

(1952) 03 PAT CK 0002

In the Patna High Court

Case No : A.F.O.D. No's. 99 and 137 of 1951

Dalmia Jain and Co. Ltd.

APPELLANT

Vs

Kalyanpore Lime Works Ltd. and Others

RESPONDENT

Date of Decision : 27-03-1952

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 101
Constitution of India, 1950 — Article 299
Contract Act, 1872 — Section 10, 20, 55
Evidence Act, 1872 — Section 91
Government of India Act, 1915 — Section 30
Specific Relief Act, 1877 — Section 15, 18, 22, 23, 28

Citation : AIR 1952 Patna 393

Hon'ble Judges : Reuben, J; Das, J

Bench : Division Bench

Advocate : S.M. Bose, S.K. Mukharji and R.P. Katriar, for the Appellant; A.G., A.B. Saran, Jaleshwar Prasad, A.K. Prasad, C.S. Prasad and K.N. Chaturvedy, for the Respondent

Final Decision : Allowed

Judgement

Reuben, J.—These appeals are directed against a decision of the Additional Subordinate Judge of Sasaram decreeing a suit for specific performance of an agreement to lease two limestone quarries. The appellant in Appeal No. 137 is the State of Bihar who has been directed to execute the leases. The appellant in Appeal No. 99 is Messrs Dalmia Jain & Co., hereafter referred to as Dalmia Jain, in whose favour the limestone quarries in suit were leased by the State of Bihar on the 10th of August 1949 for a period of one year. The decree directs that the leases will commence from the 1st April 1943 and that the plaintiff-respondent Messrs Kalyanpore Lime Works Limited, hereafter referred to as the Lime Company, will get compensation from the appellants for the period commencing from the 1st April 1948 till recovery of possession of the leasehold properties.

2. The main facts are undisputed. The properties in question are situated side by

side on Murli Hill in the Sasaram Subdivision of the Shahabad district. One of them forms a portion of the Rehal Khasmahal and appertains to tauzi No. 4769. It occupies the upper portion of the hill and I will refer to it as Upper Murli. The other property appertains to the Banskatti Mahal and bears tauzi No. 4771. The Government besides certain rights in respect of the surface has the right to quarry limestone within this "mahal." I shall refer to this property as Lower Murli.

3. The suit properties were originally leased by the Government to the Kuchwar Lime and Stone Co. Ltd. (hereafter referred to as Kuchwar Co.) for a period of twenty years commencing from the 1st April 1928. Among other terms, the leases forbade on penalty of forfeiture the transfer without the assent of the Board of Revenue of the leases or any right or interest thereunder. In September 1933, Kuchwar Co., which had gone into voluntary liquidation in the earlier portion of the year, entered into an unregistered agreement with one Subodh Gopal Bose for a consideration of Rs. 6,000 to transfer to him the entire interest under the two leases. The agreement stipulated that the assignment would be made after obtaining the assent of the Board of Revenue. By the same agreement, in anticipation of the transfer, Bose was appointed the local agent of Kuchwar Co. and subject to furnishing security for the payment of Government dues was authorised to work the quarries on his own account (Exhibit A (1), p. 47). The Kuchwar Co. then applied to the Board of Revenue for its assent to the proposed transfer and in the meantime Bose began to work the quarries in accordance with the agency agreement. The Government treated the transaction as being a transfer of the leases or at least a sublease and by an order dated the 27th March 1934 sanctioned the forfeiture of the two leases. (Annexure A : Exhibit 3A, page 106). Thereafter, Government re-entered into possession of the quarries.

4. In the meantime, the Lime Company, in anticipation that Kuchwar Co. having gone into liquidation the property would be open to resettlement, had applied for a settlement of it by an application dated the 25th January 1934 (Exhibit A, page 1) which was recommended by the local officers. The proposal to lease these properties to the Lime Company was approved by the Board on the 31st March 1934 (Exhibit 3Z (26), page 106) and the Lime Company entered into possession on the 15th April 1934 (Annexure C). There followed correspondence between the Lime Co. and the local officers and the Board of Revenue in the course of which the drafts of the leases to be granted to the Lime Co. were settled. Before the leases could be executed, however the Kuchwar Co. on the 29th September 1934 instituted Title Suit No. 39 of 1934 in the court of the Subordinate Judge of Sasaram against the Secretary of State for India in council challenging the validity of the forfeiture and claiming damages. The Lime Company was not impleaded in this suit. The Subordinate Judge dismissed the suit on the 7th March 1935 holding that the transaction between Kuchwar Co. and Bose was in substance a sublease and was in breach of the covenant against transfer without assent, The Kuchwar Co. appealed against this decision in First Appeal No. 68 of 1935.

5. By now the drafts of the leases proposed to be given to the Lime Company were nearly ready but by an order of temporary injunction issued by the High Court on the 25th April 1935 in First Appeal No. 68 and made absolute on the 25th July 1935 the Government was restrained from executing the leases pending the decision of the appeal. The appeal was decided on the 7th February 1936 and is reported in "KUCHWAR LIME AND STONE CO. LTD. V. SECY. OF STATE", 15 Pat 460. The High Court reversed the decision of the Subordinate Judge, holding that Bose was at best a licensee, that the agreement between Kuchwar Co. and him did not amount to a sublease or a transfer of any other interest in the property, and that, even if it did, it would be void for want of registration. It accordingly decreed the suit giving the Kuchwar Company an injunction restraining the Government "from interfering with the plaintiff's leases on the basis of the forfeiture". This decision was upheld by the Judicial Committee on the 19th November 1937 on different reasoning, holding that the transaction sought to create an agency coupled with an interest but was not effective as a transfer for want of registration "SECRETARY OF STATE v. KUCHWAR LIME & STONE CO. LTD. 65 Ind App 45 (PC).

6. The Lime Company meanwhile had continued to work the two quarries. After the decision in First Appeal No. 68 the Solicitors of Kuchwar Co. approached the Collector of Shahabad to eject the Lime Company and to restore possession to Bose as Kuchwar Co.'s agent (Exhibit 3 (Z) (16), page 212) and, on the Collector expressing his inability to eject the Lime Company (Annexure T), a petition in contempt was filed in the High Court on 4-6-36 (M. J. C. 42 of 1936), (Exhibit I, p. 216) against the Secretary of State in Council, the Collector of Shahabad, Mr. S. N. Banerji, Managing Director of the Lime Company and S. N. Bose, Manager of the Lime Company. The petition was allowed by a Special Bench of the High Court on the 9th October 1936 in a judgment which is reported in "KUCHWAR LIME & STONE CO. v. SECY. OF STATE 16 Pat 159 (SB). This decision was subsequently reversed by the Judicial Committee in its decision which is reported in "S. N. BANERJEE v. KUCHWAR LIME AND STONE CO. LTD. 17 Pat 770 (P.C.), pointing out that the Government not being in possession it was for the Kuchwar Co. which had the immediate right of possession, to eject the Lime Company if ejection was to be effected and that the Lime Company not having been impleaded in Title Suit No. 68 its right to possession if it was to be tested must be fought out on an issue properly framed against that Company. The Lime Company, however, after the High Court's decision in the Contempt Case, had relinquished possession of the Lime quarries and the Kuchwar Company had entered into possession of them. An attempt by the Lime Company to recover possession was made by a petition to the High Court under Sections 144 and 151 of the CPC but was unsuccessful, "S. N. BANERJEE v. KUCHWAR LIME AND STONE CO. LTD. AIR 1941 S. C. 128, and the Kuchwar Co. continued to work the quarries undisturbed.

7. On the 8th May 1947, when the leases in favour of Kuchwar Co. were due to expire, the State Government called for applications for fresh leases. In response

thereto, the Lime Company submitted an application for a settlement for twenty years from the 1st April 1948 offering a minimum royalty of Rs. 10,000 or such amount as might be fixed by Government. It forwarded this application with a letter in which it purported to reserve such right as it had already acquired to the quarries by the transactions it previously had with the Government (Exhibit 1 (a), page 285). The limestone quarries were settled with Dalmia Jain which fact was communicated to the Lime Company by a letter from the Board of Revenue dated the 31st May 1949 (Exhibit 3 (a), page 294) and hence the present suit.

8. In its plaint, the Lime Company" pleads the relevant facts. It alleges that the contract between it and the Government was entered into by an offer made by the Board of Revenue by its letter dated the 31st March 1934 accepted by the Company by its letter dated the 15th April 1934. The terms of the indentures of lease according to it were settled subsequently and copies of the draft indentures are annexed to the plaint as Annexures V and W. The plaint alleges that the Company has all along been willing to perform its part of the contract and seeks the following reliefs :

"A decree for specific performance of contract in terms of the agreement and as claimed hereinbefore with a direction that the defendant No. 1 through his authorised agent to execute the necessary documents for completing the title of the plaintiff for 20 years lease.

* * * * A decree for compensation to be ascertained in further proceedings. Any other or further relief to which the plaintiff may be entitled".

9. The State of Bihar in its written statement has substantially admitted the pleadings of fact. It denies that the terms of the contemplated leases were finally settled between the parties and that after the expiry of the Kuchwar leases the Lime Company approached the State for performance of the contract in suit. Messrs. Dalmia Jain in an argumentative written statement denies certain details of the facts pleaded which are not of particular importance in the case. Like the State of Bihar, it denies that the terms of the contemplated leases were finally settled. Both written statements take certain pleas in bar, particularly limitation, acquiescence and waiver.

10. The parties went to trial inter alia on the following issues : "2. Is the suit barred by limitation?

3. Was there any legal, valid and binding contract between the plaintiff and defendant No. 1 and can any such contract be enforced?

4. Was the agreement between the plaintiff and the Government defective for lack of settlement of any essential term as alleged by the defendants, and was it bad for uncertainty or vagueness?

