Privy Council Appeal No. 103 *of* 1921.

Patna Appeal No. 39 *of* 1919.

Seth Hukum Chand and others - - - - - *Appellants*

v.

Raja Ran Bahadur Singh and another - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA.

JUDGMENT OF THE LORDS OF JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH MARCH, 1924.

Present at the Hearing:

LORD SHAW.
LORD BLANESBURGH.
MR. AMEER ALI.
SIR LAWRENCE JENKINS.
LORD SALVESEN.

[*Delivered by* LORD SHAW.]

This is an appeal from a judgment and decree of the High Court of Judicature at Patna, dated the 4th June, 1919, which affirmed a judgment and decree of the Additional Subordinate Judge of Hazaribagh, dated the 24th July, 1917.

The prayers contained in the suit are numerous, but the outstanding and substantial questions which were argued before the Board were two in number. The first was for a declaration that an agreement dated the 30th November, 1908, "is binding upon the defendant." The second is for specific performance of this agreement, and that possession be made over with the demised property to the plaintiffs and the sum of Rs. 50,000 as, and by way of, compensation of damages paid to the plaintiffs. Shortly stated, the suit is one for specific performance of an agreement prefaced by a declaration that that agreement is binding.

The question of who are the parties to the suit raises an important question in the case. The defendant is thus named :—

> " Raja Ran Bahadur Singh, son of Raja Paresh Nath Singh, deceased, holder of the Palgunj Estate in Hazaribagh, by his representative and guardian for this suit Babu Krishna Chandra Ghosh, Manager of the said Palgunj Estate appointed under the Chota Nagpur Encumbered Estates Act (VI of 1876) and residing at Hazaribagh aforesaid."

Raja Ran Bahadur Singh was part owner of the sacred range of hills aftermentioned. But at all the material dates the management of his estate was, under the Chota Nagpur Encumbered Estates Act, 1876, and an order pursuant thereto pronounced on the 13th December, 1902, and duly published on the 28th January, 1903, vested in the Manager, Babu Krishna Chandra Ghosh. It was thereafter, and at the time of the lodging of the defence, vested in another Manager, Babu Janki Nath Gupta, who had been appointed Manager with effect from the 25th May, 1914, by order dated the 3rd and published on the 5th July, 1914.

This second Manager, as such, sold the right title and interest of Ran Bahadur Singh and the Palgunj estate,—in other words, sold the Paresh Nath Hill,—to the compearing respondent, by sale deed dated the 9th March, 1918. This was the result of a compromise arrived at and approved by the Court as in the interests of both the Raja Bahadur Singh and another Raja, the Raja of Nowagarh, between whom another suit was thus arranged in the months of the preceding January and February.

These details are only here referred to, to explain the appearance of the second respondent. He represents the Sitambari community of Jains, and he, as representing such community, is purchaser of the hills as just mentioned. The present suit, however, the result of which if favourable to the appellants, would upset the compromise and sale just enumerated, has reference to another and a prior agreement alleged to have been concluded at an anterior date.

The alleged agreement, specific performance of which is asked in this suit, is said to have been made during the regime of the first Manager, Mr. Chandra Ghosh, and though not, of course, made with the Raja, was (so it is contended) such an agreement as would bind him and his encumbered estate.

The Raja Ran Bahadur Singh himself, although a nominal respondent in the appeal, was not represented before the Board.

The agreement consists of a series of letters, the most important of which are dated 25th, 26th and 30th November, 1908 ; the last of these bears to be an acceptance of certain modified terms of agreement as set forth in the letter of the 26th November. It bears to be for a permanent lease of the whole hill which " will be granted to the Digambar Jains subject to the terms and conditions and reservations hereinafter contained so that the hill may be protected from everything repugnant or opposed to the feelings or religious tenets of the Jains. A premium is to be paid of Rs. 50,000, and an annual sum of Rs. 12,000 by way of rent." Various other provisions were made with reference to timber,

minerals, village rights, etc. The remarkable feature of the transaction is that it is not a transaction with the person vested in the management of the property, namely the Manager, but is with the servants and officials of the Lieutenant-Governor of Bengal.

