PRIVY COUNCIL.

P. C.* 1880 *Feb.* 4, 5 & 6.

THE NEW BEERBHOOM COAL COMPANY (PLAINTIFFS) *v.* BULARAM MAHATA AND OTHERS (DEFENDANTS).

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Specific Performance—Construction of Agreement in a Potta—Assignment of Potta—Rights of Assignees against original Lessors.

The owners of ancestral village lands gave a mokurari potta of land in a mouza to the proprietor of a neighbouring collieries "for quarrying coal, for building stores, for garden, for orchard, for road-making, and for other uses." The potta, besides the above, contained the following, as translated:—"You will build a factory according to any plan you choose, and possess the same. Within that aforesaid mouza we will not give settlement to anybody. If you take possession, according to your requirements, of extra land over and above this potta, we shall settle such land with you at a proper rate. Thereat we shall make no objection." The lessee, after being in possession for some years under the potta, assigned it to the plaintiffs, who afterwards took possession of the whole of the extra land, and demanded a potta therefor from the defendants, and made a contract advantageous to themselves to sell it to third persons. The defendants refused to grant them a potta. In a suit for specific performance,—*Held* on the construction of the potta, that if the lessee, or his assigns, had required additional land for the purpose of carrying out the objects for which the potta was granted, then the lessors would have been bound to settle so much of the adjoining land with them as might have been necessary for such requirements.

Held also, that the plaintiffs, the assignees, were not entitled to compel the defendants to grant them a potta of the extra land, even at a reasonable rate, merely for the purpose of selling it.

Semble.—In a suit for specific performance of an agreement to sell land, the fact that on account of the extraordinary character of the property, as lands containing coal or other valuable minerals, there is considerable difficulty in fixing a reasonable rate for it, is not a sufficient reason for refusing a decree.

APPEAL from a decree of the High Court at Calcutta (25th April 1878), confirming a decree of the Officiating Judge of East Burdwan (27th September 1875).

* *Present*:—SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH, and SIR R. P. COLLIER.

The facts of the case fully appear in the report of the hearing in the High Court (1).

Mr. *T. H. Cowie*, Q. C., and Mr. *Macnaghten* for the appellants.—A contract to sell or let lands at a proper rate is capable of being enforced as pointed out by the High Court—Sugden's Vendors and Purchasers, 11th Edn., p. 327; but that Court has drawn a distinction, which has no existence in the law on this subject, based on the greater difficulty in the valuation of land containing minerals as compared with land valued only for the utility of its surface. The difficulty in valuing mining land is no legal obstacle where a contract of the above description has been made. And in this case the defendants have shown by their sale to the Bengal Coal Company what they consider to be a fair price; nor can they be heard now to say that there is no basis for calculating it. The plaintiff company took possession under the contract of 1858 assigned to them, and in 1875 were in possession under a title which they could have defended had they been sued. That they should be now deprived of their right to the possession, on account of the default in the opposite party to the contract, would be contrary to equity. The contract is not obnoxious to the rule against perpetuities; *Birmingham Canal Co.* v. *Cartwright* (2). Independently of the question whether this contract was capable of being transferred, like the covenant running with the land of the English common law, it is enforceable by a purchaser as an agreement to use, or abstain from using, Mahatidihi, save in one way; and this prevails against all who have notice of it. It is not denied that the Bengal Coal Company had notice. There is, besides, a clause in the potta of 1858 agreeing that to none except to the person whom the plaintiff company represents will the Mahatas grant the land in question. Reference was made to *Tulk* v. *Moxhay* (3), *Jay* v. *Richardson* (4), *Catt* v. *Tourle* (5), *Luker* v. *Dennis* (6), and *McLean* v. *McKay* (7).

(1) *Ante*, p. 175.
(2) L. R., 11 Ch. D., 421.
(3) 2 Phillips' Ch. Rep., 774.
(4) 30 Beavan, 568.
(5) L. R., 4 Ch. Ap., 654.
(6) L. R., 7 Ch. D., 227.
(7) L. R., 5 P. C. Ap. Cas., 327.