9. Is the plaintiff entitled to specific performance of agreement? If so, how and for what period?

10. Is the plaintiff entitled to any compensation as obtained and to an enquiry into the same?

12. Is the suit barred by estoppel, waiver and acquiescence?"

11. The subordinate Judge found that there was a concluded contract between the parties for the grant of leases in accordance with terms embodied in draft leases, Exhibits 22 and 22A, forwarded by the Lime Company to the Sub-divisional Officer, Sasaram, with its letter dated the 4th/8th May 1935 (Annexure M), excepting the terms relating to the date of commencement and the distribution of royalty. According to him, the leases were to commence from the date of execution. Relying on the provisions of Section 18, Clause (a) of the Specific Relief Act, he directed the execution of leases in the terms found by him, the leases to commence from the 1st April 1948, the date on which the State was in a position to have executed them.

12. The points urged before us may be formulated as follows :

1. Was there a concluded contract in fact, that is, were the parties ad idem as regards the, terms, particularly with respect to royalty, duration and commencement?.

2. If the answer to point No. 1 is in the positive, is this the contract of which specific "performance is being sought?

3. Is the suit barred under Article 113 to the Limitation Act?

4. Is the alleged contract enforceable?

5. If the contract is enforceable, is it one of which specific performance should be granted?

6. Can the plaintiff get relief u/s 18 of the Specific Relief Act?

7. Is the plaintiff entitled to relief u/s 15 of the Specific Relief Act?

8. Can Messrs Dalmia Jain be made liable for compensation from the 1st April 1948?

13. POINT NO. 1: Was there a concluded contract? Mr. Mahabir Prasad, on behalf of the plaintiff-respondent, has contended that on the pleadings this point does not arise. He urges that the contract pleaded in paragraph 6 of the plaint has been admitted in paragraph 12 of the written statement filed by the State of Bihar. The contract pleaded is one on "the existing terms and conditions" in the Bihar and Orissa Waste Lands and Mineral Concessions Manual 1926, concluded by an offer made by the Board of Revenue in a letter dated the 31st March 1934 accepted by the Lime Company in its letter dated the 15th April 1934. As I shall show below, these letters and the provisions in the Manual are not sufficient to determine the terms of the contract. Reading the admission in the written statement in the light of the plaint, there is no force in this contention. On the contrary there are distinct pleas in paragraph 18 of the written statement of the

State Government and in paragraphs 9 and 10 of the . written statement of Dalmia Jain that there was no final contract between the parties.

14. On the 25th January 1934, the Lime Company applied (Exhibit. A, page 1) to the Collector of Shahabad offering to take a settlement of the Limestone quarries stating: "We are prepared to guarantee for this property alone a minimum royalty of Rs. 10,000 per annum, if that may satisfy you." Apart from this, there is no reference to any of the terms of the proposed lease. On the 14th March 1934, the member of the Board granted an interview to Mr. S. N. Banerji, the Managing Director of the Lime Company (Exhibit A(5), page 5). At that time the proposed cancellation of the Kuchwar leases was before the Government. The member of the Board approved of the Lime Company as a lessee but directed that orders should not issue until the Government order cancelling the Kuchwar leases was received. There is no note on record of what transpired at this interview and Mr. S. N. Banerji who is alive and available as" a witness has not been examined to depose about it. The Board's letter of the 31st March 1934 (Exhibit 3Z (26), page 106) issued on receipt of Government orders cancelling the Kuchwar leases does not refer to any terms as agreed on at the interview. It intimates that the Board approves of the proposed leases:

"On the existing terms and conditions as set forth in Chapter V of the Bihar and Orissa Waste Lands and Mineral Concessions Manual, 1926, on the understanding that after the lease is executed the question of royalty will be re-examined by the Board provided it is well understood that any reduction, if made, would be a matter of grace."

15. According to the finding of the Subordinate Judge, which is in the alternative the Lime Company's application of the 26th January 1934 and the Board's letter of the 31st March 1934 between them constituted the offer and acceptance which gave rise to a concluded contract. This finding is not in accordance with the plaint which calls the Board's letter of the 31st March 1934 the offer and the Lime Company's letter of the 15th April 1934 the acceptance (Annexure C). In this letter, the Manager of the Lime Company intimates to the Collector that having received the Board's sanction through the Subdivisional Officer for working the Murli properties, the Company has taken possession. The Manager asked the Collector to direct his office "to send the draft leases embodying the existing terms and conditions", to enable the Company to execute them, evidently referring to the Board's letter of the 31st March 1934. There is nothing to show that the Manager was empowered to enter into a contract on behalf of the Company so that his letter could be treated as an acceptance.

16. Be that as it may, the correspondence shows that up to this stage apart from the reference to a minimum royalty of Rs. 10,000 the only terms mentioned were "the existing terms and conditions" in Chapter V of the Waste Lands Manual. The rules referred to specify certain conditions which must form part of every lease for the quarrying of limestone. These conditions are embodied in the prescribed form in appendix 6 of the Manual. But under Rule 6, the Collector is authorised to

incorporate in the lease "such conditions and stipulations" as he may in each case consider necessary. In another respect, the rules are not definite, namely, the term of the lease. This may be twenty years or such shorter term as the applicant may desire (Rule 4) and the applicant is required in his application to state the period he desires (Rule 2). As the correspondence stands so far, the contract and the agreement were not yet definite. It is true that there may be a binding contract in general terms, "GOURLAY v. SOMERSET" (1815) 34 E.R. 576; "HAMPSHIRE v. WICKENS (1878) 7 Ch. D. 555; Ram Sundar Saha and Others Vs. Kali Narain Sen Choudhury and Others, and it is the duty of the Court to ascertain the terms if it is possible, "NEW BEERBHOOM COAL CO. v. BULARAM MAHTA 5 Cal 932 (P C) but the Court is powerless where the completion of the contract depends on the decision of an individual, "HART v. HART (1881) 18 Ch. D. 670. Here Rule 6 leaves some of the conditions and stipulations of the lease to the discretion of the Collector and I find it difficult to hold as the learned Subordinate Judge has done that the Lime Company impliedly agreed to such conditions and stipulations as the Collector might impose, and therefore, there was a concluded contract. And, in another respect, the contract was incomplete. The parties contemplated that a minimum royalty should find a place in the leases and the sum of Rs. 10,000 was suggested by the Lime Company. Up to now there was no clear acceptance of it, and the amount had not been distributed between the two leases.

17. That the terms of the proposed leases were still in a fluid state appears from the letter of the Lime Company dated the 19th April 1934 (Annexure F) submitting draft leases on the model of "existing lease obtained from the S. D. O.'s office" and asking the Collector to "approve the same with such modifications as you may desire." We have not before us copies of the existing leases supplied by the Subdivisional Officer and can only conjecture that they were copies of the prescribed form. In the next letter dated the 23rd April 1934 (Exhibit 3M, page 107) the Collector informs the Commissioner that he has instructed the Subdivisional Officer of Sasaram to take steps for the execution of "the new lease" by the Lime Company. Apparently, at this time the draft leases submitted by the Lime Company to the Subdivisional Officer had not reached the Collector, for, in his next letter dated the 13th/14th May 1934 (Annexure E) we find him telling the Lime Company that he has submitted to the Board of Revenue "the draft leases". Had the conditions on which the leases were to be granted been settled this would not have been necessary. This letter was written in reply to one from the Lime Company asking for the Collector's permission to start work at once (Annexure G) and the Collector says in his reply,

"having been granted a lease for Limestone concession in the upper and lower Murli areas, you are lawfully entitled to start work in them at once."

18. Much has been made of the use of the word "lease" in this letter and the use of this word and the derived words "lessee" and "lessor" in subsequent letters and in Court proceedings by Government or the Lime Company in describing the

relations between themselves. Evidently, the words were used loosely. Everyone knew that the legal relationship of lessor and lessee had not yet been established and steps were being taken to get the leases executed. The Lime Company was described as lessee because the execution of the leases was regarded as merely a matter of time. The use of the words did not indicate that the terms on which the leases were to be granted had been finally settled.

19. The next letter in the series which is on the record is from the Board of Revenue and is dated the 19th of January 1935 (Annexure H). The Board disapproved of certain terms and conditions suggested by the Collector and the Government Pleader of Shahabad and approved of the draft leases submitted subject to certain modifications;

"(1) Lease I relating to the Banskati portion of the Murli Hill.

(i) In Clause 2 of the following proviso should be added at the end : "provided that a minimum royalty of rupees two thousand and five hundred shall be payable in each and every year whether the aggregate royalty calculated according to the above scale falls short of that amount or not". If, however, the Collector considers this amount high he is authorised to reduce it to any sura that would appear to be necessary and add the difference between Rs. 2,500 and the amount so reduced to the amount of minimum royalty (Rs. 7,500) suggested in a similar proviso to the corresponding clause 2 of the other draft leases relating to the Rehal Government Estate, (ii) In accordance with past precedents, Clause 8 should be amplified as follows: "The lessees authorise the aforesaid Dehri Rohatas Light Railway to supply the Collector or any officer authorised by him with full particulars of all lime and limestone carried for him and shall make no objection to the books of the Railway being examined for the purpose of checking the quantity of material exported by them."

(2) Lease II relating to the Rehal Government Estate.

(i) The preamble should be amplified as indicated therein so as to make it clear that the area in question appertains to the Rehal Government Estate.

(ii) In Clause 2 a proviso should be added similar to what has been suggested above in regard to the other lease. The total amount of minimum royalty recoverable for both the leases should not exceed Rs. 10,000 as already decided.

(iii) In accordance with past precedents Clause 9 should be amplified as indicated above in respect of the corresponding Clause 8 of the other lease."

