

(1919) 06 PAT CK 0027
In the Patna High Court

Seth Hukum Chand and Others

APPELLANT

Vs

Raja Ran Bahadur Singh and Another

RESPONDENT

Date of Decision : 04-06-1919

Acts Referred:

Transfer of Property Act, 1882 — Section 52

Citation : 53 Ind. Cas. 833

Hon'ble Judges : Dawson Miller, C.J.; Mullick, J

Bench : Division Bench

Judgement

1. This is an appeal from a judgment and decree of the Additional Subordinate Judge of Hazarihagh, dated the 24th July 1917, dismissing the plaintiffs' suit for specific performance of a contract, alleged to have been entered into on behalf of the Raja of Palganj to grant a permanent lease of Paresnath Hill to the Digambari community of Jains in India.

2. The suit was instituted on the 5th September 1913 in the names of Dhannu Lal Agarwalla and Parmesti Das Serowgee, as plaintiffs suing on behalf of themselves and as representatives of the entire Digambari Jain community of India. Both these gentlemen died about a year after the suit was instituted. The present plaintiffs thereupon applied under the provisions of the CPC (Order I, Rule 8) to be made parties, and by an order of the lower Court, dated the 1st February 1915, their names were added to the record as plaintiffs and the suit proceeded.

3. At the time when the suit was instituted the defendant's estate was being administered by Babu Krishna Chandra Ghosh, who had been appointed Manager of the Palganj Raj under the provisions of the Chota Nagpur Encumbered Estates Act (Bengal Act VI of 1876), and the defendant was sued through the said Manager as his representative and guardian. Babu Krishna Chandra Ghosh, having ceased to act as Manager, Babu Janki Nath Gupta was appointed in his place, and by an order of the 2nd February 1915 his name was substituted on the record as Manager and guardian in place of the former Manager.

4. The events leading up to the present suit are referred to at some length in the pleadings and a short history of the same is set out in the judgment now under appeal. It is convenient to refer again shortly to the circumstances under which the agreement sought to be enforced came to be made. The range of hills known as Paresnath Hill lies in the Hazaribagh District and runs roughly from east to west. It has a central range about a mile and a quarter long with outlying spurs, a part of which is Government property. The greater part of the Hill, however, is claimed as part of the Palganj Zamindari. For many years this Hill has been an object of adoration by the Jains who hold an Ekrarnama from the father of the present Raja of Palganj agreeing to grant them such lands on the Hill as they may need for the purpose of building temples. Indeed, at one time they went so far as to claim the Hill as their own under sunnads granted by Akbar and Ahmed Shah. These, however, were found by the Calcutta High Court to have been, spurious documents. A number of temples have in the past been erected along the crest of the central range and many pilgrims resort there for worship, and in the course of time the Jains have come to regard the locality as a sacred adjunct to the performance of their religious observances and keenly resent its use or occupation by others for purposes which are repugnant to their religious views and which they regard, rightly or wrongly, as an interference with their vested rights.

5. In the year 1907 the Government of India approved a scheme submitted by Mr. Carey, then Deputy Commissioner of Hazaribagh, for opening a sanitarium and residential buildings for Europeans on the western spurs of the range and on its northern slopes, leaving the crest of the central range for the Jains whose temples at present occupy that site. This scheme met with strong opposition from both the Sitambari and Digambari sects of the Jain community, which resulted in the intervention of Sir Andrew Fraser, then Lieutenant-Governor of Bengal, who took a personal interest in the matter and endeavoured to bring about a settlement which would be satisfactory to all parties. In August 1907, he visited the Hill accompanied by the leading representatives of the Jains of both sects and held a darbar at Madhuban, when he suggested that the Jains should themselves purchase the Raja's interest in the Hill. This suggestion appears to have commended itself to the Jains, and in September of the following year, after some further negotiations, a conference was held at Ranchi with a view to settling terms. This was a task of some magnitude, as there were many interests to be considered. Certain lease-holders had vested interests, the Sonthal tribes claimed the right of hunting wild animals over the whole of the Hill, the Zemindar of Nawagarh claimed the southern slopes as part of his Zemindari, and other claims and encumbrances of a public and private nature had to be considered. Meantime some correspondence passed between the Government of Bengal and the Government of India on the subject, and the latter had expressed their approval of the suggestion that the central hill should be leased to the Jains. The conference at Ranchi was attended by Sir Andrew Fraser, Mr. (afterwards Sir William) Date, Chief Secretary to the Government of Bengal, Mr. Macintosh,

Commissioner of Chota Nagpur, the Raja of Palganj, and representatives of the Digambari and Sitambari Jains. Certain proposals and counterproposals were made at this meeting, but it terminated without any settlement being come to. Negotiations, however, still continued between Sir Andrew Fraser and the representatives of the Jains, Two proposals were suggested, one-a temporary arrangement terminable when the estate should be restored to the Raja, and the other a permanent arrangement granting a permanent lease at a fixed rental in addition to premium, certain rights being reserved to the Raja. It may be mentioned here that the Sitarubari Jains already held leases of certain plots on the Hill the rental of which was Rs. 1,500 per annum, and it was that soot which tad the option of taking further plots for the purpose of building temples under the agreement with the late Raja above referred to. Their desire apparently was to obtain complete control and exalusive rights over the whole Hill, including the jungles, villages, and existing lessees. Sir Andrew Fraser would not consent to this scheme, as appears from his letter of the 7th October 1908 addressed to Maharaj Bahadur Singh (Exhibit 19). Subsequently, on the 20th October 1908, Pandit Mohan Krishna Dar, representing the Digambaris, wrote to Sir Andrew Fraser requesting him to use his influence to bring about a settlement on what the writer considered a just and reasonable basis, stating the terms he was prepared to offer for a permanent lease, namely, Rs. 50,000 premium and a rental of Rs. 12,000 annually, including the Rs. 1,500 payable by the Sitambaris. Further correspondence then followed between Sir Andrew Fraser and the original plaintiffs as the acoredited representatives of the Digambaris, and on the 3rd November 1908 the latter wrote offering on behalf of the Digambari Jain community and without prejudice to their rights to take a permanent lease of the whole Hill subject to existing leases paying Rs. 50,000 by way of premium (a cheque for which sum was tendered,), and an annual rental of Rs. 12,000, the right of cutting timber in the jungles being reserved to the Raja. On the 25th November Sir William Duke wrote in reply detailing the terms which the Lieutenant-Governor would be prepared to accept. These were, with slight modifications, the terms already offered on behalf of the Digambaris. Any excess over-and above a limit of Rs. 2,000 which should become payable in future on account of existing leases was to be added to the annual rental of Rs. 12,000, and the mineral rights on the Hill were to be retained entirely by the Zamindar. The demarcation of the Hill was to be made by the Deputy Commissioner and was to exclude the villages in the plain. These terms were prefaced by the following remark:

