convey, and tells us so in his evidence as P. W. 3. He states,

> "In this letter the threat about termination of the contract and about claim for return of earnest money had been given with the object of making the receivers expedite the matter."

It it evident then that he did intend to convey the impression that he was unwilling to perform. However, we are not concerned with what he says in the witness-box but with what he said in the letter.

80. It was argued on behalf of the pltf. that even if the pltf. was insisting on vacant possession that may be indicative of a genuine difference of opinion between the parties regarding the interpretation of a term of the contract and it was argued, on the *strength of Berners v. Fleming*[29], that in such a case the pltf. can be granted specific performance of the contract as interpreted by the Court notwithstanding his refusal to perform on those terms : 31 Halsbury's Laws of England, p. 380, para. 436, and Pollock and Mulla's Indian Contract and Specific Relief Acts Edn. 7 p. 667 were also quoted.

81. The Chancery case relied on does not decide what the learned counsel for the pltf. contends. In that case the pltf. was the vendor and the deft. the purchaser. It turned out that the pltf. placed a wrong construction upon a term of the contract and refused to perform except upon his own interpretation of that term. He then instituted a suit for specific performance of the contract as interpreted by him. The deft. did not resist specific performance altogether. He did not say that he wished to rescind the contract but stated that he wanted the contract to be performed, but to be performed on the true interpretation of the terms, and he set out in his written statement the interpretation which he placed upon the agreement, an interpretation which the Court held was right. On those facts the first Court held that the Plantiff could not obtain specific performance because he had repudiated the contract. The Court of Appeal reversed that decision, pointing out that the option to rescind, when there was a breach, lay with the other side and that as the deft. had chosen to keep the contract alive and the Plantiff in the end agreed to perform according to the true interpretation there was no reason why specific performance should not be decreed simply because the deft. at a later stage changed his mind and wanted to repudiate.

82. Pollock, M.R. said, at p. 270,

> "In the present case, there was no indication on the part of the deft. that he treated the plff's conduct as equivalent to renunciation or as affording him the opportunity of electing to treat it as such. The deft. adhered to the contract and pleaded that, properly interpreted, he was ready and willing to fulfil it. 'In that case he keeps the contract alive for the benefit of the other party as well as his own'!."

Sargant, L.J., took the same view, though there are other passages in his judgment on which the learned counsel for the Plantiff relied, but the gist of the judgment is, in our opinion, to be found in the passage which we now quote :

> "And, further, it is essential that a party to a contract, who desires to avail himself of an act of repudiation by the other party, should evidence his election to do so with every reasonable dispatch .... But here, on the contrary, from the time of the delivery of the defence down to the hearing of the action,

[29](1925) 1 Ch 264

> the respt. so far from availing himself of what is now relied on as a repudiation by the appellant, professed his willingness to complete the contract if (as has now proved to be the case) the contract should be construed in the sense contended for by him."

83. The third Judge, Astbury, J., was of the same opinion, and said,

> "At the time when the plff's counsel offered to complete the agreement on its true construction both parties were or must be taken to have been, as I have said, willing and offering to complete their existing contract, as in law they ought to have been, and this seems to me to end the matter."

84. It will be seen then that all that that case is authority for is that one side cannot unilaterally put an end to a contract. If he breaks the contract or expresses an unwillingness to perform that gives an option to the other side either to put an end to the contract or to keep it alive. But if the other side wishes to keep it alive then it is kept alive for the benefit of both parties. It is not open to a party to say that he will keep a contract alive so far as it benefits him but will put an end to it regarding matters which he does not like.

85. That this is the proper interpretation of that case is evident from the passage from 31 Halsbury which is relied on. The learned authors state at p. 380,

> "Where a vendor claiming specific performance of a written contract insists down to and at the trial upon a wrong interpretation of the contract and the purchaser by his defense offers to complete the contract as rightly interpreted, the vendor may be granted specific performance of the contract as interpreted by the Court."