20. That this letter disposed finally of the matter so far as the Board was concerned is clear from the direction that "a copy of each of the leases as executed" should be forwarded to the Board for record. The matter of the minimum royalty, however, was placed within the discretion of the Collector. Annexure I, dated the 16th February 1935 from the Sub-divisional Officer to the Manager of the Lime Company stating that the District Officer had sent amended draft leases and had asked him to obtain six "fair copies of the leases (one on

stamped paper and other five on plain papers) from you", indicates that the Collector exercised this discretion and sent on to the Subdivisional Officer the amended drafts for getting the leases ready for execution. The Subdivisional Officer informed the Manager that the amended draft leases would be available for inspection in his Khasmahal Office. A copy of this letter was passed on by the Manager to the Managing Director, Mr. S. N. Banerji (Exhibit 3Z (8), page 180.)

21. The next communication dated the 3rd April 1935 (Annexure J) from Mr. S. N. Banerji sends the Subdivisional Officer, "two fair copies of the amended draft leases for favour of your perusal and return if approved" promising that on approval six fair copies would be supplied. It has been argued from the fact that the approval of the Subdivisional Officer was asked for that the conditions on which the leases were to be taken were still unsettled. It is evident, however, that all that was asked for was a clerical check in order to see that the amended draft leases as submitted by the Lime Company were in order. Apparently, they were in order and in his letter dated the 9th April 1935 (Annexure K) the Subdivisional Officer returned the two draft leases submitted by the Lime Company for the submission of six fair copies. The fair copies with the corresponding number of plans were supplied by the Lime Company by a letter dated the 4th/8th May, 1935 addressed to the Subdivisional Officer of Sasaram (Annexure M). The letter mentions that the Company stamp and the signatures of the two directors have been put on all the copies and an enquiry is made as to the stamps required for the execution of the leases and for registration. There seems little doubt that the draft leases (Exhibits 22 and 22A, pages 199 and 203) which bear the Subdivisional Officer's office seal of the 10th May 1935 and which were obtained from the Board's office file relating to these proposed settlements are one of the six sets of copies submitted with this letter of the Lime Company.

22. Some stress has been laid on the fact that there was no compliance with the Sub-divisional Officer's request that one of the fair copies should be on stamped paper. Between the two letters last mentioned, however, the High Court had issued its order of temporary injunction on the 25th April 1935. The question of immediate execution of the leases, therefore, could not arise and this omission on the part of the Lime Company cannot be treated as showing unwillingness to complete " the transaction and a refusal of the offer made by the Government. Par from it, the Lime Company had throughout shown eagerness to enter into the contract, to the extent of entering into possession of the property and leaving it to the Government to propose such conditions as might to it seem proper. In exhibit 22, relating to Upper Murli, the minimum royalty is stated at Rs. 8,000/- and in Exhibit 22A relating to the Lower Murli it is fixed at Rs. 2,000/-. Evidently the Collector in exercise of the discretion vested in him by the Board of Revenue had varied the minimum royalty proposed within the limits of his discretion. The term of the proposed leases according to these two documents is twenty years and the date of commencement is stated as the 15th April 1934. There was now an agreement between the parties complete In ail

details.

23. It has been argued that there is no evidence on the record to show that Exts. 22 and 22A are correct copies of the draft leases which were sent by the Collector to the Sub-divisional Officer. That they were correct copies may, however, be inferred from the fact that they are produced from the office of the Board of Revenue. Before reaching that office, they had to pass through the offices of the Subdivisional Officer, the Collector and the Commissioner and we may properly presume that these officers did their duty and checked the documents to see that they were in order. That some sort of check was exercised is indicated by the fact that by his letter dated the 25th May 1935 (Annexure N) the " Subdivisional Officer asked for revised plans which were supplied on the 26th May 1935 (Annexure O) and were forwarded by the Subdivisional Officer to the Collector on the 17-6-1935 after being checked by the Kanungo (Annexure S). On this correspondence regarding the supply of revised plans the argument was put forward that there was still no final agreement. I am not impressed with this contention. The property had already formed the subject of leases in favour of the Kutchwar Co. It is elaborately described in the drafts Exhibits 22 and 22A. There can therefore be no doubt that the parties knew what they were negotiating about and were agreed as to its extent. All that the correspondence was necessary for was to ensure that the property was correctly shown on the plans accompanying the leases which were to be executed.

24. There is one document in this series to which I have not yet referred, namely, Annexure E, dated the 13th May 1935, a letter from the Commissioner of the Patna Division to the Board of Revenue referring to the proposed lease of the Murli Hill quarries. He states that in view of the Board's order dated the 31st March 1934, sanctioning the leases,

"the leases should take effect from April 1st. 1934, instead of the 15th April 1934, as suggested by the Collector."

When the Commissioner sent this letter the approved leases had already been fair-copied by the Lime Company and the fair-copies had been given to the Subdivisional Officer. It does not appear from anything on the record or in the rules that the Commissioner as such had any authority to settle or alter the conditions of the proposed leases, and the suggestion made by him does not seem to have been accepted. I say this because the Exhibits 22 and 22A which came from the Board's Office bear dates of commencement from the 15th April 1934 and no action appears to have been taken by the Board to get the date of commencement modified. A memorandum endorsed on the Commissioner's letter, Annexure D, shows, however, that a copy was forwarded to the Collector i"or information and necessary action and it is possible that the Commissioner's opinion was brought to the notice of the Lime Company. This explains why in Annexures V and W, which according to the plaint incorporate the terms as finally agreed upon, the date of commencement is shown as the 1st April 1934.

25. Mr. Mahabir Prasad has contended that the contract between the parties was concluded on the 14th March 1934 in the interview which the member of the Board of Revenue gave to the Managing Director, Mr, S. N. Banerji, and that all that happened subsequently was the working out of the details of a contract entered into on that date. The contention is not consistent with the plaint which makes no mention of the interview and according to which the contract was concluded by an offer of the Board in its letter dated the 31st March 1934 and an acceptance by the Lime Company in its letter dated the 15th April 1934. Alternatively, Mr. Mahabir Prasad has contended that the contract was concluded by the Board's letter of the 31st March 1934 accepting, according to him, the offer of the Lime Company in its application of the 25th January 1934, This again is inconsistent with the plaint. Further, as I have indicated above, at this stage the terms of the proposed leases were still indefinite. It was not as in the case of "RAM KANAI SINGH v. MATHEWSON AIR. 1915 S. C. 27, a case in which the proposed transaction in all its essential particulars had been settled and in which subsequent proceedings were merely to give effect to the agreement by the preparation of appropriate deeds. There is more force in the further alternative contention of Mr. Mahabir Prasad that there was a concluded contract between the parties when the Lime Company indicated its acceptance of the final terms offered by submitting fair copies of the draft leases containing the final terms, or at least on the 17th June 1935 when it submitted revised copies of the plans for these draft leases. This is substantially in accordance with the alternative finding of the Subordinate Judge.

26. As regards the terms of the proposed leases they are set out in detail in the draft leases, Exhibits 22 and 22A. The Subordinate Judge has held these documents to be incorrect as regards the distribution of the royalty which he holds to have been in accordance with the original proposal of the Board, namely, Rs. 2,500/- and Rs. 7,500/-. His reason is that there is nothing on the record to show that the Collector agreed to a decrease in the minimum royalty for Lower Murli and a corresponding increase in the minimum royalty for Upper Murli. I do not agree. The course of the correspondence leaves no doubt that the Collector exercised the discretion which was vested in him, and that the change in the amounts proposed by the Board was made by him. The proposal of the Board passed to the Subdivisional Officer through the Collector, and the fair-copied draft leases, Exhibits 22 and 22A, must, in the ordinary course, have passed through his office to the Board. We are justified, therefore, in drawing the inference that the alterations in the amounts proposed for minimum royalty were made by the Collector.

27. As to another important term, namely, the date of commencement of the proposed leases, the Subordinate Judge holds that the draft leases, Exhibits 22 and 22A, did not represent the agreement between the parties. In coming to this conclusion, he seems to have been influenced by the fact that, whereas Exhibits 22 and 22A mention the proposed date of commencement as the 15th April 1934, the date given in Annexures V and W annexed to the plaint is the 1st April

1934. He refers to the letter of the Commissioner addressed to the Board of Revenue suggesting, that the leases should commence from the 1st April 1934 and not from the 15th April 1934 as proposed by the Collector, and observes that in the absence of execution of Exhibits 22 and 22A by an authorised agent of the Government it cannot be said that Government accepted the date of commencement as mentioned therein. I have dealt with this matter above.

28. The Collector in passing on the draft leases to the Subdivisional Officer was merely sending on the terms approved by the Board of Revenue with a modification as regards the minimum royalty. These terms must have included the date of commencement which appears in Exhibits 22 and 22A. The parties were therefore agreed as to this. The Commissioner's letter merely represents his opinion as to what would be the proper date for the commencement of the proposed leases. There is nothing to indicate that his suggestion was accepted by the parties at that time. On the contrary, the fact that the date of commencement still appears as the 15th April 1934 in Exhibits 22 and 22A which have been produced from the office of the Board of Revenue indicates that his suggestion was not accepted. The subsequent insertion of the Commissioner's date in Annexures V and W prepared for the purposes of this suit cannot affect a term finally agreed upon by the parties.

29. For the reasons I have given I would hold that the parties came to a final agreement on all the essential terms of the proposed leases on or before the 10th May 1935, and these terms are embodied in the fair copies,, Exhibits 22 and 22A.

30. POINT NO. 2: If the answer to Point No. 1 is in the positive, is this the contract of which specific performance is being sought?

According to the plaint, Annexures V and W embody the terms which were finally agreed upon between the parties. Annexure V relates to Lower Murli and corresponds to Exhibit 22A. Annexure W relates to Upper Murli and corresponds to Exhibit 22. One difference between the Annexures and Exhibits 22 and 22A relating to the date of commencement of the proposed leases has been noticed and explained. The other differences to which reference has been made before us relate to Clauses 9, 10 and 12 of Annexure W, as compared with the corresponding clauses of Exhibit 22.