Without discussing the precise character of the rights and ownership of the Zemindar of Palganj over the Paresnath Hill, it is proposed that in deference to the wishes which you and other Jains have expressed the ownership should be limited by a distinct agreement in the following respect."

6. The letter ended thus:

I am to request that you will state clearly and definitely whether you accept

these terms and conditions. I am also to request that you will state whether you are to be the contracting parties with the Court of Wards and whether in that capacity you represent the Digambari Jains only or the Jains in general.

7. "On hearing from you that you accept. these terms and who the contracting parties on your behalf will be, the Lieutenant-Governor will give orders to have the agreement drawn up by the Government Solicitor in consultation with any lawyer whom you choose to name."

8. On the 26th November the original plaintiffs wrote acknowledging the letter of the previous day and adding:

We are very thankful to His Honour for his kind and sympathetic consideration of the offer made by us without prejudice on behalf of the Digambari Jains of India. We shall esteem it a great favour if you will kindly permit us to modify the terms of agreement as set forth in paragraph 2, clauses (1) to (6) of your favour. The terms as set forth by you are given below and the modifications prayed for by us are shown in italics. In the margin we have indicated, in brief, some of the reasons which have induced us to make the aforesaid modifications."

9. Then follow the proposed terms and the modifications which were not of a substantial character. The letter concludes in this way:

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

11. The permanent lease and other documents may hereafter be prepared as suggested by you and. in those documents it would be better if you would kindly allow to join us at least two other representatives of our sect, to wit, Seth Manick Chand of Bombay and Lala Devi Sahay of Ferozepur,"

12. The only modification of the proposed terms which calls for remark was the first which stipulated" A permanent lease of the whole Hill will be granted to the Digambari Jains, subject to the terms and conditions and reservation hereinafter contained."

13. The proposed terms having contemplated a grant to the Jains generally and not to the Digambari sect, attention is drawn to this because one of the points urged in argument by the respondent was that a community such as the Digambari Jains, not being a legal entity, could not be the grantees of a lease.

14. On the 30th November 1908, Sir William Duke replied to this letter, stating:

15. "I am directed to acknowledge the receipt of your letter, dated the 26th November 1908, and to say that the Lieuteuant Governor has bean plaassd to acsept the modified terms of agreement as set forth therein. I am to enolose herewith for your information a copy of letter No. 4791, dated the 30th

November 1908, to the Solicitor to the Government of India, and to request you to nominate a lawyer in consultation with whom the draft agreement may be prepared."

16. The letter to the Government Solicitor, No. 4.791, a copy of which was enclosed was as follows:

I am directed to state, for information, that the Lieutenant-Governor has been pleased to sanction the grant to the Digambari Jains of a permanent lease of the Hill known as the Paresnath Hill, in the District of Hazaribagh, owned by the Zamindari of Palganj on the conditions mentioned below:

17. "(1) A permanent lease of the whole Hill will be granted to the Digambari Jains, subject to the terms and conditions and reservations hereinafter contained, so that the Hill may be protected from every thing repugnant or opposed to the feelings or the religious tenets of the Jains.

18. "(2) This lease is to be subject to the existing leases and arrangements, but the income derived from these existing leases and arrangements shall go to and be received by and be assigned over to the Digambari Jains, provided that any amount payable on amount of these a leases over and above Rs. 12,000 shall be added to the annual payment of Rs. 12,000 referred to below.

19. "(3) The Digambari Jains have paid by a cheque Rs. 50,000 (fifty thousand) by way of premium and no further premium will be demanded.

20. "(4) The Digambari Jains will also pay an annual sum of Rs. 12,000 by way of rent, this sum of Rs. 12,000 will include the Rs. 1,500 now annually payable by the Sitambari Jains.

21. "(5) The Palganj Zemindar shall be entitled only to the premium and the rent aforesaid and excess over Rs. 2,000 as mentioned in Clause (2), as also to the rents of subleases under Clause (7). He shall also be entitled to cut the jungle according to the necessity of himself and of his present estate, such cutting to be done in accordance with rules to be framed by the Deputy Commissioner with the sanction of the Commissioner, regulating the kind of timber or wood to be cut, and the time, conditions, and circumstances of the cutting. The right to minerals on the Hill shall be retained entirely by the Zemindar, but no steps shall be taken for the prospecting for minerals or for their working, collecting, securing or removal without the order of the Deputy Commissioner passed with the sanction of the Commissioner and without the consent of the Jains; such consent only to be withheld when anything repugnant to the religious feelings of the Jains is proposed. Beyond this the Zemindar will have no other right, interest, claim or control over any part of the aforesaid-Hill, as long as the stipulated annual payment is duly made.

22. "(6) The demarcation of the Hill shall be made by the Deputy Commissioner and shall exclude the villages on the plain so as to render it more convenient to deal with the existing leases and rights.

23. (7) The Digambari Jains will not be entitled to grant any sub-lease with regard to any piece or parcel of land not now covered by the aforesaid subsisting leases without the consent of the Zamindar of Palganj in writing, and the rents from such sub leases shall go to the said Zamindar of Palganj.