The same proviso is to be found in Pollock and Mulla's Indian Contract and Specific Relief Acts, at p. 667. The passage occurs in note (h). It is contained in the words : "Where the deft. had offered so to perform and had not withdrawn the offer." But, however that may be, the Privy Council has, in our opinion, settled this question in *Bindeshri Prasad v. J AIR am Gir*[30], Under the agreement between the parties in that case the Plantiff purchaser was not entitled to an absolute warranty of title. Later, he insisted on an absolute warranty and said he was willing to perform provided an absolute warranty was given. The deft objected to that and struck out the clause which the Plantiff proposed regarding an absolute warranty and substituted another in its place. In the action the plff stated that he had all along shown readiness to have the contract completely performed so far as he himself was concerned and so asked for a decree for specific

performance. As to that their Lordships observed at p. 711 :

> "Now there he distinctly claimed to have the contract performed by having this warranty of title; and when he says that he was ready to have the contract completely performed, as far as he himself was concerned it must be taken that he was ready to have it performed in that way,"

[30]9 All 705 at p. 709
and later at p. 712 they said,

> "but there is no evidence that any time before this stage of the case the Plantiff had in any way submitted or shown his willingness to take any other sale-deed than one with a warranty of title,"

and at p. 713 they conclude,

> "the Plantiff has all long, until he saw that the judgment of the High Court was likely to be given against him, been insisting upon having the sale deed with the warranty of title; and it it admitted by his learned counsel at the bar that he had no right to any such covenant. It has not been attempted to be shown that he Had. Thus he was insisting upon having that which he had no right to have, and he delayed performing his part of the agreement for the payment of the purchase-money on that account. Under such circumstances as these, it certainly is not a case in which it would be right for this Committee to advise Her Majesty to make any decree for specific performance."

86. The position is similar here. It will be observed that in the P. C. case there was never any direct refusal by the Plantiff to perform. All he did was to insist upon a sale deed with a covenant for absolute warranty of title and called upon the deft. on different occasions to perform the contract with that warranty. Here also, even if it can be said that there was no direct refusal by the Plantiff to perform there is certainly insistence of having vacant possession, a thing to which the Plantiff was not entitled except at the vendor's option. There was also delay in carrying out the plff's. part of the agreement because of that insistence. The cases are consequently similar and in our judgment, the plff's. insistence on having vacant possession amounted to a repudiation of the contract where the option was given to the other side. In any event the Plantiff at no time expressed an unconditional willingness to withdraw his repudiation and he delayed in going forward with the matter.

87. We note in passing that there is no trace in the plff's. pleadings that he considered that this was the true construction of this clause regarding vacant possession and that that was why he insisted on vacant possession. The Defendant distinctly pleaded that the Plantiff had wrongfully demanded vacant possession. The Plantiff filed a lengthy reply but nowhere suggested that that was his justification. The lower Court held that the Plantiff was wrong and held that the option lay with the Defendant There is no ground of appeal to the effect that on a true construction of Ex. D-49 the option was to be with the Plantiff; nor was this suggested in the opening argument of the plff's. learned counsel. On the contrary, in reply to a question from the Bench, counsel

admitted that the option was with the Defendant It was not till the Plantiff-appellant was replying to the Respondents' arguments that this point was put forward and developed. We do not consider that there is anything in it.

88. Another factor has also to be taken into consideration. Because of the plff's. attitude the receivers have changed their position. They entered into an agreement for sale with deft. 3 on 25-2-1938, and if they do not fulfil it they will probably be liable in damages to deft. 3. Now it does not so much matter, so far as this is concerned, whether the plff's. letters are capable of bearing the construction which the plffs'. learned counsel contends for or not. At best they are equivocal. Time after time the Defendant told the Plantiff in plain terms that he appeared to be unwilling to purchase. In no case did the Plantiff unequivocally repudiate that assertion; but continued to use language which was calculated, and as the Plantiff admits, deliberately calculated to induce the view that the Plantiff wished to terminate the contract unless the Defendant agreed to his terms - terms to which he was not entitled under the agreement. This, in our judgment, disentitles the Plantiff to a decree for specific performance.

89. Our conclusion on this part of the case is, (1) that Ex. D-57 amounted either to a repudiation or, at any rate, to an unwillingness to perform, and (2) that in any event the plff's. conduct, coupled with Ex. D-57, indicated that, and the Defendant were accordingly justified in inferring that the Plantiff was not prepared to carry out his bargain.