31. Clause 9 of Exhibit 22 provides that:

"all stone and lime shall be exported *"via Dehri Rohtas Light Railway" and Dehri-on-Sone Railway Station*" (the italics (here in inverted commas) are mine).

and authorises the Dehri-Rohtas Light Railway to supply the Collector or any officer authorised by him with full particulars of lime and limestone carried for the lessees. The intention is that the Government might be in a position to ascertain full particulars of lime and limestone exported from the leased property. In Clause 9 of Annexure W the words in italics (here in inverted

commas) are omitted although the authority to the Dehri-Rohtas Light Railway to disclose particulars of exports is given. There is a similar provision as regards Lower Murli in Clause 8 of Exhibit 22A and the words which have been omitted in Annexure W are duly included in the corresponding Clause 8 of Annexure V.

32. Clause 10 of Ext. 22 requires the lessee to allow certain Government Officers to enter the premises to inspect them, "and for the purpose of checking the accounts of export". The words relating to entry for the purpose of checking accounts have been omitted from the corresponding clause of Annexure W. Again we find a similar provision in Clause 9 of Exhibit 22A which has been properly included in Clause 9 of Annexure V. Clause 12 of Exhibit 22 requires the lessee to pay

"road and public work cess leviable under Cess Act IX (B. C.) of 1880 or any other "which may hereafter be imposed by law in addition to the rent and" royalty to be paid."

33. The words which I have put in italics (here in inverted commas) have been omitted in the corresponding clause of Annexure W. As in the case of the other discrepancies, we find that the corresponding clause appearing in Exhibit 22 has been reproduced in Clause 11 of Annexure V. The explanation is obvious. Draft leases sent by the Lime Company were sent by the Collector to the Board of Revenue. They came back with alterations approved by the Board and were shown to the representative of the Lime Company at the Subdivisional Officer's khasmahal Office. This representative made notes on the basis of which fair copies were prepared. As the two leases were identical in most of their terms, it is probable that the representative did not make his notes fully in respect of each draft. At that time when his memory was fresh, the omission in respect of the other draft would not matter and the fair copies were made in accordance with the approved drafts. Apparently the notes taken were fuller in the case of Lower Murli than of Upper Murli. When, therefore, Annexures V and W were prepared later for the purposes of this case omissions occurred in Annexure W, but not in Annexure V. For these reasons, I would not attach much importance to the discrepancies pointed out as between Exhibit 22 Annexure W and would, if the occasion had arisen, have been prepared to consider an application for an amendment of the plaint.

34. There is a more serious objection relating to the date of commencement of the leases which the Lime Company is seeking to obtain. The relief sought is for

"specific performance of contract in terms of the agreement and as claimed hereinbefore with a direction that the defendant No. 1. through his authorised agent to execute the necessary documents for completing the title of the plaintiff for twenty years" lease."

35. According to the agreement, as I have found" it, the leases were to run for twenty years from the 15th April 1934. According to Annexures V and W, the date of commencement would be the 1st April 1934. In either case the leases would

expire in the year 1954. The previous leases in favour of Kuchwar Co. expired on the 31st March 1943. So, when Government was again in a position to grant the leases to the Lime Company only six years remained of the period agreed upon and Government was not in a position to grant a twenty years" lease. The Subordinate Judge has interpreted the relief claimed as one for a twenty years" lease commencing from the 1st April 1948 and his interpretation has been supported by Mr. Mahabir Prasad, who has been "prepared to concede that the Court may readjust the period by deducting the period of two years and a few months, during which the Lime Company remained in possession. According to him in claiming this relief the Lime Company is not asking for specific performance of a contract other than that agreed on between the parties. His contention is that what the parties agreed on were leases for a period of twenty years and that the time of commencement of the leases was not of the essence. He points out that in the Exhibits 22 and 22A, time is not stated to be of the essence, that the Lime Company was not consulted before the date 15th April 1934 was fixed, and that the Commissioner proposed a change of that date when consulting the Lime Company.

36. The answer is that the 15th April 1934 as the date of the commencement of the lease was obvious from the Lime Company's own letter of that date stating that it had entered into possession of the property. From that time onwards, the Lime Company spoke of itself as the lessee and Government on its part treated it as such and received royalty from it in that capacity. The intention that the leases should commence from the 15th April 1934 was thus clear and this was the date incorporated in the draft leases which were sent down to the Sub-divisional Officer for acceptance by the Lime Company. As regards the suggestion of the Commissioner, it was merely an expression of his opinion and it does not appear that his suggestion was given effect to. I do not think that the doctrine that equity does not ordinarily regard time as of the essence of the contract has any application. It applies only where a party to a contract which is complete in all its terms has delayed in performing his part of the contract. In certain circumstances, the Court of Equity will condone the delay and enforce the contract. The Court has no power, however to make a new contract between the parties. There can be no contract to lease without the parties being agreed as to the date of its commencement (MARSHALL v. BARRIDGE (1882) 19 Ch. D. 233).

37. In the case before us, the parties were agreed on the point and the Lime Company was actually put in possession of the property. The agreement was for lease of twenty years from that date. A lease for twenty years or for a period of seventeen and odd years from the 1st April 1948 would be a different lease altogether. In these circumstances. I am unable to accept the contention of Mr. Mahabir Prasad that in asking for a twenty year lease, the Lime Company was asking for specific performance of the contract entered into between the parties.

38. Even so. Mr. Mahabir Prasad has urged that, the Court's power to enforce a contract after the time agreed on for its performance has passed implies the

power to reconstruct the contract, and so the relief asked for can be granted. In support of this, he has referred to "MAGNIRAM VITHURAM v. BAKUBAI 36 Bom 510 AIR 1949 83 (Nagpur) ; SURENDRA NATH v. RAJENDRA CHANDRA 27 CL J 289; "LOOTNARAIN SINGH v. SHOWKEE LALL 2 CL R 382; and "SURAJ PRASAD SINGH v. WAZIR 23 ALT 119. "MAGNIRAM VITHURAM"'S CASE 36 Bom 510 was not one of specific performance. The plaintiff claimed the suit land under a sale deed executed by the defendant when by reason of an execution proceeding pending before the Collector the defendant, u/s 325(a) of the CPC of 1882, had no power to sell the property. The defendant's power to transfer the property having been subsequently restored by the closing of the proceedings in attachment, the High Court held that the plaintiff was entitled to a declaration that he was a full owner by purchase of the suit property, relying on Section 43 of the Transfer of Property Act and applying the principle enunciated in Section 18 of the Specific Relief Act.

39. In AIR 1949 83 (Nagpur) the defendant in whose favour certain property was knocked down at a sale for arrears of land revenue agreed before the confirmation of sale to sell the property after confirmation and the Court enforced the contract after the sale was confirmed. In "SURENDRA NATH DEY"'S CASE 27 Cal L J 289, a Ghatwal mortgaged certain property which was subject to restrictions on his right of alienation. These restrictions were subsequently removed and the High Court held that the mortgage operated as an executory agreement operating in equity to transfer the beneficial interest to the mortgagee as soon as the restrictions were removed. In each of these cases, the Court gave effect to the original contract entered into between the parties, and no question of reconstruction as to any material term arose.

40. "LOOTNARAIN SINGH"'S CASE 2 Cal L R 382, was a case of mortgage of a mahal by way of a "zuripeshgi" lease. At the time when the lease was granted the mortgagor had a ghatwali right in the mahal. After the lease was granted, the ghatwali interest was extinguished as a result of ouster by the zamindar in execution of a decree obtained by him against the mortgagor. Some years later, the zamindar granted the mortgagor a perpetual mokararri lease of the mahal. The High Court held that the mortgage would operate on the mokararri interest. In coming to this conclusion, the High Court acted on the principle embodied in Section 18 of the Specific Relief Act that, where a person contracts to sell or let property in which he has an imperfect title and later acquires some interest in it, he must "make good the contract" out of that interest. The same principle finds place in Section 43 of the Transfer of Property Act which makes a fraudulent transfer of property operative at the option of the transferee against such interest as the transferor may subsequently get in that property. This is not an instance of reconstructing a contract in the sense of making a new contract between the parties. It is an enforcement . of the original contract to the extent that such enforcement is possible.

41. "SURAJ PRASAD SINGH"'S CASE 23 All 119 is more in point. S, having agreed

to lease certain property to W for 15 years, executed a lease of the same property for two years in favour of N, who had no knowledge of the agreement to lease to W. A suit by W for specific performance after setting aside N's lease having failed against N for want of knowledge on his part, the Court of first instance gave W a lease of the property for 15 years commencing after the expiry of N's lease. This decision was upheld by the High Court, relying on the principle of Section 18 of the Specific Relief Act. It is obvious that Section 18 had no application, as S had a perfect title when he entered into agreement with W. But their Lordships reasoned that his position could not be better than if he had had an imperfect title when he entered into the agreement. With respect, I would submit that there is nothing in Section 18 to sanction the grant of a lease for the full period originally agreed on commencing from a new date. Section 18 requires the vendor to make good "the contract" out of such interest as he may have subsequently acquired. That is to say, the Court can enforce the contract which the parties entered into, to the extent that is possible. The fact that a lease from a later date for the full period originally agreed upon is a different lease was not averted to.

42. For these reasons, I consider that the contract of which specific performance is asked for in the plaint is not the contract which the parties entered into.

43. This finding is sufficient to dispose of the appeal, but it is necessary that I should deal briefly with the other points raised and indicate my opinion about them.

44. "Point No. 3. Is the suit barred under Article 113 to the Limitation Act?"

Under Article 113, time runs for three years from

"the date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused."

Here, no date was fixed for performance. So the second alternative date is relevant. The question of a refusal on the part of Government to execute the leases does not arise prior to the decision of First Appeal No. 68 of 1935 by the High Court on the 7th February 1936. Up to the 25th April 1935, the negotiations were in progress between the Government on one side and the Lime Company on the other to settle the terms of the leases and to get the necessary documents executed. On that date, the execution of leases was stayed by a temporary injunction which continued throughout the pendency of the First Appeal. It is urged that the permanent injunction granted by the High Court decree in the First Appeal restrained the Government from "interfering with the plaintiff's leases on the basis of the forfeiture", thus leaving it open to Government to grant the leases with effect from the expiry of the Kutchwar leases, a date which must be taken as certain, as no covenant for renewal of the leases in favour of Kutchwar Co. has been pleaded. The argument is that a refusal to execute the leases must be taken to have occurred when the leases were not executed within a reasonable period after the 7th February 1936.