"I am to request you to draw up, in consultation with any lawyer whom the Jains may choose to name, a draft agreement embodying the above terms which have been accepted by the Digambari Jains for execution by (1) the Deputy Commissioner of Hazaribagh as Manager of the Palganj Estate now managed by the Court of Wards under the Chota Nagpur Easement-estates Act, (2) the Raja of Palganj, and (3) Babus Dhannu Lal Agarwala and Parmesti Das Serowgi as representing the Digambari Jains."

24. The terms set out in the above letter were those already agreed to between the plaintiffs and Sir Andrew Eraser and they contain the agreement of which specific performance is sought. The agreement embodying these terms was never in fact drawn up or executed, but a draft lease was prepared by the Government Solicitor and forwarded to the plaintiffs" Solicitors in January 1909.

25. In August 1909 it was decided to make a survey and prepare a Record of Rights of the area to be leased which had not up to that time been delimited, with a view to obtain the requisite particulars for the grant. This took some time, and disputes arose as to the line of demarcation, the Digambaris representatives contending that the Hill extended further into the plain including several villages lying therein outside the demarcation line laid down by the Deputy Commissioner; and before the Survey Report was completed the Government of Bengal, acting on instructions from the Government of India, informed the plaintiffs" Solicitors that the arrangement arrived at for a settlement would not be carried through. This decision was conveyed in a letter from the Government of Bengal to the plaintiffs" Solicitors on the 6th September 1910 in the following terms:

"Gentlemen

26. I am directed to state that on behalf of the Raja of Palganj, whose estates are under the management of the Court of Wards, this Government agreed to the grant to the Digambari sect of the Jains of a lease of the Paresnath Hill in the district of Hazaribagh on certain conditions proposed in a letter, dated the 28th November 1908, from your clients, Seth Parmesti Das Serowgi and Babu Dhannu Lal Agarwalla. Having regard, however, to the preferential claims of the Sitambari community the Government of India, to whom the matter was reported, do not feel justified in giving effect to the offer of settlement made by this Government. I am, therefore, to request that you will be so good as to inform your clients that the arrangement proposed in November 1908 has fallen through and that the Accountant-General, Bengal, has been asked to refund them with interest at "4 per cent, (the Bank rate of fixed deposits) the sum of Rs. 50,000 which they had paid as premium."

27. This decision was, no doubt, arrived at in consequence of a report made by Mr. John Reid, the Settlement Officer of the Chota Nagpur Division, on the 3rd June 1910 (Exhibit D) in which he stated that the grant of the proposed lease to the Digambari Jains would result in serious differences and disputes between them and their rivals, the Sitambaris, who were in possession of the existing temples and had preferential rights over the Hill in case they wished to erect new temples. The Digambaris, on the other hand, had no such rights and were not in possession of any temples of their own. In dealing with what he considered would be the immediate result of granting the proposed lease Mr. Reid reported that, "The Digambari Society would proceed to erect new tanks, some of them possibly adjacent to the already existing tanks which are managed by the Sitambaris. The Sitambaris would of course object and would fall back on their rights under the agreement of 1872. To enforce their legal rights they would, no doubt, resort to violence, and very likely the site of every proposed new tank would be the scene of a riot of greater or less magnitude. I understand that it is not the local authorities but the local Government who propose to sanction the lease of the Hill to the Digambari Jains. In that case the latter authority would be put in the extremely invidious position of having sanctioned an agreement, the result of which must necessarily be rioting, possibly of a serious character. With this prospect in view, if there is any doubt of the legality of the proposed lease it is evidently one which cannot be carried through."

28. There can be no question that these two rival branches of the Jain community entertain feelings of hostility towards each other, and the conclusions arrived at by Mr. Reid may possibly have been justified. However that may be, the Government of Bengal definitely refused to proceed further in the matter. At that time Sir Andrew Fraser's term of office as Lieutenant-Governor had come to an end. The appellants refused to accept the cheque and interest tendered in the letter of the 6th September 1910, and on the 5th September 1913 instituted this suit claiming specific performance of the contract mentioned or alternatively damages against the defendant.

29. Various defences were pleaded in the written statement. The most important of these may be summarised thus:

(1) That the defendant's estate was at all material times vested in a Manager under the Chota Nagpur Encumbered Estates Act, 1876, by Section 3 of which the defendant was incompetent to charge, lease or alienate his Immovable property or to enter into any contract which might involve him in pecuniary liability, and if, and in so far as he had purported to do so by himself or through others, such contract was invalid. None of the persons conducting the negotiations had any authority to enter into a binding contract.

(2) That under the Act the only person having power to deal with the defendant's property was the Manager, and even his powers derived from Section 17 of the Act did not include the power of entering into an agreement to grant a lease.

(3) That no binding agreement was entered into, and that what took place was mere negotiation, all parties thereto contemplating the necessity of ascertaining the exact legal rights of all persons interested in the Hill before a lease could be granted, no date being fixed for the commencement of the demise.

(4) That the parties were fully aware that none of the persona conducting the negotiations had authority to enter into a binding agreement, and that the plaintiffs agreed only to be bound in the event of a short agreement embodying the terms being prepared and executed by such person or persons as were authorised to sign such agreement, and that this was never done.

(5) That Sir Andrew Fraser was acting solely in an executive capacity and had no authority to enter into a contract binding upon the defendant or his estate.

(6) That negotiations were not conducted on the basis of obtaining the highest value for the property.

(7) That the contract should not be enforced on the ground of public policy.