90. Now of course the plff's. repudiation, in this behalf would not debar him from obtaining the relief he wants unless the term he repudiated was what Halsbury describes as "essential and considerable": see 31 Halsbury's Laws of England, p. 390, para. 450. We find it impossible to hold that this term, leaving the option of giving vacant possession to the receivers, was an unessential term. In our opinion it was vital to the receivers. They had already placed deft. 8 on the land as a sub-lessee, and if they had attempted to oust him against his wishes and against the terms of their engagement they would hive been landed with a heavy claim for damages. The term therefore was not one which either side could afford to ignore, or would be justified in ignoring.

91. Another point which arises at this stage is whether the one week's time given in Ex. D-30 for performance was reasonable. Though time is not normally of the essence in a contract for the purchase and sale of land, either party can make it so by giving reasonable notice to the other side. This rule is laid down *in Jamshed Khodaram v. Burjorji Dhunjibhai, 40 Bom 289 at p. 299(SUPRA)* where their Lordships say :

> "But equity will not assist where there has been undue delay on the part of one party to the contract, and the other has given him reasonable notice that he must complete within a definite time."

So the only question is whether the Plantiff was given a definite time and whether it was reasonable.

92. Now the one week fixed by Ex. D-30 is clearly definite, and as to its reasonableness, it is not to be taken by itself. It must be taken in conjunction with the previous history. It will be

remembered that a week's time was fixed as early as 28-7-1937 (Ex. D-59). Then followed the long series of letters urging haste and even when one week was given on 8-11-1937, the Defendant deferred from proceeding further and did not cancel the agreement till 14-12-1937. In the circumstances, seeing that the Plantiff resided at Nagpur, which is only a few hours from Bombay, we cannot regard the one week's time given in Ex. D-30 as unreasonable, particularly when we find that that was the Plantiff's own estimate of reasonableness. The Plantiff's ultimatum was given on 6-10-1937 (Ex. D-25), and he gave the Defendant only one week for completion, and they were told that if they did not comply within a week the Plantiff would consider cancelling the agreement.

93. It is also pertinent to note that when the Defendant first fixed a week's time for completion on 28-7-1937 in Ex. D-59 the Plantiff did not protest that the time fixed was unreasonable; on the contrary he did precisely the same thing on 6-11-1937. Taking all this into consideration, we are of opinion that the time given in Ex. D-30 was not unreasonable. Had the Plantiff been in earnest he could have done all that was necessary in a matter of days.

94. It was argued that in addition to all else the nature of the contract must also be looked at, and counsel for Defendant 1 and 2 went so far as to urge that in every commercial transaction for the sale and purchase of land time is always of the essence. He relied on 31 Halsbury's Laws of England, p. 402, where the learned author says :

> "Even apart from an express term, the Ct. may infer an intention of the parties to treat time as essential by reason of the nature of the contract. Such an intention is inferred in the case of a contract in respect of..... contracts for the sale of land to be used directly for purposes of trade and commerce.....A similar intention, may be inferred from the surrounding circumstances in contemplation of which the contract is made as, for example .... where delay by one party would involve hardship to the other."

95. We need not go as far as that, but the nature of the property and the surrounding circumstances are certainly matters to be taken into consideration (see Pollock a Mulla's Indian Contract and Specific Relief Acts, Edn. 7, p. 302), and even if time was not of the essence originally a much shorter time for performance would be considered reasonable when a demand for performance within a fixed space of time is made in a case where a commercial element is involved.

96. It is argued on behalf of the Plantiff that if ever there was a contract where leisureliness was in order this was it because, according to the finding of the lower Ct., deft. 3 did not want to run the cinema. All he wanted was control of the building so that no one else could set up business in that line in competition with his own cinema across the road. But that, in our opinion, confuses the issue. The contract here was not with deft. 3 but with the receivers. One of the main considerations of the head-lease was that a cinema for the benefit and amusement of the public should be constructed and run on the premises. Failure to do this was regarded as so serious by the Nazul authorities that the head lease provided that it would entail forfeiture, and as a matter of fact forfeiture proceedings were actually started, and the receivers obtained indulgence from the Nazul authorities only with difficulty. It was obvious to the receivers that deft. 3 could not be expected to put his heart into the business so long as his own title was insecure; and as the

receivers were not in a position to run the cinema themselves they had no alternative but to look to some one who would take on this responsibility and save the head-lease from forfeiture. Therefore there was an element of urgency in the situation.