45. The question is: what was a reasonable period in the circumstances? The leases, if executed, could not be given effect to till after the 31st March 1948. There was therefore no urgency in the matter. And, even in the absence of a renewal clause, the date of termination of the Kutchwar leases was not certain. Kutchwar Co. was in liquidation, and it was possible that it might surrender the leases before the 31st March 1948, a possibility which the Lime Company had in view when it filed its memorial (ExhibiFB, page 31) to the Prime Minister in December 1937 (vide Annexure V dated the 21st January 1938). On the other hand, Government had shown itself to be wholly on the side of the Lime Company. It had contested the suit filed by Kutchwar Co. up to the Privy Council decision on the 19th November 1937, and, in reply to the memorial Exhibit B had assured the Lime Company that

"the claims put forward by you will receive full and sympathetic consideration." (Annexure V dated the 21st January 1938).

46. In its memorial of December 1937 (Exhibit B, page 31) the Lime Company spoke of Kutchwar Co. as intending to approach Government to sanction the transfer to Bose or, in the alternative to accept a surrender from it and resettle the quarries with Bose. It requested Government not to agree to either proposal. Apparently, the expected move on the part of Kutchwar Co. did not materialise and in a memorial dated the 31st January 1939 (Ext. A(7), page 39) the Lime Company suggested that Kutchwar Co. being under liquidation, it would expedite a surrender of the leases if Government conveyed to the liquidators a formal refusal to sanction a transfer to Bose. It reminded the Revenue Secretary to the Government about this matter on the 6th April 1939 (Exhibit A (3), page 58). Government evidently did not accede to the suggestion, as we find the Lime Company enquiring on the 16th May 1939 if a decision has been arrived at (Exhibit A(2), page 57) and informing the Legal Remembrancer on the 20th June 1940 (Exhibit A(4), page 59) that in proceedings before the Calcutta High Court the agent of the liquidators of Kutchwar Co. had stated that Kutchwar's application of the 9th October 1933 asking the Board of Revenue to assent to the assignment of the leases was still pending.

47. It seems that, whatever the agent of the liquidators may have said in Calcutta, Kutchwar Co. did not approach Government, and we can understand Government refraining from taking action of its own accord aimed at bringing the Kutchwar leases to an untimely end. This reluctance would not necessarily indicate an unwillingness to lease the quarries to the Lime Company in the event of the Kutchwar leases terminating. Hence, merely because a considerable time elapsed after the 7th February 1936 without the leases being executed it would not follow that there was a "refusal" within the meaning of Article 113. On the one hand, the Lime Company did not ask for the execution of leases, and there was no express refusal. On the other hand, there was no reason to think that Government would be unwilling to lease the quarries to the Lime Company, as soon as it was free to do so. The first intimation that Government might not be

prepared to consider the Lime Company as a possible lessee was the newspaper advertisement of the 8th May 1947 calling, for applications for the settlement of the quarries for fresh terms on the expiry of the existing leases. This is within three years of the filing of the present suit.

48. "Point No. 4": Is the alleged Contract enforceable?

The first ground on which the enforceability of the alleged contract is attacked is that it is void u/s 20 of the Contract Act, by reason that both parties were under a mistake of fact as regards the title of Government to the subject-matter of the proposed leases. It has been strongly urged that this objection does not arise on the pleadings. It was raised in the Court of the Subordinate Judge before whom one of the draft issues was:

"Was the contract alleged by the plaintiff bad due to mutual mistake of law and fact?"

On the objection of the Lime Company, the issue was deleted by the Subordinate Judge's Order No. 40 dated the 29th November 1950 and was substituted by the issue:

"Whether the letters which are Annexures D, E and F of the plaint are based upon mis-appreciation of facts and law and are binding upon Defendant no. 2?"

an issue the finding on which is of no help to a decision of the suit. In spite of this, it is difficult to resist the objection u/s 20. The whole case has proceeded on the basis that Government, believing that Kutchwar Co. had contravened a clause of the leases which entailed forfeiture, forfeited the leases and, believing it could lawfully re-lease the quarries, agreed to lease them to the Lime Company, who believing on their side that the Kutchwar leases had been legally forfeited entered into the agreement. In paragraph 10 of the plaint, the Lime Company expressly pleaded mistake:

"That the plaintiff was not aware of any defect in the exercise of the right of forfeiture by Government, nor of the fact that the transfer deed by Kuchwar Ltd., had not been registered, nor had any such fact been disclosed by the Govt. It was rather confidently and assuringly alleged by the Government that the leases had rightly been forfeited and, as a matter of fact, the Government entered into Khas possession of the lease-hold and represented to the plaintiff that they were entitled to grant fresh leases to the plaintiff."

49. At first sight, this reads as if there is an attack against the good faith of Government, but reading the plaint as a whole the impression seems to be incorrect and. at the trial and before us, there was no suggestion that Government did not honestly believe that the Kutchwar leases had been legally forfeited. In the written statements filed by the defendants, paragraph 10 of the plaint is traversed in general terms and in particular it is pleaded that the Lime Company was fully aware of the relevant facts, including the non-registration of the transfer deed and that no assurance was given by the Government as

alleged. There was no suggestion that either the Lime Company or the Government or both knew that in law the forfeiture was defective and that the Kutchwar leases had not been terminated, and this as I have observed is the basis on which the case has proceeded throughout.

50. The parties clearly contracted under a mistake regarding Government's title to the quarries. The interest which a person has in a particular property partakes of the nature of the property and its existence is a question of fact, even though it has to be determined by applying the general law to the facts. Here, wrongly applying the law regarding the registration of instruments transferring Immovable property, the parties thought the title in the quarries had reverted to the Government. The mistake was one of fact. I am supported by the observations of Lord Westbury in "COOPER v. PHIBBS (1867) L R 2 H L 149 :

"It is said, "Ignorantia Juris haud excusat"; but in that maxim the word "jus" is used in the sense of denoting general law the ordinary law of the country. But when the word "jus" is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake."

51. This was accepted as an authority by the Special Bench in "KUCHWAR LIME & STONE CO., LTD. v. SECY. OF STATE 16 Pat 159 (S. B.), The decision was reversed by the Privy Council on another ground in "S. N. BANNERJEE v. KUCHWAR LIME & STONE CO., LTD 17 Pat 770 (PC). In "A. M. APPA-VOO CHETTIAR v. S. I. RY. CO.", AIR 1929 MP 177 Ramesam and Jackson, JJ. opined that the general words used by Lord Westbury must be read in a restricted sense as relating to cases where the mistake is the combined effect of a person's "view of the law and the facts". With respect I would suggest that there is no difficulty if a wrong view of facts has contributed to the mistake. Their Lordships were concerned with a claim u/s 72 of the Contract Act to recover a payment made under a mistake of law as to the liability to pay. This is different from an interest in Immovable property, which is a right of a concrete nature, capable of forming the subject of possession, prescription, transfer, and so on.

52. In this view, it is unnecessary to refer to Clause (c) of Section 28 of the Specific Relief Act which provides that specific relief of a contract cannot be enforced against a party whose assent was given under the influence of "mistake of fact, misapprehension, or surprise". This section becomes relevant only if I am wrong in thinking that the mistake under which the parties contracted is a mistake of fact for, in that case, it may be contended that the mistake is a misapprehension within the meaning of this section.

53. The next ground on which the enforceability of the contract is assailed is based on Section 30 of the Government of India Act, 1915. I reproduce this

section:

"(1) The Governor-General in Council and any local Government may, on behalf and in the name of the Secretary of State in Council, and subject to such provisions or restrictions as the Secretary of State in Council, with the concurrence of a majority of votes at a meeting of the Council of India, prescribes, sell and dispose of any real or personal estate whatsoever in British India, within the limits of their respective governments, for the time being vested in His Majesty for the purposes of the Government of India, or raise money on any such real estate by way of mortgage, and make proper assurances for any of those purposes, and purchase or acquire any property in British India within the said respective limits, and make any contract for the purposes of this Act.

(2) Every assurance and contract made for the purposes of this section shall be executed by such person and in such manner as the Governor-General in Council by resolution directs or authorises, and, if so executed, may be enforced by or against the Secretary of State in Council for the time being.

(3) All property acquired in pursuance of this section shall vest in His Majesty for the purposes of the Government of India."

54. It is emphasised that the section requires "firstly" a contract in the name of the Secretary of State in Council and "secondly" that the contract to be enforceable must be executed, that is to say, there must be a written contract. Once again, it is urged on behalf of the Lime Company that the objection, which was raised for the first time in appeal, does not arise on the pleadings. The answer is that the question is one of evidence and concerns the manner in which the contract set out by the Lime Company can be proved. The existence of a contract binding on the Government has been denied. As I have shown, the Lime Company pleaded the negotiations for the grant of a lease with reference to the correspondence in which the negotiations were carried on. This was substantially admitted by the Government, but with reference to paragraph 14 of the plaint in which the plaintiff spoke of having signed "documents incorporating the terras of the lease as approved by Government" the Government pleaded:

"It is not a fact that the terms were finally settled between the parties for a lease. If the plaintiff had put their signature on any document it is not binding on the defendant."

In view of this pleading, it was for the plaintiff to establish that there is a contract binding on the Government, and, if a written document executed in a particular manner is required by the law, the contract can only be proved by such a document u/s 91 of the Indian Evidence Act.