30. The Additional Subordinate Judge of Hazaribagh, before whom the case came for trial, dismissed the suit, being of opinion that none of the officers who conducted the negotiations with the plaintiffs was competent to make the agreement in question, and that it had, therefore, no operation in law. His judgment was based mainly upon the interpretation of the provisions of the Chota Nagpur Encumbered Estates Act. By Section 3 of that Act the proprietor of an estate vested in a Manager under the Act, so long as that management continues, is incompetent to mortgage, charge, lease, or alienate his Immovable property or any part thereof. The powers vested in the Manager by Section 17 include the power to demise all or any part of the property under his management for any term of years or in perpetuity to take effect in possession in consideration of any fine or fines or without fine and reserving such rents and under such conditions as may be agreed upon. By an amending Act of 1909 what is now known as Clause 18B was added, This was not in operation at the date of the agreement now under consideration. It provide as follows:

Subject to the sanction of the Commissioner, the Manager shall have power to enter into any contract or to execute or relinquish any lease or counterpart of any lease or to take any action not otherwise provided for in this Act which in his opinion is necessary for the proper care and management of the property."

31. It must be borne in mind that the Manager in whom the estate was vested at the date of the agreement was Babu Krishna Chandra Ghosh. This gentleman was no party to the agreement, and, so far as the evidence goes, there is nothing to show that he was even consulted during the negotiations and before the agreement was entered into. It is also quite clear that the Raja of Palganj, although he may be taken to have been throughout a consenting party, had no power to deal with his estate. The learned Judge came to the conclusion that Sir Andrew Fraser, the Lieutenant-Governor of Bengal, had no functions at all in the

matter connected with the granting of the lease; that the Commissioner and the Deputy Commissioner were authorised by the rules framed u/s 19 of the Act to sanction leases to be given by the Manager alone, and considered that they could by clear implication dictate terms to the Manager, but could not demise themselves and far less make a binding contract to lease; that the only person authorised to grant a lease under the Act was the Manager and nobody else. Having arrived at that conclusion his judgment proceeds in this way:

The question, therefore, resolves itself into this:-Whether the power to lease provided in Section 17 necessarily implies a power in the Manager to contract for it as well.

32. He then considered the arguments addressed to him on this question and arrived at the conclusion that the power to lease granted by the Act did not necessitate the power to enter into a binding contract to lease. The fact that the latter power had been conferred upon the Manager by the amending Act of 1909 (Section 14B) indicated to him that before the passing of the amending Act such power had been excluded and he came to the conclusion that none of the officers who took part in the negotiation was competent to make the agreement in question and, therefore, that it had no operation in law and he dismissed the suit.

33. It is not very clear from these findings whether the learned Judge dismissed the suit solely on the ground that the Manager had no power to enter into an executory contract to grant a lease, or whether he also based his decision upon the ground that even if such power existed, the Manager was no party to the agreement. Having arrived at the conclusion that the suit must fail on the ground above referred to, he thought it unnecessary to determine the other issues; but, in view of an appeal, he recorded his findings on those issues on the assumption that the agreement in question should be held to be a competent one. He considered that the agreement was a concluded agreement and not a mere negotiation contemplating further steps before it should have a binding effect. He further thought that Sir Andrew Fraser, in bringing about a settlement which involved questions of public policy of considerable magnitude, must be supposed to have been acting in his executive capacity because he had no statutory power to deal with the matter, and that his action was, therefore, subject to the control of the Government of India; that he had obtained the sanction of the Government of India to settle only the central range, and that his subsequent scheme leasing the whole range was not submitted to or approved by the Government of India who refused to sanction it; that Sir Andrew Fraser was under a misapprehension that the Digambari sect represented the majority of the Jain community and possessed the greater number of shrines on the Hill, which was not the fact, and that he conducted the whole negotiations in an extremely partial manner without enquiring into the preferential rights and privileges of the rival sect of Sitambaris, and that the effect of giving the Hill to the Digambaris would be to put the estate under a disadvantage and to throw the two rival sects into unavoidable conflict to the detriment of the estate. In view of these facts

and circumstances he considered that he would not have been prepared to decree specific performance of the contract. On the question of damages he came to the conclusion that assuming there was a binding contract and specific performance was not enforced, damages would have to be allowed only nominally as the actual amount spent could not be ascertained by the evidence adduced.

34. By the time the case came on for hearing on appeal before this Court, the Palganj Estate had ceased to be administered by a Manager and the Raja had been restored to the possession and enjoyment of the property under Clause 12 of the Chota Nagpur Encumbered Estates Act, a notification to that effect having been published in the Bihar and Orissa Gazette, dated the 11th December 1913, The Raja, it appear., was at that time quite prepared to carry out the agreement of the 30th November 1603 and grant the appellants a lease on the terms therein mentioned. He accordingly presented a petition, dated the 24th February 1919, praying the Court to pass a decree under Order XXIII, Rule 3, of the Civil Procedure Code, in accordance with the terms arrived at by a compromise between himself and the plaintiffs, which terms are set out in the petition. By this compromise the Raja admits the appellants' claim for specific performance of the contract for a perpetual lease of the Hill upon the terms and stipulations of the agreement on which the claim is based; the appellants give up their claim for interest, mesne profits, damages and costs and undertake to bear the costs of all litigation that may arise out of the present litigation as well as the costs of an appeal if any, to His Majesty in Council from the final decree in this case. This application was opposed by learned Counsel on behalf of Nagarseth Kasturibhai Manibhai, representing the Sitambari Jains, who had been added as a respondent to this appeal under the following circumstances:

35. In the year 1911 the proprietor of the Nawagarh Zemindari, commonly known as the Raja of Nawagarh, instituted a suit against the Raja of Palganj through his Manager and guardian Krishna Chandra Ghosh in whom the estate was then vested as defendant claiming a declaration of title to the southern half of Paresnath Hill. The Raja of Nawagarh, who unlike his neighbour of Palganj, is an adherent of the Sitambaris was successful in his suit before the Subordinate Judge of Hazaribagh-An appeal (No. 551 of 1914) was preferred against that judgment to the High Court on behalf of the Raja of Palganj and came before this Court in January 1918. Pending that appeal the Raja of Nawagarh entered into an agreement with a representative of the Sitambaris to grant him or his nominee a permanent lease of his interest in the Hill. The policy of the Manager and those associated with him in the management of the Palganj Estate also favoured the transfer of the Raja of Palganj's interest in the Hill to the Sitambaris, the Government of India considering that they had preferential claims over their rivals, the Digambaris, In fact, the sanction of the Commissioner of Chota Nagpur had already been obtained the 6th October 1917 u/s 13B of the Act to transfer the Raja's rights to the Sitambaris. The result was that when the appeal in the Raja of Nawagarh's suit came before this High Court

in 1918 the parties to that litigation, although disputing as to their respective rights and interests in the Hill, were both anxious to transfer those rights, whatever the extent of them, to the representatives of the Sitambaris who, in their turn, were apparently prepared to pay each of the contesting parties the price they were willing to accept for a transfer of their respective interests. In these circumstances, a purchaser being found who was willing to take over from the disputants their joint interest in the Hill without further determination of their respective rights and interests inter se, a compromise was arrived at between them, when the appeal in that suit was partly heard, and on the 4th February 1918 a compromise petition setting out the terms agreed to by the parties and approved by the Sitambaris was ordered to be filed and the parties were ordered to carry out the terms of the compromise, the appeal standing over for final orders. The compromise it was provided that both parties should transfer, the one by a conveyance and the other by a permanent lease, their right, title and interest in Paresnath Hill to the representatives of the Sitambaris upon terms already settled between them; that all questions of ownership and possession of the respective parties should remain undetermined as between the parties; but that, in order to settle the extent of the interest to be transferred by the Raja of Nawagarh, the boundary between the Hill and Nawagarh Pargana to the south should be determined by a competent Survey Officer to be appointed by the Court. The conveyance and lease contemplated in the said compromise were then prepared and subsequently executed by Janki Nath Gupta, who had succeeded Krishna Chandra Ghosh, as Manager of the Palganj Estate and the Raja of Nawagarh, respectively, transferring their interests in the Hill to Nagarseth Kasturibhai Manibhai in his individual capacity and as representing the Sitambari community of Jains. The Raja of Palganj was personally opposed to this settlement, and when the matter came again before the Court for final orders on the 8th March 1918, he petitioned the Court complaining of the bargain made by the Manager on his behalf with the Sitambaris, and asking the Court to recall the order "made on the 4th February, and not to pass a final decree in the terms of the compromise. At the same time a similar petition was presented on behalf of the Digambari Jains, who had previously made an unsuccessful application to be added as parties in that suit. The Raja's petition was rejected both on the ground that he had no control over the management of his estate at that time and also on the merits, he having, it appeared, agreed personally with the Sitambaris on more than one occasion in 1912 and 1913 to grant them a permanent lease of the Hill. The Digambaris petition was also rejected, although the Court consented to hear them through Counsel, The Court then ordered a decree to be passed in the terms of the compromise and ordered the conveyance and lease, copies of which were filed, to be executed and registered, The Court also observed that the terms of the conveyance by the Manager of the Palganj Estate safeguarded the interests of the Digambaris in so far as they provided that the conveyance should be subject to any order which might be passed by this Court in the present appeal. In the same conveyance the purchaser representing the Sitambaris covenanted to take all necessary steps to

get his name substituted in place of that of the Rija of Palganj as respondent in the present appeal and, at his own expense, to defend the action and indemnify the vendor and the Palganj Estate against all costs and damages arising out of the litigation after the 1st January 1918. The purchaser, after execution of the conveyance, accordingly applied to this Court on" the 7th August 1918 to have his name substituted in place of that of the Raja of Palganj as respondent, when it was ordered that the name of Nagarseth Kasturibhai Manibhai be added as a respondent in the appeal, the name of the original respondent being also left on the record.

36. The question which now arises is whether we ought, in the circumstances just mentioned, to record the compromise of the 21th February 1918, and pass a decree in accordance with the terms thereof. The appellants rely upon the provisions of Order XXIII, Rule 3, and say the Court has no option in the matter once the compromise is satisfactorily proved, as in this case, and ought to pass a decree in accordance there with. They further contend that the respondent Nagarseth Kasturibhai Manibhai is a purchaser pendente lite and takes subject to the rights of the appellants under the decree now asked for. It is true that the purchase on behalf of the Sitambaris was, by the terms of the conveyance and with the approval of the Court which sanctioned that conveyance, made subject to any order which might be made in the present litigation. It is also true that the doctrine of *lis pendens*, as embodied in Section 52 of the Transfer of Property Act applies to transfers during the pendency of a suit even when that suit is terminated by a compromise decree; but in such cases the Court should be satisfied that the compromise is not a collusive agreement entered into with the object of defeating the purchaser. It must be taken that the compromise entered into by the Manager de the Palganj Estate in Appeal No. 551 of 1914 and the conveyance made in pursuance thereof are binding on the Rija of Palganj and his estate to the same extent as if the latter had been himself the contracting party. There was, therefore, an implied obligation on the transferror not to derogate from the grant. It was contemplated also that the purchaser should be substituted in the present appeal as respondent in place of the Raja and indemnify the latter against all liability he might incur by an adverse decision therein, In such circumstances to deny the purchaser the right of defending the present action by setting up any defence that would be open to the Raja of Palganj would be to work a manifest injustice if there is any real defence to the suit. The transfer made to the contesting respondent was made under the authority of the Court within the terms of Section 52 of the Transfer of Property Act, and one of the terms was that it should be subject to any order passed in the present appeal. The object of this was clearly to preserve the existing rights of the Digambaris which were then sub judice, but not to enlarge those rights by putting it in their power to defeat the transfer by a collusive arrangement with the transferror. It seemed to us, therefore, necessary to consider whether the compromise we are now asked to record was a bona fide one or merely colourable "with the object of preventing the contesting respondent from setting

up such defence to the action as might otherwise be open to the original defendant. It is contended that the compromise is a reasonable one, as the questions to be determine are doubtful and may not end in this Court and the result may be to saddle the Raja of Palganj with heavy costs and possibly damages even if specific performance be not decreed. This argument did not commend itself to us, as there is an undertaking by the purchaser to indemnify the Raja against all liability arising from such a contingency, and it is not suggested that the purchaser's financial resources are inadequate for that purpose. It seemed to us that if there is a real and substantial defence to the claim, the compromise we are asked to record would not in the circumstances already mentioned be a lawful agreement within the meaning of Order XXIII, Rule 3, and without considering the ease on the merits we were not prepared to record it and pass a decree in accordance with the terms thereof. We accordingly decided to hear the appeal on the merits.