97. In addition to this it has to be remembered that Govt. considered that an element of public importance attached to these proceedings. The whole point of insisting that a cinema should be run on this land was so that amenities for amusement and recreation could be provided for the general public of Nagpur. In the circumstances, and particularly seeing that the parties themselves fixed very short periods for performance in Ex. D-49, it is not unreasonable to hold that the delay of 6= months which occurred between the date of Ex. D-49 and the date of cancellation, despite the receivers' repeated notices, is fatal to the Plantiff

98. We say that short periods are fixed in Ex. D-49 for this reason. In Clause 13 the receivers were given only one week for sending the Plantiff's solicitors certain documents to enable them to draw up the final agreement. Then the title deeds had to be handed over within three days of the execution of the final agreement by reason of Clause 4. Next, Clause 6 provided that the sale should be completed within two months from the date of the execution of the formal agreement. It is evident then that the parties did not contemplate long delays. Even if time was not of the essence, they fixed a time table for themselves, allowing very short periods for performance, and that in itself indicates that there was no intention to let the matter drift endlessly.
99. The Plantiff's learned counsel also contended that it is not every delay which will give the other side a right to rescind, and he relied on *Jamshed Khodaram v. Burjorji Dhuibhai, 40 Bom 289(SUPRA)* and on *Muralidhar v. International Film Co., AIR 1943 PC* 34(SUPRA). That of course is so, but each case must be decided on its own facts, and in the circumstances which we have set out, we are of opinion that the delay here was unreasonable and did give the Defendant the right to rescind.

100. Next we have to see whether the Plantiff acquiesced in the Defendant' repudiation even if he did not himself repudiate. The facts are that though the Defendant repudiated on 14-12-1937 the Plantiff made no move till 9-2-1938, and even then did not express an unconditional willingness to perform. This justifies an inference of acquiescence. The Plantiff's letter of that date means that his attitude was,

> "Yes, the matter is at an end, but if you wish to reopen negotiations for a different sort of contract I will reconsider the question of purchasing, provided you agree to my terms."

101. Next comes the question whether, assuming there was a repudiation by the Plantiff was he justified in repudiating ? It is necessary here to examine the pleadings and to see exactly what the Plantiff complains of. In para. 6 of the plaint the Plantiff expressed his readiness and willingness to perform, but he said (1) that he came to learn of the Nazul proceedings for the cancellation of the head-lease after Ex. D-49, (2) that the receivers failed either to obtain a lease-deed from deft. 3 or to give vacant possession and (3) that eventually the receivers, in collusion with deft. 3 prepared a draft lease which contained a provision requiring the Plantiff to pay a higher insurance premium. This was amplified in the Plantiff's rejoinder where he set out his exact complaint in these terms :

> "The actual engrossment and execution of that formal agreement was put off as the

> Plantiff learnt in the meantime of proceedings, against the original lessee whose representatives the Defendant were, started by the Govt. for cancelling the lease and entering upon the leasehold property, a fact which the Defendant were bound in law to disclose but which they deliberately suppressed on 14-4-1937 and thereafter. The Defendant were thus guilty of active suppression and in fact of a gross misrepresentation on this point and they are further guilty in not supplying proper information to the Plantiff on this subject though asked for and in fact in trying to mislead the Plantiff by representing that the matter was compromised."

102. This is the only reason given in the pleadings, namely, that there was a deceitful suppression of a material fact to wit, the Nazul proceedings in which the Nazul authorities were contemplating forfeiture of the head-lease, the very thing the Plantiff was asked to buy. If this is true then of course he would be justified in repudiating, but, as we will show in a minute, the facts are incorrect.