55. On the provisions of Section 30, the conclusion seems unavoidable that a contract in order to be enforceable against the Government must be in writing and executed. There is general agreement as to this but the Courts are not agreed as to whether a formal document is necessary or a contract can be spelt

out from the correspondence in which the negotiations for the contract have been conducted. The view that a formal document is required" was taken in "MUNICIPAL CORPORATION OF BOMBAY v. SECY. OF STATE" 58 Bom 660 which was followed in Krishnaji Nilkant Pitkar Vs. Secretary of State, . The same view was expressed in "SANKARA MINING SYNDICATE LTD., NELLORE v. SECY. OF STATE". AIR 1938 MP 749. The contrary view finds expression in Devi Prasad Sri Krishna Prasad Ltd. and Another Vs. Secretary of State, which followed Secretary of State for India in Council Vs. Bhagwandas Goverdhandas, . For the purposes of the present case, it is not necessary to determine which is correct view, and to decide finally who is the person authorised to execute contracts of this kind on behalf of the Secretary of State in Council. In Rule 7 at page 12 of the Waste Lands Manual, 1926, the authority is traced back to a notification u/s 2 of the East India Contracts Act, 1870 (33 and 34 Vict. Cap. 59), which notification was preserved by Section 130 of the Government of India Act, 1915. The notification No. 713-734 dated the 2nd June 1913 published at page 1195 of the Supplement to the Gazette of India dated 7th June 1913 was issued in exercise of the Governor-General in Council's power u/s 2 of the East India Contracts Act, 1870. In respect of the Province of Bihar and Orissa, it specifies the officers authorised to execute various classes of documents. The relevant clauses are:

"2. Contracts and other instruments in matters connected with the lease of land
--

(a) If the lease be permanent ... By Collectors and Deputy Commissioners

(b) If otherwise ...

By Settlement Officers, Collectors, Deputy Commissioners, and Sub-divisional Officers.

3. (a)

Contracts and other instruments in matters connected with the hire or purchase of land or buildings or with the sale of Government land or with the lease or sale of Government buildings, or with prospecting and exploring licenses and mining leases.

... By Collectors and Deputy Commissioners.

(b)

Contracts, instruments and engagements specified above when the value or amount of such contract, instrument or engagement does not exceed Rs. 600/-.

...

By Assistant Commissioners, joint Magistrates, and Sub-divisional Officers.

4.

Contracts and other instruments not included in Article 3 in matters connected

with the lease of ferries, fishe-ries, and other benefits arising

...

By Collectors, Deputy commissioners, and Sub-divisional Officers."

56. I have cited all these clauses because, at least as regards Lower Murli, the surface right in which does not belong to Government and in which Government has merely the right to quarry limestone, the contract sought to be enforced is not a lease of land. Ignoring a discrepancy between the notification and Rule 7 at page 12 of the Waste Lands Manual, we may take it under Clauses 2 and 4 of the notification that the contracts in question could have been executed in this case either by the Collector or by the Subdivisional Officer.

57. Let us consider now if there is on the record any document or set of documents satisfying the conditions of Section 30. One of the conditions is satisfied by Exhibits 22 and 22A, which are expressed to be on behalf of the Secretary of State for India but they are signed only on behalf of the Company. The subdivisional Officer having received them, must have sent them on to the Collector who in his turn must have forwarded them to the Commissioner for transmission to the Board of Revenue. The forwarding letters are not before us and we do not know who signed them. Also, the letters were sending (sic) on these documents for purposes of record, the parties having already come to terms finally. Therefore, the signatures affixed to those letters were not affixed with the intention of binding the Government. This intention can only be attributed, if at all, to the letters forwarding the offer of Government in the shape of the approved drafts, of which Exhibits 22 and 22A are the fair copies. It is these approved drafts and forwarding letters which, with Exhibits 22 and 22A, may be said to comprise the contract sought to be specifically performed in this suit. Neither the draft lease nor the forwarding letters are before us. The Lime Company has therefore failed to establish the contract of which it is seeking specific performance.

58. In this view, it is not necessary to consider the final objection under this head, namely that the contract as evidenced by these documents is an "agreement to lease" within the meaning of Clause (7) of Section 2 of the Indian Registration Act and is inadmissible in evidence for want of registration under Clause (d) of Sub-section (1) of Section 17 of the Act.

59. POINT NO. 6: Can the plaintiff get relief u/s 18 of the Specific Relief Act?

POINT NO. 7: Is the plaintiff entitled to relief u/s 15 of the Specific Relief Act?

It will be convenient to consider these points together. I reproduce below Sections 15 and 18 of the Act, so far as they are relevant:

"15. Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed forms a considerable portion of the whole, or does not admit of compensation in money, he is not entitled to obtain a

decree for specific performance. But the Court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, provided that the plaintiff relinquishes all claim to further performance, and all right to compensation either for the deficiency, or for the loss or damage sustained by him through the default of the defendant."

18. Where a person "contracts" to sell or let certain property, having only an imperfect title thereto, the purchaser or lessee (except as otherwise provided by this Chapter) has the following rights:

(a) if the vendor or lessor has subsequently to the "sale or lease" acquired any interest in the property, the purchaser or lessee may compel him to make good "the contract" out of such interest."

60. It has been urged with some weight that Section 18 Clause (a) applies only to cases in which the party with the imperfect title has executed the sale or lease. I have placed in italics (here in inverted commas) the words which support this contention. The section begins "where a person "contracts" to sell or let". Here the word "contract" may refer either to the agreement to sell or lease, or to executed sale or lease. The section then fixes a point of time with reference to "the sale or lease". It goes on to provide that if after "the sale or lease" the vendor or lessor acquires an interest in the property, the purchaser or lessee may compel him to make good "the contract" "out of that interest. Having used the words "sale or lease" the section goes back to the word "contract". Thus the words ""sale or lease" appear to be used in contrast to the word "contract". (I do not attach much importance in this connection to the use of the words "vendor" or "lessor" and "purchaser" and "lessee", because these words have been used loosely elsewhere in the Act to indicate persons entering into a contract to sell or a contract to lease, vide Section 25).

61. Read in this light, the section seems to overlap Section 43 of the Transfer of Property Act, under which a transfer made fraudulently or on an erroneous representation operates against any interest which the transferor may subsequently acquire in the property. It is not necessary to consider and explain, the necessity for and the exact effect of the provision in Clause (a) of Section 18, because it is conceded that apart from it, the purchaser in a contract to sell or lease entered into in such circumstances is entitled to sue for specific performance against such interest as the vendor may afterwards acquire in the property. Fry on Specific Performance, Fifth Edition, says in Article 994 :

"It is not necessary to the specific performance of a contract, that it should be one which the parties at the time of entering into it had the power of carrying into effect, nor one with regard to which it depends on themselves alone whether they would ever be able to perform it. For, where a party enters into a contract without at the time having the power of performing it, and afterwards acquires that power, he is bound to perform the contract he entered into."

62. Here, at the time when Government entered into the contract, the leases in

favour of Kutchwar were subsisting and Government was unable to execute the leases in favour of the Lime Company. The barrier being now removed and a suit for specific performance not being barred by time the Lime Company is entitled to sue for that relief. What it must sue for however is to enforce "the contract". This is in keeping with Section 18 which provides for making good "the contract" and with Section 43 of the Transfer of Property Act under which "the transfer" operates against the subsequently acquired interest.

63. I have rejected above the contention that the Court may reconstruct the contract so as to give the Lime Company the period originally contracted for or that period minus the period in which the Lime Company was in possession of the property. The contract is for leases from the 15th April 1934 for a period of twenty years and specific performance if granted can be only for the portion of that period which remains. This is how Section 15 comes in. Government is unable to perform a portion of its part of the contract, and u/s 17 of the Act specific performance can be decreed only under one or other of the Sections 14 to 16. Sections 14 and 16 have no application. It has been urged that Section 15 also does not apply. It refers, it is urged, to an inability to perform a portion of the contract at the time when the contract is entered into. Both the illustrations to the section relate to a deficiency in the area contracted to be transferred. In such event, the purchaser can enforce the sale in respect of the remaining area. I do not see why the section should be read as restricted to an incapacity in space and not to extend to an incapacity in time. It is possible that the incapacity in space may be conditioned by time. Thus in illustration (a), A may subsequently to the contract have acquired 25 bighas of the land from the stranger. In that case, he would have been liable under the section to sell 75 bighas to B. A person who, having agreed to give a lease for twenty years, can do so only for six years is unable to perform the whole of his part of the contract, and the contract comes within the scope of Section 15.

64. In order to get relief u/s 15, however, the plaintiff must relinquish : "all claim to further performance, and all right to compensation either for the deficiency, or for the loss or damage sustained by him through the default of the defendant." The application filed by the Lime Company on the 18th February 1952 for relief u/s 15 is in these terms : "That without prejudice to the submissions made by the petitioner u/s 18 of the Specific Relief Act the petitioner alternatively claims relief u/s 15 of the Specific Relief Act and claims a decree for specific performance of contract for the period after the expiry of the lease of Kuchwar Lime and Stone Co. Ltd., that is from 1-4-48 to 31-3-1954 on the usual covenants as mentioned in Waste Land Mineral Concessions Manual with such compensation as may be permissible. He further relinquishes all claims to further performance and all right to compensation either for the deficiency or for the loss or damages sustained by him for default of the defendant for the period prior to 1-4-1948."

65. The reference to the submissions made u/s 18 of the Specific Relief Act, relates to the argument that the Court in granting specific performance may

reconstruct" the contract. The Lime Company has therefore not relinquished all claim to "further performance" though it professes to do so in the last sentence of the petition. Also, as regards compensation the petition relinquishes it only "for the period prior to 1-4-1948". Such a limitation is not sanctioned by the terms of Section 15.

66. For these reasons, I think that the plaintiff company is not entitled to specific performance u/s 18 or Section 15 of the Specific Relief Act.