37. The main questions which were argued before us were, (1) whether the agreement relied on was made by persons who were competent to deal with the Palganj Estate at all; (2) whether the Manager of the Estate, assuming him to be a contracting party, had power to enter into an agreement to execute a lease as ancillary to his statutory power to grant a lease; and (3) whether there was a completed agreement upon which a suit for specific performance could be based. These were the points towards which the arguments were mainly directed, but it was further contended by the contesting respondent that the suit, as framed, was not maintainable because the alleged contract was made either with the Digambari Jains as a body or with certain individuals. In the former case no suit was maintainable by the Digambaris, who are not a legal entity. In the latter case the individuals were dead and their legal representatives were not substituted in their place, and even if they claimed as trustees for the Digambaris, there, was nothing to shew that the substituted plaintiffs were appointed trustees in place of the original plaintiffs.

38. The first of the above points involves a consideration of some of the provisions of the Chota Nagpur Eacumbered Estates Act, and in dealing with this question it is necessary to determine who in fact were the actual parties to the agreement. So far as the Raja of Palganj is concerned, he may be taken to have been a consenting party and to have authorised Sir Andrew Fraser to enter into a contract on his behalf, but it is clear from Section 3 of the Act that, so long as the estate was under the control of the Manager, the Raja was incompetent to mortgage, charge, lease or alienate his Immovable property or any part thereof, and his Action in the matter may be ignored. According to Sir William Duke's evidence it was Sir Andrew Eraser who directed the whole course of the negotiations, acting on his own responsibility and forming his own decisions. It is also dear from the documentary evidence that the representatives of the Digambaris throughout were treating with Sir Andrew Eraser, and, so far as appears from the evidence, never once approached the Manager of the Palganj Estate. The reason for this is not far to seek. Sir Andrew Fraser was Lieutenant

Governor of Bengal. The matter was one which the Government was likely to consider as involving questions of policy in the government of that Presidency, if the Manager of the Estate had been asked to grant a lease, he would probably have refused to commit himself until he was satisfied that his Action in the matter had the approval of the Local Government. The Digambaris, no doubt, felt confident that if they obtained the formal sanction of the Lieutenant-Governor to their scheme the rest was merely a question of routine, and that for all practical purposes the sanction of the Lieutenant-Governor meant the consent of the Manager and the consequent grant of the lease. Unfortunately for the appellants, however, the Lieutenant-Governor was not himself competent to exercise the statutory powers vested in the Manager. Had the suit been one against Sir Andrew Fraser for breach of warranty of authority different considerations would arise, which it is not necessary to consider. The suit is against the Raja of Palganj through his Manager, who alone at the material time had power to grant a lease of the property. The management of the estate was vested in the Manager u/s 2 of the Act. His duties are defined in Section 4 and the following sections. They consist mainly in the collection of rents and profits and the disposal of them for certain purposes, which in some cases require the approval of the Commissioner. He must also enquire into and settle debts and liabilities due from the estate, machinery for which is provided involving judicial enquiries with appeals from his decisions in certain cases to the Deputy Commissioner and Commissioner. His powers are enumerated in Part V of the Act. They include certain powers connected with his duties, and Section 17 provides:

39. "Subject to the rules made u/s 19 the Manager shall have power to demise all or any part of the property under his management for any term of years or in perpetuity to take effect in possession in consideration of any fine or fines or without fine and reserving such rents and under such conditions as may be agreed upon."

40. Section 18 gives him power in certain cases with the sanction of the Commissioner to raise money by mortgage, sale or loan in order to pay the debts of the holder or charges on the property. Section 18B, which was enacted after date of the agreement sued on, is set out at length in an earlier part of this judgment.

41. By Section 19 the Lieutenant-Governor may make rules consistent with the Act to regulate certain matters therein specified and generally for the guidance of officers in all matters connected with the enforcement of the Act and such rules, when made, shall have the force of law. Rule 5 says:

42. Wherever the Manager appointed under the Act is not the Deputy Commissioner of the district, the Deputy Commissioner will (subject to such orders consistent with the provisions of this Act as the Commissioner may from time to time issue) exercise a general control over the management of all the properties in his district." Rule 16 makes the power of the Manager to grant a lease u/s 17 subject to the sanction of the Commissioner if the lease exceeds a

term of four years.

43. The appellants contended that it was impossible to believe that even if the Manager were not a formal party to the agreement his consent and acquiescence had not been obtained by Sir Andrew Fraser, and that it ought, therefore, to be assumed. We are unable to draw any such inference. From the evidence of Sir William Duke as to the manner in which the negotiations were carried through by Sir Andrew Fraser, I think it is much more probable that the Manager's opinion was never asked. The only evidence urged in support of this argument consists of two documents which came into existence long after the date of the agreement. The first is a note signed by the Manager and dated the 6th February 1909, [Exhibit 13 Ind. Cas. 831 : 39 I. A, 1 : 39 C. 232 : 21 M. L. J. 1156 : 16 C. W. N. 74 : (1912) M. W. N 22 : 9 A. L. T. 33 : 15 C, L. T. 69 : 14 Bom. L. B. 5 : 11 M. L. T. 8 (P.C.). giving certain information required by the Solicitors with a view to preparing the lease. The second is a letter from Ganga Charan Balav, the Forester of the Palganj Estate, addressed to the Manager, Encumbered Estates, Hazaribagh, dated the 25th January 1910, (Exhibit 50) stating that the cadastral survey of the Hill had commenced and requesting sanction for two assistants. There is nothing in either of these documents which would warrant the assumption that the Manager had delegated his powers under the Act to Sir Andrew Fraser even assuming he had power to do so which, to say the least, is a violent assumption in the case of statutory powers.