103. Incidentally, however, this shows that the Plantiff was not willing to purchase. It would be absurd to say that he was prepared to purchase despite the danger to his title. In a case of specific performance, a purchaser cannot, after agreeing to purchase say in mid-stream, as it were, "No, wait. I am not sure. I want to investigate your title. I refuse to go on till I am satisfied" His hesitation indicates that he is not willing to purchase till after the period of investigation and can mean nothing else. If Ex. D-49 provides that there shall be no binding agreement till, among other things, the Plantiff is satisfied (as indeed, we think, it does) then this sort of attitude would be entirely proper. But if, the document imports a binding engagement, as the Plantiff now contends, he cannot say, 'I am not bound. I reserve the right to make up my mind and to decide later whether to purchase or not; but you are bound." In these circumstances either there is no binding engagement or the Plantiff is unwilling to purchase over a material period of time. There would be want of mutuality in a case like that. We repeat again that the question at this stage is not whether the Plantiff is justified in taking up such an attitude. He may be, but he cannot be allowed to say that he was unconditionally willing to purchase over that period of time.

104. However, to return to the facts, is it true that there was any suppression? (After discussing the evidence their Lordships proceeded) : The burden is on the Plantiff to establish misrepresentation and the suppression of material facts, and we are clear that not only has he not established that but on the contrary the Defendant have proved that the facts about which complaint is made were disclosed at the material time.

105. Ex. P-28 is the order sheet of the Nazul proceedings. It shows that notices were issued to deft 5 for cancellation of the head-lease some time before 20-7-1936. Shri Rustomji appeared on 19-8-1936 and asked for time to make a statement. He filed one on 16-10-1936 and stated that the receivers had taken over from deft. 5 and asked for further time (Ex. P-24). Time was granted and he made a fuller statement on 18-11-1936 (Ex P-26). The substance of the statement was that the receivers were not aware of the conditions of the lease but that the property had been leased to deft. 3 and that everything would now be set right.

106. The Nazul Officer asked for further clarification and in the end ordered on 16-1-1937 that Shri Rustomji

"should definitely state the period within which the breach of the condition of the lease will be rep AIR ed."

107. This statement was made on 8-4-1937 and was recorded in Ex. P-27. It was as follows :

"The lessee is willing to insure the theatre. He will also lay out a garden as stated in the lease-deed. The lessee will comply with this within a period of six months."

The order sheet of that date states that "He is heard and his statement recorded."

108. In between this and the nest date of hearing, the document, Ex. D-49, was drawn up. If the receiver and Jugmal Raja are to be believed, and we do believe them, then the receiver told them in Bombay that

"the dispute about the head-lease was being settled and not that it had been settled. This was an accurate statement of fact, and so there was neither suppression nor misrepresentation. Actually nothing more was done before the Nazul Officer after 8-4-1937, and if it had not been for the fact that he was busy with other work, as his order sheets show, the matter would probably have been settled before 14-4-1937. What actually happened was that the Nazul Officer submitted his report to the Deputy Commissioner that the breaches be condoned. The Deputy Commissioner agreed and passed orders of condonation on 16-5-1937 and returned the papers for 'further action'."

109. Now we are not concerned with this "further action." The crucial date is 14-4-1937, and on that date the receiver was justified in telling the plff's representatives that the dispute was being settled. But the Plantiff's learned counsel argued that though that may be true, actually there were further breaches and so the forfeiture proceedings were revived. He argued that the forfeiture proceedings were never closed; they were merely held in abeyance. That, we think, is true, but it makes no difference to the result because the crucial date was 14-4-1937, and if the Plantiff chose to bind himself, as he says, finally on that date knowing these facts, and knowing that the matter had not been finally settled, but was only "being settled," and if he chose not to wait for the result and see how the settlement would turn out, it is evident that he chose to take the risk and could not thereafter complain that the matter was not going quite as he had hoped it would go. If, on the other hand, that was not his position on 14-4-1937 and he was not prepared to buy "a pig in a poke" then it is evident that there was no concluded agreement on that date. But, however, that may be in the end, whatever may have been the doubts for a time, the matter ended as the receivers desired. The breaches were condoned, the conditions were later fulfilled by deft. 3, and the lease was not cancelled.