The facts have been stated in both the judgments of the Court below with much clearness and care. The following description of these sacred hills is taken from the judgment of the High Court :—

> " The range of hills known as Paresh Nath Hill lies in the Hazaribagh District and runs roughly from East to West. It has a central range about a mile and a quarter long with outlying spurs a part of which is Government property. The greater part of the hill, however, is claimed as part of the Palgunj Zamindari. For many years this hill has been an object of adoration by the Jains who hold an Ekrarnama from the father of the present Raja of Palgunj agreeing to grant them such lands on the hill as they may need for the purpose of building temples. Indeed at one time they went so far as to claim the hill as their own under Sanads granted by Akbar and Ahmad Shah. These, however, were found by the Calcutta High Court to have been spurious documents. A number of temples have in the past been erected along the crest of the central range and many pilgrims resort there for worship and in the course of time the Jains have come to regard the locality as a sacred adjunct to the performance of their religious observances and keenly resent its use or occupation by others for purposes which are repugnant to their religious views and which they regard rightly or wrongly as an interference with their vested rights."

There were in the hills many interests, legal, customary and religious, which had to be considered. Some leaseholders had already vested interests therein : The Sontal tribes claimed a right of hunting wild animals over the whole range. The Zemindar of Nowagarh had a claim to the property of the southern slopes of the hill as part of his Zemindary. Certain rights had been granted by way of lease to a Mr. Boddam, under which the lessee had made tea-gardens and erected a piggery. As the taking of life was a violation of the religious feelings and beliefs of the Jains this establishment tended to be provocative of confusion and disorder.

In 1907, the Governor-General of India had approved of a scheme for opening a sanatorium and residential buildings for Europeans on the western spur of the central slopes of the range. The crest of the central range is dotted over with small temples, or tonks, which the Jains are allowed to enter and there to worship the " charans " or footprints of the saints in whose honour the tonks had been erected. Much had to be done by way of demarcation of boundaries as well as an adjustment of rights.

It was in these circumstances, after the Government approval of the erection of a sanatorium, that the hill was visited by the Lieutenant-Governor of Bengal, Sir Andrew Fraser. Following upon his visit there took place the correspondence which has been referred to, the governing object of which no doubt was to have the hill taken in lease by the Jains from those in right of it by law. The principal of these was the Raja already mentioned, the Zamindar of Palgunj. His estate, as stated, was under a

Manager appointed by virtue of the Chota Nagpur Encumbered Estates Act.

It is important now to consider what are the position, legal status and rights of such a Manager in law. Under Section 2 of the Act VI of 1876, called "The Chota Nagpur Encumbered Estates Act, 1876," it is provided that when the holder of immovable property is a minor or of unsound mind, or when his property has been attached in execution of a decree of a Civil Court, then, upon application, the Commissioner may, with the previous consent of the Lieutenant Governor, "appoint an officer (hereinafter called the Manager) and vest in him the management of the whole or any portion of the property." Section 3 declares the effect of the order and is important. It provides in particular :—

> "Thirdly, so long as such management continues :—
>
> "(*a*) the holder of the said immovable property and his heir shall be incompetent to mortgage, charge, lease or alienate their immovable property or any part thereof or to grant valid receipts for the rents and profits arising or accruing therefrom.
>
> * * * * * * * *
>
> (*c*) the holder of the same property and his heir shall be incapable of entering into any contract which may involve them, or either of them, in pecuniary liability."

Elaborate provisions are made for the performance of the Managers' duties, including the recovery of all rents and profits, the disbursements therefrom and the settlement of duties. Under Section 10 an appeal is granted to the Deputy Commissioner, within whose jurisdiction the property is situated, against refusals, admissions or determinations of claims by the Manager, failing which appeal the Manager's determination is final. Under Section 12, if the debts and liabilities are paid and discharged, or an arrangement made for satisfaction accepted by the creditors and approved by the Commissioner, the holder or his heir, are to be reinvested in the property, or such part thereof, as has not been sold by the Manager under the power contained in Section 18, but subject to the leases and mortgages, if any, granted and made by the Manager under the powers hereinafter contained.

Under Sections 13 to 18 the wide powers of the Manager are set forth. In particular under Sections 17 and 18 powers to demise the property for a term of years or in perpetuity, powers of mortgaging and selling by auction, etc., are all given to him.

Up to this point it is clear that the owner is disabled not only from acts of management but from mortgaging, charging, leasing or alienating the property, whereas on the other hand the Manager is vested and alone vested with such powers. The latter is, in short, in the eye of the law, fully and completely vested in the management of the estate, and the vesting in him continues during the tenure of his office.

Under Section 19, of which much was made by the appellants, power was given to the Lieutenant-Governor of Bengal to regulate

a variety of matters by making rules which have expressly to be rules " consistent with this Act."

Under Section 20 it is provided :—

> " Whenever the Commissioner thinks fit, he may appoint any officer to be a Manager in the stead of any Manager appointed under this Act ; and thereupon the property then vested under this Act in the former Manager shall become vested in the new Manager. Every such new Manager shall have the same powers as if he had been originally appointed."