44. It was next contended that Sir Andrew Fraser, at all events, consulted and discussed the matter with the Commissioner of Chota Nagpur (Mr. McIntosh) and the Deputy Commissioner of Hazaribagh (Mr. Radios), and, as the Manager was by the rules just mentioned subject to a general control by the Deputy Commissioner and could only grant a lease of this description with the previous sanction of the Commissioner, it was quite sufficient if the consent of these gentlemen should be established. We think it maybe assumed from Mr. McIntosh's telegram of the 6th November 1908 (Exhibit 21) that he and the Deputy Commissioner assented to the terms eventually arranged between Sir Andrew Fraser and the representatives of the Digambaris. We are unable to hold, however, that because the power to lease vested in the Manager by the Statute requires the sanction of the Commissioner, this in itself gives the Commissioner power to grant a lease without consulting the Manager at all, much less that the Commissioner may, unknown to the Manager, bind him by an agreement compelling him to exercise his statutory powers. It remains to consider whether the Deputy Commissioner, by reason of Rule 5 referred to, which imposes upon him the duty to exercise a general control over the management of all the properties in his district," can, in like circumstances, dispense with the functions of the Manager and himself exercise the powers vested by the Statute in the Manager. In our opinion such was not the intention of the rule. The Statute contemplates (see Section 9) that the Manager may be either the Deputy Commissioner himself or someone else. In the latter case the powers of the Deputy Commissioner are given by the rule and are confined to a general control

over the management of another person. To say that he may treat the Manager as non-existent and exercise his powers himself would, we think, be to extend the scope of the rule beyond its legitimate meaning. Section 21A gives the Board of Revenue control and supervision over the orders and proceedings of the Commissioner and Deputy Commissioner and affords some light on the meaning of the word control. It could hardly be contended that the Board of Revenue could exercise the functions of the Commissioner.

45. It was lastly contended on this part of the case that the Manager must be taken at least to have ratified the agreement. It is sufficient to say that we have looked in vain for any evidences of ratification. The two documents [Exhibits 34 (1) and 50] already referred to were relied on as indicating acquiescence by the Manager and an attitude of mind from which ratification might be inferred. We do not think any such inference can be drawn. It follows from these findings that the plaintiffs' suit must fail and the appeal be dismissed. But as the other two points were argued at some length before us, we think it desirable to record a decision on those points also.

46. On the second point it was contended for the respondent that the rule whereby equity aids the defective exercise of a power by a tenant for life so as to bind the remainderman can have no application to powers created by Statute. The foundation of the equitable doctrine would appear to be based upon the view that in most cases the donor of the power cannot have intended that the lack of a seal or the omission of some legal formality not necessarily known to him should defeat the exercise of the power by the grantee, if it otherwise expresses the paramount intention of the donor. But to aid the powers granted by Statute for similar reasons would be to treat the Legislature as *inops consilii* (See Farwell on Powers, 3rd Edition, pages 394-5). The appellants contend, however, that the rules governing the powers of tenants for life or other limited owners can have no application in a case like the present where the Manager, though appointed by Statute, must be regarded as for the time being in the shoes of the owner, who would undoubtedly have been bound by an executory contract to grant a lease had he remained in control and possession of his estate. This argument, in so far as it denies the analogy between the position of the Manager and that of a tenant for life, has much to commend it. But it appears to us that the decision of the question must depend upon whether a statutory power of leasing can, by the canons of construction relating to Statutes, be read as including the power to contract to grant a lease. It was contended that such power was a necessary and essential adjunct to the power to grant a lease, and should, therefore, be read into the Statute. It does not appear to us to be essential to the proper exercise of a power to lease that the lessor should also have power to enter into a contract to lease. Even in the case of guardians and managers of minors it has been distinctly laid down by the Judicial Committee that it is not within their competence to bind the minor's estate by a contract for the purchase of Immovable property [Mir Sarwarjan v. Fakhruddin 13 Ind. Cas. 331 : 39 I. A. 1 : 39 C. 232 : 21 M.L.J. 1156 : 16 C.W.N. 74 : (1912) M.W.N 22 : 9 A.L.T. 33 : 15

C.L.T. 69 : 14 Bom. L.R. 5 : 11 M.L.T. 8 (P.C.).] The contract in that case was found to be for the benefit of the minor, and it would presumably have been within the competence of the Manager to purchase. In our opinion the powers granted by Statute to managers of an encumbered estate should be at least as strictly construed, We are unable to hold that the power to grant leases given to the Manager by the 17th Section of the Act included the power to enter into an executory contract like the present, and this question in our opinion should be decided against the appellants.

47. The third question is, whether there was a completed agreement upon which a suit for specific performance can be based. The terms offered by the appellants on the 26th November 1908 were undoubtedly accepted by Sir Andrew Fraser on the 30th November. But the respondents contend that the appellants' consent to those terms was conditional and that the conditions were never fulfilled. The conditions were those enumerated in the concluding paragraphs of the letter of the 26th November already quoted. The instructions sent to the Government Solicitors on the 30th November also show that Sir Andrew Fraser intended those conditions to be complied with, although it is noticeable that he treated the Deputy Commissioner of Hazaribagh as the Manager of the Estate, when in fact this was not the case. This misapprehension on his part may account for the fact that the real Manager took no part in the negotiations. Another inaccurate statement in the same part of the same letter is that the estate was being managed by the Court of Wards. It seems probable that the appellants were aware on the 26th November that an agreement by Sir Andrew Fraser alone might not be sufficient legally to bind the estate, and, therefore, stipulated that before they themselves should be bound a formal agreement should be prepared and executed by the proper officer authorised to deal with the estate as well as by the Raja of Palganj and, lastly, themselves.