110. Another point that was taken in the plaint is set out in Para. 6 as follows :

"The Defendant 1 and 2 in collusion with deft. 3 thus attempted to frustrate the agreement and for the same reason prepared a draft lease containing a liability against Plantiff for a higher insurance."

111. It will be observed that the only complaint on this score is about a "higher insurance."

112. Now throughout the correspondence, except for one letter, the only complaint was that deft. 3 had broken the covenants of the head lease and so it was in danger of forfeiture; also that these facts had been suppressed. That is the burden of the song in Exs. D-51, D-57, D-23, D-25, D-31 and D-48. But in the last letter, Ex. D-48, a new complaint was added, namely,

> "Our client cannot accept liability for higher insurance premia for the cinema machinery to be fitted by Shri Naidu and such premia should be made payable by Shri Naidu who has to run the cinema. We are instructed to enclose a draft of a lease to Shri Naidu."

113. In the Plantiff's evidence there is not a word of complaint regarding this higher insurance. On the contrary he says, as P. W. 3,

> "I wanted them (i.e. his solicitors) to enquire from the receivers why they had not disclosed about these proceedings (Nazul proceedings) to us. That is the only reason why I did not sign the stamped agreement."

114. This point about the insurance premium was not raised in the grounds of appeal either. In any case the matter is without foundation and seems to have been a lame excuse put forward after the cancellation of the agreement by the Defendant as a justification for the Plantiff's attitude and in order that he might not forfeit the earnest money.

115. The head-lease contained a clause that the theatre was to be insured by the lessee. That of course would not affect any terms the Plantiff or the receivers might choose to make with deft. 3 in the sub-lease. Ex. D-44 is the draft of the proposed sub-lease. It was prepared by the receivers' solicitors and deft. 3 states, as D.W.1, that he approved of it. It was sent, after approval by the deft.s' solicitors, to the Plantiff's solicitors, along with their letter (Ex. P-19) dated 11-11-1937. Clause 2 (i) of Ex. D-44 lays the burden on taking out a policy of insurance for the premises only on the lessor and not for any machinery or films stored in the building. Also the only obligation was to take out a policy "consistently with the term in the aforesaid superior lease." Clause 1 (3) states that the sub lessee's rights to the storage of films etc. are to be "consistent with the policy of insurance to be taken out by the receivers," and sub-Clause (10) provides that the sub-lessee shall be responsible for any increase or extra premium which may be demanded on account of anything the sub-lessee may do in contravention of the policy to be taken out by the lessor. Clause 3 (i) provides for forfeiture and gives the lessor a right of re-entry for breach. We fail to see how the lessor could be more effectually safeguarded and can only look upon this objection as a frivolous excuse to justify the Plantiff's action.

116. In his evidence as P. W. 3, the Plantiff tells us that he had been informed that deft. 3 was to do all the insurance. This however, is not in keeping with the plaint which imports the admission that this burden was on the Plantiff though not for the higher insurance which the draft. lease contemplated. In any case, the Plantiff is wrong about this, and he does not tell us who told him about this fact.

117. The lower Court finds that deft. 3 took his sale with knowledge of the Plantiff's prior agreement and so cannot put forward the plea of purchase in good faith. Defendant 3's learned counsel stated that this was not his client's plea and that this finding casts a reflection on his client. He, therefore, wanted us to reverse that finding.

118. We have not been through the scandalously lengthy written statement of deft. 3 to see what foundation there was for the lower Ct.'s findings on this point because the matter is not material and because deft. 3 contends, here at any rate, that he does not rely on this in support of his title. That ends the matter so far as we are concerned, but we will pause to observe that the point was put in issue without any apparent objection from deft. 3. The issue in question is No. 15. If, therefore, any reflection is involved on deft. 3 it is entirely his fault.

119. As regards the question of collusion between the receivers and deft. 3, we do not think any conclusion regarding collusion would be justified on the facts. Of course deft. 3 was anxious to obtain control of this theatre because he did not want competition, but there are legitimate ways of accomplishing that, and we have not been shown anything which would suggest that deft. 3 and the receivers acted otherwise than in a proper manner.