67. POINT NO. 5.: If the contract is enforceable, is it one of which specific performance should be granted?

The first ground urged as a reason why specific performance should be refused is that of hardship. It is pointed out that the demand for limestone has increased since the agreement was entered into with the Lime Company, and that whereas under the agreement with them the total of the minimum royalty for the two leases is Rs. 10,000 the total minimum royalty under the leases in favour of Dalmia Jain is Rs. 75,000. I am not certain that there is any merit in fact in this contention. The question of minimum royalty only arises when the quantity of Limestone removed falls so low that the royalty payable at the rates specified in the leases is less than the minimum royalty. If the demand for limestone has gone up, as indicated by the minimum royalty agreed to by Dalmia Jain, the average removal of the limestone is likely to be big enough to cover that amount. It is not necessary to investigate the point, however. The consideration urged might be of some weight if specific performance was to be granted for a period after the 14th April 1954 as has been done by the Subordinate Judge. I have indicated above that this cannot be done. If the decree for specific performance is confined to the period originally agreed on, the question of hardship does not arise. The Government and the Lime Company negotiating on an equal basis and in full knowledge of all the relevant facts agreed on Rs. 10,000 as a proper minimum. Circumstances have altered since then, and in a lease given now a lessee would agree to a higher minimum royalty. But this does not make it a hardship for Government to have to perform the contract which it entered into with the Lime Company.

68. The second ground urged under this head is delay. I have dealt with this in considering the question of limitation. While the parties thought they were free to contract and the Government was not restrained by an injunction, steps were taken for obtaining leases. After the High Court decreed Title suit No. 39 of 1934 the urgency of getting the leases executed vanished and there were reasons why the Lime Company should prefer to wait till the Government was again free to execute leases in its favour. Another line of argument proceeds thus. If the Lime Company had sued in 1935 for specific performance it would have failed, at first by reason of the injunction in First Appeal No. 68 of 1935 and, after the decree of the High Court, because the Court could not direct specific performance in conflict with the Kutchwar leases. How can the lapse of time improve the Lime Company's position and entitle it now to sue for specific performance? The

argument presupposes a suit to enforce the contract for the period prior to the 1st April 1948. It is not certain that the hypothetical suit would have failed if the relief sought had been confined to the period of the contracted term from the 1st April 1948 to the 14th April 1954. As I have suggested, there were reasons why the Lime Company might have preferred to wait.

69. Next it is suggested that the suit ought to fail on the ground of want of mutuality, for a suit by Government to enforce the contract would have failed. This is no reply to a suit confined to the period from the 1st April 1948 to the 14th April 1954 if such a suit is maintainable u/s 15, Specific Relief Act. This section expressly provides that the contract, to the extent that it is possible to enforce it, can be enforced only by one of the parties.

70. A more substantial reason why specific performance should be refused is that the Lime Company is not the real plaintiff. The Lime Company was a private Company consisting of two share-holders S. N. Banerjee and K. N. Banerjee, each holding 250 shares of Rs. 100 each (Exhibit 21, page 85. Proceedings Book of Directors' meetings of the Lime Company, minutes of meeting held on the 1st July 1930. and Exhibit 21 (b). Proceedings Book of the Shareholders' meetings of the Lime Company, minutes of meeting held on the 30th December 1930). Both of them were Directors of the Company, S. N. Banerjee being the Managing Director (Exhibit 21. 17-8-30). This was the constitution of the Company when it entered into the suit contract and the signatures of the two Banerjees appear on Exhibits 22 and 22A. On the 10th June 1937, the Lime Company resolved that steps be taken to register a Public Limited Company and to transfer to it after its incorporation the properties and business of the Lime Company (Exhibit 21). A new Company, the Kalyanpore Lime and Cement Works, Limited (hereafter referred to as the Cement Company) was formed and registered with an authorised capital of Rs. 25,00,000 divided into 7000 preference shares of Rs. 100 each, 16000 ordinary shares of Rs. 100 each and 8000 deferred shares of Rs. 25 each. Among the promoters of the Company were the Banerjees, each holding 10 ordinary shares. Foremost among the objects of the new Company was the acquisition as a going concern of the business and good will of the Lime Company (Exhibit E, page 26, Memorandum of Association of the Cement Company dated the 11th August 1937).

71. On the 28th November 1938, an agreement (Exhibit F, page 37) was entered into between the Lime Company on one side and the Cement Company on the other, under which the Lime Company agreed to sell and the Cement Company to buy

"the undertaking of the "Lime Company" which expression shall be deemed to include all the lands, buildings, hereditaments, goods, Chattels, moneys, credits, debts, bills, notes, good-will, things in action, contracts, agreements, securities & other assets whatsoever and wheresoever of the Lime Company" ".

72. As part of the consideration, the Cement Company agreed to meet all

obligations of the Lime Company and to indemnify it against all claims in respect thereof. Further, if the Lime Company within a certain time went into voluntary liquidation the Cement Company agreed to bear all the costs of liquidation and to meet all demands against the Lime Company in respect thereof. This contingency did not arise as the Lime Company did not go into liquidation. As further consideration, the Cement Company agreed to pay Rs. 2,00,000 in the form of 8000 of its own deferred shares of Rs. 25 each. The agreement was ratified by the Lime Company in a Share-holders' meeting on the 1st December 1938 (Exhibit 21 (b)). There was some delay in the execution of the deed of transfer and in an extra-ordinary General Meeting of the Shareholders on the 3rd July 1939 the Lime Company decided that all the assets and liabilities of the Company "excluding the leases for quarrying Limestone in Murli Hill properties"

be transferred as early as practicable to the Cement Company, and that thereafter

"the Kalyanpur Lime & Cement Works Ltd., be requested to delegate such authority and provide such funds as may be necessary to enable this Company to function in the interest of the Cement Company." (Exhibit 21(b).)

73. It was further resolved that the accounts of the Lime Company be closed from the date of the conveyance. At this time, the Privy Council had confirmed the decree of the High Court in First Appeal 68 of 1935 and the appeal against the High Court's order dismissing the Lime Company's petition for restitution of possession was pending before the Privy Council. The meaning of the resolutions is obvious. After the conveyance the Lime Company would exist only for the purposes of the Cement Company. The sale deed (Exhibit D, page 50) was executed on the 13th July 1939. It is expressed to be in pursuance of the agreement of the 28th November 1938. By the deed, the Lime Company for the consideration agreed on in November 1938 transferred to the Cement Company "firstly"

"all goods, chattels, moneys, credits, debts, bills, notes, goodwill of the business of the vendors, with the exclusive right to use the name of the Kalyanpur Lime Works Ltd., in any business which the purchasers may decide to carry on hereafter, and or trade-mark in connection therewith, things in contracts, agreements, securities and other assets whatsoever and wheresoever of the vendors" (pages 51-52) and "secondly" the properties set out in the Schedule annexed to the deed, together with all the rights of the Lime Company in relation thereto.

74. The deed further recited that besides the properties set out in the Schedule it had been agreed between the parties as regards the Murli Hill quarries that

"the transfer of the said rights in the said property should be deferred until the title thereto is perfected and the necessary permission from the Secretary of State for India for the transfer thereof is obtained."

The deed further recites that the Lime Company has made over all the transferred properties to the Cement Company, and, on the 13th August 1939, the shareholders of the Lime Company recorded a resolution making over to the Cement Company the Lime Company's assets and liabilities according to its balance sheet of that date (Exhibit 21(b)). Of the deferred shares which the Lime Company got by this transaction, 3000 were transferred to each of the Banerjees to be held by them in their own right under a resolution of the shareholders of the Company dated the 20th March 1943 (Exhibit 21(b)). The remaining 2000 shares were sold under a resolution of the Directors dated the 4th December 1945 and the proceeds of Rs. 50,000 were invested in the Cement Company as an advance bearing interest at two per cent per annum (Exhibit 21 and Exhibit H page 63, the Balance Sheet of the Cement Company as at the 31st December 1945). At the same time, all the shares in the Lime Company were purchased by the Cement Company, partly in the name of the Cement Company and partly in the names of three "benamidars". The benami nature of the purchase was denied by K. M. Rakshit (P. W. 2) but was not contested before us. The transfer was made in the books of the Lime Company under the resolution of the Directors dated the 4th December 1945 (Exhibit 21, page 96) and the shares find entry in the Balance Sheet of the Cement Company as assets (Exhibit H, page 62).

75. After this, the Banerjees cease to have any connection with the Lime Company, the shareholders in which are the Cement Company and its benamidars, K. M. Rakshit, D. N. Choudhary and C. P. Sinha. From this time, the assets of the Lime Company consist of the investment of Rs 50,000 and the annual interest of Rs. 1,000 on it is its sole income (Vide the evidence of K. M. Rakshit. Director of the Lime Company, P. W. 2 at page 65). Rakshit deposes further that under its agreement with the Cement Company the Lime Company is bound as soon as it gets the leases to transfer them to the Cement Company without receiving any further consideration and that this suit has been instituted for the benefit of the Cement Company (P. W. 2, pages 65-66). In fact, the Lime Company exists only in name and the real plaintiff is the Cement Company,

76. On the ground that u/s 23, Clause (g) of the Specific Relief Act, a new company formed by the amalgamation of the contracting Company with another Company can sue for specific performance of the contract, it has been argued that it cannot matter that the contracting Company seeks for specific performance for the benefit of another Company. It is noticeable however that Clause (g) is confined to the case of an amalgamation of public companies. Also, the argument loses sight of Clause (b) of the section which disentitles a transferee from enforcing a contract if it contains a provision against assignment. Alternatively, it is urged that there is nothing to prevent the Lime Company from working the quarries on its own account.

77. I have shown above that the Lime Company exists only in name. Its shares have been acquired by the Cement Company and it continues to exist merely for

the advantage of the Cement Company. Its sole assets are Rs. 50,000 invested in the Cement Company, earning an annual income of Rs. 1,000. These assets must be considerably reduced now, for we are told by K. M. Rakshit that the expenses of the present litigation are being debited against the invested sum of Rs. 50,000, and they had already mounted to Rs. 12,000 when the witness was deposing (P. W. 2, page 65). In these circumstances, I do not think the Lime Company has the resources necessary for the undertaking. Exhibits 22 and 22A both contain a covenant against transfer without the assent of the Board of Revenue. So the Murli Property will be of no value as security for a loan; and it is not likely that the Lime Company will be able to raise the funds necessary for working the quarries itself. There is no doubt that, if the contract is enforced, the quarries will be worked by the Cement Company in the name of the Lime Company. In other words, the Court will be forcing on the Government a lessee other than the person with whom it contracted.