48. There is a long series of decisions, beginning with *Ridgway v. Wharton* (1857) 6 H. L. C. 23 : 27 L. J. Ch. 48 : 4 Jur (N. S.) 173 : 5 W. R. 804 : 29 L. T. (O. S.) 390 : 108 R. R. 88 : 10 E. R. 1287. in 1857 up to modern times, the effect of which is stated by Lord Parker (as he afterwards was) in the case of *Von Hatzfeldt Wildenburg v. Alexander* (1912) 1 Ch. D. 284 : 81 L. J. Ch. 181 : 105 L. T. 434. "It appears to be well settled by the authorities," says that learned Judge, that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract, either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored."

49. The present case appears to us to fall within the first alternative of the first

class of cases considered by Lord Parker, where the law will not enforce the contract because the condition subject to which the consent is given is not fulfilled. For the reasons already mentioned, we think the proper construction of the agreement is that the appellants were quite willing to agree to a lease on the terms mentioned provided the Manager of the estate would execute a formal agreement on those terms. We do not lose sight of the fact that this point only arises on the assumption that the Manager was bound by the acts of Sir Andrew Fraser, a hypothesis which, as already stated, we are unable to accept. But even so the circumstances were peculiar, and whatever may have been the real reason it seems to us that the appellants regarded the execution of the formal agreement by the Manager as a condition precedent to their own consent. That condition has so far been unfulfilled. The formal agreement was never prepared, much less executed by the persons named. It was argued, however, that the condition imposed was one introduced in favour of the appellants, and that they would be entitled to waive it, and had in fact waived it as their subsequent conduct in connection with the survey and other matters shewed. The case of *Hawksley v. Outram* (4) was relied on for this proposition. In that case a term was introduced into a contract which was clearly in favour of the purchaser alone. It bound the vendor of a business not to carry on a similar business within a certain radius. It was found to be in restraint of trade and, therefore, unenforceable. It was held by the Court of Appeal that the purchaser in whose favour the Clause was interested could waive it and claim performance of the contract omitting the objectionable clause. That case is merely an authority for the proposition that where a completed contract provides for the insertion in a contemplated conveyance or lease of terms which cannot legally be enforced, either party may waive this part of the bargain if those terms are solely for his benefit, and claim specific performance of the rest of the contract. It was not decided upon the question of whether an agreement had been come to but whether a concluded agreement could be enforced. It is difficult to see how the principle there enunciated can be applied to the facts of the present case, where the question is whether there was a completed contract by which both parties were bound. If one party says: "I agree to certain terms provided a certain condition shall hereafter be fulfilled," and the other party consents, in our opinion it does not lie within the competence of either party to waive the condition without the consent of the other. But even if the principle referred to in *Hawksley v. Outram* (1892) 3 Ch. D. 359 : 62 L. J. Ch. 217 : 2 R. 60 : 67 L. T. 804. can apply to a case like the present, we think the condition insisted on by the appellants was not one which was for their benefit alone. This question was considered in *Lloyd v. Nowell* (1895) 2 Ch. D. 744 : 64 L. J. Ch. 744 : 13 R. 712 : 73 L. T. 154 : 44 W. R. 43. (1895) 2 Ch. D. 744. : 64 L. J. Ch. 744 : 13 R. 712 : 73 L. T. 154 : 44 W. R. 43. There the plaintiff wrote a memorandum which he signed and sent to the defendant in the following terms:

Subject to the preparation by my Solicitor and completion of a formal contract, I am willing to sell to you lease of 365 Camden Road, for a term of twenty eight

years at a rent of ? 110 per annum, you paying me ?500 premium for same and also paying the cost of new lease.--?100 paid (and receipt hereby acknowledged) as conditional deposit. The balance to be paid 1st day of January 1895, and possession given on completion. Plants and conservatory flowers to be included in price named.

50. The defendant on receiving it wrote there. on "Accepted" and subscribed his name. The defendant, having afterwards refused to complete, the plaintiff sought specific performance. It was there held that such a stipulation was not for the benefit of the vendor alone. It was equally to the advantage of the purchaser to see and consider the formal contract and to have the position defined before final acceptance. It was further held that the stipulation as to the preparation by the Solicitor and completion of a formal contract was one which was a condition precedent to consent. "That provision," said Kekewich, J., "seems to me to go to the root of the contract, and not to be such a stipulation as the vendor may waive, for the purpose of insisting on performance of the contract without it." In our opinion the same reasoning applies with equal force to the present case, and there is in the circumstances which have arisen no complete and binding agreement which can be enforced. It was argued that Sir Andrew Fraser and those associated with him had themselves waived the stipulation by allowing the survey to proceed and allowing the Solicitors to prepare a draft lease. It is sufficient to say we can see no force in this contention. The Solicitors' instructions were to prepare a draft agreement embodying the terms stipulated. Why this was not done, but a draft lease prepared, does not appear but a perusal of the draft shows that there remained much to be done by way of delimiting the area to be leased. There had already been disputes about the delimitation Laid down by the Deputy Commissioner, and it would require more convincing evidence than anything we can find in the record to prove that there was a mutual waiver of any of the stipulations in the agreement.

51. Whether a suit would lie on behalf of the Digambari sect of Jains by the substituted plaintiffs in a representative capacity it is not necessary, having regard to the above findings, to decide. But it seems to us that it is extremely doubtful whether the Digambaris as a body acquired any right to sue which could be enforced on their behalf by the present plaintiffs under the provisions of Order I, rule 8. The rule deals with procedure only and creates no substantive rights of suit. The Digambari Jains are not a legal entity. The substituted plaintiffs are not the legal representatives of those with whom the contract was originally made, and, unless it can be shewn that all the Digambari Jains individually acquired rights under the contract, a suit brought on their behalf by individuals in a representative capacity would not lie. We do not wish to base our decision on the determination of this question nor is it necessary to do so, but for the reasons already given on the other points we think this appeal should be dismissed with costs.