120. Deft. 3, was on the premises as a sublessee, well before the Plantiff came on the scene. He offered to attorn to the Plantiff and sent for his approval a perfectly proper sub-lease. A very belated objection was taken to only one term, and that objection we have found to be baseless. The Nazul aff AIR was settled on 28-8-1937, as Ex. P-28 shows. The Plantiff was a Nagpur man and could easily have ascertained the facts for himself on the spot if he was really in earnest. Yet we find him at best procrastinating even as late as 9-2-1938, (Ex. D-48.) He does not there call upon the Defendant to perform; nor even at this stage does he say that he is willing to perform. All he says is that he is prepared to reconsider the question of performance on conditions.

121. Time and again, the Plantiff was offered an opportunity of putting forward his point of view, but, on his own showing, he wanted to create the impression that he was unwilling to perform according to the terms of Ex. D-49. Nearly ten months had elapsed between 14-4-1937 and 25-2-1938 when deft. 3 agreed to purchase. Whatever the position may have been originally, towards the end it was clear that the Nazul authorities insisted that there should be a running cinema concern on the land. The matter had therefore, by that time, assumed a definitely commercial aspect, and deft. 3 could not be expected to invest money and time in the business so long as his own position was uncertain and insecure. The Plantiff was a local man and he was well aware of these facts as early as May 1937. He tells us in the witness-box as P.W. 3 that

> "I came to know the conditions of the Nazul lease about a month after the agreement. There is a condition in the lease that cinema shows would be exhibited in the theatre on this land and the land was granted for that purpose only. The condition was that the lease was liable to be cancelled if cinema shows were not exhibited in it. I did feel apprehensive that if Naidu did not care to exhibit pictures in the theatre the lease may be cancelled. I did feel that if I purchased after paying Rs. 35,000 there was risk of the Nazul least being cancelled in this way through Naidu's default. I did not however wish to terminate the agreement of purchase. I wanted to get vacant possession or a Kabuliyat from Naidu

according to the terms of the agreement. Under the terms of his lease Naidu was bound to exhibit pictures in the theatre and so if he had made default and in consequence the Nazul lease had been cancelled, I would have pursued legal remedy against Naidu. My solicitors had advised me that according to the terms of Naidu's lease he was bound to exhibit pictures in the theatre."

122. In the circumstances, we are of opinion that there was an element of urgency in the situation to the plffs. own knowledge, and whether the Plantiff was unwilling to perform or was merely procrastinating, deft. 3 was fully justified in negotiating for the purchase.

123. The receivers' position was even worse. On the one hand they ran the risk of losing their head-lease if deft. 3 backed out, and on the other, the risk of losing a prospective purchaser. They had no personal interest in this matter. They were merely officers of the Court and they had explained that they were in no position to run a cinema themselves, particularly in opposition to one across the road. Deft. 3 was the obvious choice if they did not wish the theatre to collapse, as it had under Madans. There was therefore urgency from their point of view as well. All this can hardly be described as collusion.

124. The lower Court has directed a refund of the earnest money. There is no appeal against that and the decree on that point stands.

125. In the lower Court there was an alternative claim for damages. This was disallowed there, and there is no ground of appeal seeking the alternative relief in this Court Now was this point argued or pressed before us. Accordingly there is no need for us to consider that aspect of the case. Also, on our findings on the other points, the Plantiff has no right to damages.

126. The appeal fails and is dismissed with costs.

127. The Defendant ask for separate costs and point out that separate costs were allowed in the lower Court. We are not prepared to modify the lower Court's order because that was not argued before as. But in this Court we consider only one set of costs should be allowed. Defendant 3 and 4 claim through Defendant 1 and 2, and there was no need for separate counsel; nor indeed was there any substantial difference between the two sets of arguments presented on behalf of these defendants. Only one set of costs will therefore be allowed.

128. We were also asked to award such costs as were to be allowed to the Defendant separately. We are prepared to do this as each set of Defendant wants this and it makes no difference to the Plantiff But as counsel for the Defendant are not able to agree as to how the costs should be split up between them we direct that each set of Defendant will get half the costs. That is to say, Defendant 3 and 4 will get half and Defendant 1 and 2 will get half. Deft. 5, who did not appear in this Court will bear his own costs. The decree of the lower Court will stand.
Appeal dismissed.