Section 21 may also be reckoned as relevant, namely :—

> " Every Manager appointed under this Act shall be deemed a public servant within the meaning of the Indian Penal Code."

In the opinion of the Board it is necessary to give very full and careful effect to the position of a Manager vested under the Act, in the management of the property of the nature already described. It is in their Lordships' opinion clear that the owner of such property is expressly disabled from making any effective contract with regard to it and it is equally clear that no other officer, whether political or departmental, could occupy the place, or enjoy or exercise the rights, of the disposal of the estate the management of which estate is vested in the Manager and the Manager alone.

It may well be that as the Manager was in the list of public servants his conduct as such servant may have been open to comment by those in higher official rank, and it may also be that a successor to him might be appointed ; but the moment such a successor was appointed the predecessor was divested and the successor invested with all the rights and title. Under the Encumbered Estates Act, the Manager for the time being stands responsible in law for fidelity in the discharge of the entire duties of management, disposal, realisation and restoration, with regard to the estate under his care.

It is the further opinion of the Board that in the performance of such duties the Manager is neither the servant, nor the agent of another, be that other either a private intervener or a public or political or departmental officer. The Manager is himself the principal under the statute, and he must conform in the discharge of his duties to the provisions of the Act.

It may well be that political and social considerations may induce a certain course of policy with regard to portions of property under a Manager's charge and that communications may accordingly be addressed to him, in so far for instance as they bear upon the safety of the property, or the possible injury or advantage to the rights committed to the Manager's charge. But the Manager must, with all his local knowledge, consider these problems for himself, and with regard to the acquisition or disposal of the estate or a permanent lease thereof, it is clear that the responsibility lies upon him as the principal in the transaction.

It must not be supposed that such considerations were absent from the mind of the Lieutenant-Governor in the course which he was anxiously pursuing for the appeasement of any trouble in the district. The contrary is the case, and in the

letter of the 26th November, 1908, from the representatives of the Digambari Jains, the following express proviso was accordingly made :—

> " We hereby accept the terms modified as above provided that a short agreement embodying these terms be prepared and executed by (1) the Deputy Commissioner or such other officers, representing the Court of Wards as is authorised to assign such agreement (2) the Raja of Palgunj, and (3) ourselves as representing the Digambari Jains."

On this, three points have to be noted : (1) In the negotiations reference is made to officers representing the Court of Wards. That, of course, is a mistake in terms ; but it is a recognition that the property is under management other than that of the owner and that a public official is in control of it.

(2) No agreement, embodying the terms, was ever prepared. Certain communications passed with solicitors, and a draft lease was attempted, but the negotiations with regard to that broke down.

(3) As to the provision that an agrreement was to be prepared and executed by the three persons there named, none of them ever executed such an agreement, and in particular the Manager of the Encumbered Estate, not only never did so, but he declined to give his assent to carrying out of any transaction upon the lines indicated.

In view of what has been already said as to the position and rights of the Manager under the Encumbered Estates Act, it will be manifest that the letters founded upon as an agreement in respect of which specific performance should be asked, did not constitute any agreement with the one person who, by law, could be a contracting party with regard to the estate under his charge, and, therefore, that upon that ground neither he nor anyone authorised by him, or entitled to act in his name, having entered into the alleged agreement, the ground of action for specific performance fails.

But their Lordships, out of respect for the High Court who have investigated the whole complex subject with much care, do not wish to indicate any dissent from the opinions of the learned Judges on the assumption that the above proviso would have been a condition precedent. 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 that 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. In a very full and strong sense the proviso cited was a condition precedent to the transaction.

The cases upon the subject are legion and one citation very properly noted in the judgment of Mullick J. may be here repeated, namely that made from the judgment of Lord Parker (as he afterwards was) in the case of *Von Hatzfeldt Wildenburg* v. *Alexander* (L.R. [1912] 1 Ch. 284) :—

> " It appears to be well settled by the authorities " says that learned Judge " that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain ; or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored."

Their Lordships revert to the question only again to note, however, that the proviso is, in their opinion, much more than a condition precedent.

This is a negotiation carried on by a civil officer who is not the owner of the ground and who is not acting either as master or principal of the person who is the owner of the ground. Accordingly, specific performance of any contract so entered into is an impossibility in law because the owner of the ground and the person *in titulo dominii*, namely the Manager, is no party to the contract which is asked to be specifically enforced. That is an end of the case in its legal aspect.