78. Yet another ground on which specific performance should be refused is that the plaintiff company has not been "ready and willing throughout" to perform its part of the contract. Such readiness must continue to the date of the decree, "ARDESHIR H. MAMA v. FLORA BASSOON 55 Ind App. 360 (PC). The contract in this case was for leases from the 15th April 1934 to the 14th April 1954. In December 1937, in the memorial submitted to the Prime Minister (Exhibit B, page 31) the Lime Company requested Government after the expected surrender of the leases by Kutchwar Co. to execute in the Lime Company's favour "the leases already settled and sanctioned". To this request, there can be no objection. This attitude changed when the period drew near for the expiry of the Kutchwar leases. Exhibit 1(a) dated the 9th June 1947 (page 285) is the petition forwarding the Lime Company's application in the prescribed form in answer to the Government's advertisement calling for applications for leases of the Murli Hill quarries from the 1st April, 1948. The application is for a term of twenty years from that date, and the applicant offers a minimum royalty of "Rs. 10,000 or such amount as may be fixed by the Government". The term of the leases applied for thus overlaps the term of the leases sought to be enforced in this suit. The forwarding petition states that the application is "without prejudice to the right which the petitioner Company has already acquired in the said Hills" by reason of preceding transactions between it and the Government. The petition refers to the fair copies of the draft leases signed by the Company and says that instead of calling for fresh applications the just, legal and equitable procedure would have been for Government.

"to complete the said leases in favour of the petitioner Company and allow it to re-enter and work the quarries under the said leases for "a period of twenty years commencing from the date of its re-entry", (The italics (here in inverted commas) are mine.)

79. The petition concludes by asking that the old leases" in its (the Lime Company's) favour be completed", and stating that the application is forwarded

"without prejudice to any of its (the Lime Company's) rights" in order to avoid technical objection. Even if we ignore the application which is stated to be "without prejudice", it is clear that the Lime Company was asking for the execution of leases on the basis of Exhibits 22 and 22A for a fresh period of twenty years. This is the position which the Lime Company took up in the plaint and in this Court in Appeal. This is its position also in its petition u/s 15 of the Act which petition is "without prejudice" to the submissions u/s 18 of the Specific Relief Act. Where the plaintiff is asking for more than he is entitled to under the contract, he cannot be said to be ready and willing to perform his part of the contract.

80. Point No. 8: Can Messrs. Dalmia Jain be made liable for compensation from the 1st April 1948?

The Subordinate Judge has directed that

"the plaintiff will get compensation from defendants Nos. 1 and 2 for the period commencing from the 1st April 1948 till he gets possession of the leasehold properties."

These words appear to make Dalmia Jain liable from the 1st April 1948. The intention of the Subordinate Judge is more clearly expressed when he deals with the point of compensation under issue No. 10. He says there that Dalmia Jain will be liable for compensation only for the period for which they have been in possession. Obviously they could not be liable for the period that they were not in possession.

81. For the reasons which I have given. I would allow these appeals with costs, set aside the decree of the Subordinate Judge and dismiss the suit with costs.

Das, J.

82. I have had the advantage of reading the judgment prepared by my learned brother and I am in agreement with him as respects the main conclusions at which he has arrived. Therefore, it is unnecessary for me to cover the same ground which my learned brother has so ably and fully covered. I shall content myself with summarising the conclusions at which I have independently arrived, for reasons, more or less the same as explained by my learned brother.

83. A large number of questions--some of them rather hypothetical in nature--were mooted, argued and investigated before us. This was unavoidable to some extent; because what the plaintiff-respondent really wanted was not specific performance of the contract finally agreed on by the parties, but a reconstruction of such contract for his benefit. I agree with my learned brother that from the correspondence between the parties and the draft leases (Exhibits 22 and 22A) which were produced from the office of the Board of Revenue, it is possible to spell out a finally concluded agreement, with regard to the essential terms of the proposed leases, on or about the 10th of May, 1935. This is, however, different from the agreement which the plaintiff-respondent pleaded, or which the plaintiff-

respondent wished to be specifically performed. The main argument of the learned Advocate General (Bihar) appearing for the plaintiff-respondent that there was an agreement between the parties for a twenty years" lease on what he called usual terms in respect of upper and lower Murli at a much earlier date than the 10th of May 1935, and his further argument that the correspondence merely worked out the details of that agreement, cannot in my opinion, be accepted, regard being had to the tenor and true import of the correspondence which has been examined by my learned brother. The argument of the learned Advocate General (Bihar) that the date of commencement of the proposed lease was not an essential term, and his further argument that the Court's power to enforce a contract after the time agreed on for its performance has passed implies the power to reconstruct the contract, appear to me to be unsound. My learned brother has referred to the decisions on which the learned Advocate General relied. I need merely point out that the decision in "MAGNIRAM VITHURAM v. BAKUBAI 36 Bom 510 was not approved by the Privy Council in "GAURISHANKER BALMUKUND v. CHINNUMIYA 45 Ind App 213 (PC). Their Lordships definitely said that "MAGNIRAM VITHURAM'S CASE", was erroneously decided.

84. The agreement which was finally concluded between the parties on or about the 10th of May 1935, cannot be specifically performed for the following reasons. I agree with my learned brother that both parties were under a mistake as to the right of Government to grant a lease--a mistake of fact essential to the agreement--and, on that ground, the agreement was void. A void agreement is not a contract, and Section 4(a) of the Specific Relief Act states that, except where it is otherwise expressly enacted, nothing in the Act shall be deemed to give any right to relief in respect of any agreement which is not a contract. I am further of the view that if the agreement was not void u/s 20 of the Indian Contract Act, on the ground that the mistake was not a mistake as to a matter of fact essential to the agreement, even then specific performance of the contract could not be enforced against a party thereto when the assent of the party was given under the influence of a misapprehension; vide Clause (c) of Section 28 of the Specific Relief Act. The word "misapprehension" occurring in Clause (c). in the juxtaposition of the words before and after it, must mean something more than a mere mistake of fact. The misapprehension in the present case was erroneous belief of Government that it had the right and authority to grant a lease of upper and lower Murli in 1935.

85. The second difficulty in decreeing specific performance arises out of the provisions of Section 30 of the Government of India Act, 1915. I agree with my learned brother that the contract, which is sought to be enforced against the State Government, was not executed "by such person and in such manner" as was laid down by the Governor-General under the provisions of Sub-section (2) of Section 30.

86. The third difficulty in the way of the plaintiff-respondent arises out of

Sections 15 and 18 of the Specific Relief Act. There has been much controversy before us as to if Clause (a) of Section 18 relates to executed contracts or executory contracts. On behalf of the appellant, it has been contended that both Section 43 of the Transfer of Property Act and Clause (a) of Section 18 of the Specific Relief Act relate to executed contracts. It is stated that the distinction between the two sections is this, as pointed out at "page 208 of Sir Dinshaw Mulla's Transfer of Property Act, Third Edition:

"Section 43 follows the equitable rule in that, until the option is exercised, it treats the transferee as the beneficiary of a trust who may be defeated by a purchaser for value without notice. But it departs from the equitable rule in that it does not require the transfer to be effected by a further conveyance. If the transferee were enforcing the contract u/s 18(a) of the Specific Relief Act, the transferor would be required to execute a further conveyance. But u/s 43 the exercise of the option or the mere requisition of the transferee is sufficient to bring the subsequent interest within the scops, of the original transfer. "

87. It is, I think, unnecessary in this case to decide if Section 18(a) Specific Relief Act, can apply to an executory contract (though I am of the view that the words used in Clause (a), such as "sale or lease", are only apt and appropriate to executed contracts); assuming that Section 18(a) applies to executory contracts, like the one we have here, the plaintiff-respondent is up against the difficulty of Section 15. Section 17 of the Specific Relief Act lays down that the Court shall not direct the specific performance of a part of a contract except in cases coming under one or other of the three last preceding sections. I have no doubt in my mind that the date of the commencement of the proposed lease, as finally agreed to by the parties, was the 15th of April 1934. and the period agreed to was twenty years from that date. Therefore, the State Government was unable to perform the whole of their part of the contract at the date of the suit.

88. I think it is unnecessary to express any opinion whether a suit for specific performance could have been brought at any earlier stage or whether there could be a suit for specific performance of an agreement to grant a lease on some future date. It is sufficient to state that on the date on which the suit was brought, one of the parties to the contract was unable to perform the whole of his part of it; therefore, he could not enforce the contract. The other party could ask the Court for specific performance and the court might direct the party in default to perform specifically so much of his part of the contract as he could perform, provided that the plaintiff relinquished all claim to further performance and all right to compensation either for the deficiency, or for the loss or damage sustained by him through the default of the defendant. This, in my opinion, is the effect of Section 15. My learned brother has pointed out, and I entirely agree with him, that the plaintiff-respondent did not relinquish all right to compensation etc. A conditional and partial relinquishment, without prejudice to other rights, does not fulfil the requirements of Section 15.

89. Lastly, I agree with my learned brother that though the Lime Company is the

nominal plaintiff, the real plaintiff, is the Cement Company for whose benefit the suit has been brought. The Lime Company may legally exist; but in decreeing specific performance, the Court will really be allowing the quarries to be worked by the Cement Company in violation of the agreed covenant against a transfer without the assent of the Board of Revenue. From this point of view also, the Court should not exercise its discretion of decreeing specific performance.

90. For these reasons, I agree with my learned brother that the appeals should be allowed with costs, the decree of the Subordinate Judge should be set aside, and the suit dismissed with costs.