But their Lordships think it right to add that on a matter of fact they see no reason to differ from the judgment of the High Court where it is stated :—

> " It must be borne in mind that the Manager in whom the estate was vested at the date of the agreement was Babu Krishna Chandra Ghosh ; this gentleman was no party to the agreement and so far as the evidence goes there is nothing to show that he was even consulted during the negotiations and before the agreement was entered into."

Further, it is permissible to think that if the Manager had been applied to he would have made just such enquiries as were made later by the Settlement Officer, Mr. Reid, when he was asked to report upon difficulties which emerged with regard to carrying the projected policy forward. Mr. Reid narrates the conflict of opinion and otherwise between this Sitambari Society of the Jains and the Digambari Society. He refers to the litigation that has occurred, to the intrusions which have been made upon the hill, as already alluded to in this judgment, and to the conflict of title with regard to certain portions of it ; and he concludes by stating in effect and quite frankly that

he thinks the proposed lease is inadvisable and illegal. He then adds these observations :—

> "The Digambar Society would proceed to erect new tonks some of them possibly adjacent to the already existing tonks which are managed by the Sitambars. The Sitambars would of course object, and would fall back on their rights, under the agreement of 1872. To enforce their legal rights, they would no doubt resort to violence, and very likely the site of every proposed new tonk would be the scene of a riot of greater or lesser magnitude. I understand that it is not the local authorities but the local Government who proposed to sanction the lease of the hill to the Digambari Jains. In that case the latter authority would be put in the extremely invidious position of having sanctioned an agreement, the result of which must necessarily be rioting, possibly of a serious character. With this prospect in view, if there is any doubt of the legality of the proposed lease, it is evidently one which cannot be carried through."

This citation has only been made to indicate the serious responsibility that would have rested upon the Manager in becoming a party to such a transaction and the necessity for his personally acting with much circumspection. It is not for this Board to express any opinion whatsoever upon the conflicting points of policy or otherwise appearing in these discussions, but the futility of the attempt made on legal grounds in the present suit to have specific performance of the bargain not made with the Manager at all, is now obvious.

The judgments of the Courts below are accordingly affirmed.

There are two further points to which it may be necessary briefly to allude. The negotiations canvassed in this information took place during the regime of Manager No. 1, and in accordance with the opinion of the Board confirming that of the High Court no concluded agreement as the result thereof was ever arrived at. During the regime of Manager No. 2 a compromise was, entered into of certain conflicting rights and this compromise was recorded and decree passed in accordance therewith on the 24th February, 1909. Accordingly, the attempted bargain in the first regime came to nothing : the compromise in the second regime resulted in a transfer of the hill to the respondent No. 2 and that bargain was duly confirmed by the Court.

> "It must be taken that the compromise entered into with the Manager of the Palgunj Estate in Appeal No. 551 of 1914 and the conveyance made in pursuance thereof are binding on the Raja of Palgunj and his estate to the same extent as if the latter had been himself the contracting party."

These are the words taken from the judgment of Mullick J. and their Lordships are of opinion that it was an undoubtedly sound conclusion to be drawn as in these words :—

> "There was, therefore, an implied obligation on the transferor not to derogate from the grant."

The Board is of opinion that the correct course was taken upon this point of the compromise of the suit and upon the attempt of the Raja of Palgunj to interpose on the subject.

The last question raised is as to what is to become of the Rs. 50,000 which was transmtted in the form of a cheque for

Rs. 50,000 on the Bank of Bengal by Pundit Mohan Krishna Dhar dated the 3rd November, 1908. per a letter from him to the Private Secretary of the Lieutenant Governor. The disposal of that remittance still stands upon the footing set out in the letter of the 6th September, 1910. by Mr. Gourlay, the officiating Secretary to the Government of Bengal, to Messrs. Morgan & Co. printed on page 15 of the Record. This letter concludes in the following terms :—

> "I am, therefore, to request that you will be so good as to inform your clients that the arrangement proposed in November, 1908, has fallen through and that the Accountant General, Bengal, has been asked to refund them with interest at 4 per cent. (the Bank rate of fixed deposits), the sum of Rs. 50,000 which they had paid as premium."

The right to ingather that sum still stands upon that letter and the money will no doubt be repaid upon demand by the proper authority accordingly.

Their Lordships will humbly advise His Majesty that the appeal be dismissed with costs.

In the Privy Council.

SETH HUKUM CHAND AND OTHERS

v.

RAJA RAN BAHADUR SINGH AND ANOTHER.

DELIVERED BY LORD SHAW.

Printed by
Harrison & Sons., Ltd., St. Martin's Lane, W.C. 2.

1924.