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Mr. *Leith*, Q. C., and Mr. *Doyne* for the respondents.—The construction sought to be placed on the agreement of 1858 is one that, if correct, would render it a contract making permanently inalienable the larger portion of Mahatadihi: to allow this construction would, therefore, be to support a contract contrary to the policy of the law. The right, however, by the language of the potta, when strictly followed, is not more than a right conferred upon Mr. Erskine and his assigns to take up land in Mahatadihi for the requirements of the colliery and the works; building and road-making are among the objects specified. The objects for which the potta of 1858 was granted, indicate and limit those for which extra land may be taken.

Mr. *T. H. Cowie*, Q. C., in reply.

At the conclusion of the arguments, their LORDSHIPS' judgment was delivered by

SIR B. PEACOCK.—The proper decision of this case depends upon the correct construction of the contract of the 13th December 1858 between the Mahatas and Mr. Erskine. The contract is set out in the record; but it is agreed that the translation made by the Judge may be taken as the correct one. The contract was as follows:—"Mouza Mahatadihi, in Chakla Panchkoti (Pachete), in Parganna Shergurh, is our ancestral rent-paying brahmuttur land. Out of this taluq the share of one co-sharer, Ramdhun Mahata, two annas, and that of Uma Churn, one anna, six gandas, two cowries, two krants, being in all three annas, six gandas, two cowries, two krants, is (already) a mokurari of yours. Putting aside that interest, then out of the remainder, forming a kismut, twelve annas, thirteen gandas, one cowry, one krant, a piece not to comprise crop-bearing land,—that is to say, a piece of land quite uncultivable and waste land, a piece to cover in all 51 bighas, is leased to you under this potta, for quarrying coal, for building stores, for garden, for orchard, for road-making, and for other uses. The boundaries thereof are on the east, &c." (describing them). "This land, amounting to 51 bighas within those boundaries, is leased to you at the rent of Rs. 25-8 and a suitable

bonus. You are to quarry coal, and till garden, and erect buildings, and so on, and pay the above rent every year and month as per schedule annexed below; and you will carry on your factory according to use and wont. If you default, you are to pay interest according to law. The rent is not to be liable to increase or decrease at any time. You will be allowed no deduction in respect of drought or flood, or for uncultivableness. You will build a factory according to any plan you choose, and possess the same. Within that aforesaid mouza we will not give a potta to any factory person;" that is to say, "we shall not let (literally, give settlement) to anybody." It is not necessary with reference to their Lordships' view of the case to decide whether this really was a contract not to give a potta to any person, or a contract not to give a potta to any other factory person. The plaintiffs, however, in their plaint have treated it as a contract not to give a potta to any person whatever. If so, that might render the contract bad in restraint of alienation; but it is unnecessary to determine that question. Then it goes on:—"If you take possession," or more literally, "Take possession," and then, "according to your requirements, of extra land over and above this potta, and we shall settle any such lands with you at a proper rate. Thereat we make no objection."

It is contended on the part of the plaintiffs that this was a contract which Mr. Erskine or his heirs could assign to any one, and that the person to whom he assigned it would be at liberty to require the Mahatas to settle the land with them at a reasonable rate. It may be assumed for the present purpose that Erskine had the power to assign the contract to any one; and it may also be assumed that the Bengal Coal Company, as the purchasers from the Mahatas of the adjoining land, with notice of the contract, were also bound by it. But then the questions arise, whether it was the intention that Erskine or any one to whom he might assign it should be at liberty to take the whole of the mouza for any purpose whatever, whether for quarrying coal or not; and whether the Mahatas bound themselves to grant to Erskine all the cultivable as well as uncultivable land in the mouza. The construction

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which the plaintiffs have put upon the contract is, that Erskine was entitled, at any time and for any purpose, to take possession and to compel the Mahatas to grant him a lease of the whole of the residue of the mouza at a reasonable rate. The words are: "If you take possession, according to your requirements, of extra land." Now what is the meaning of the words "according to your requirements"? Does it mean "according to your requirements for any purpose, or according to your requirements having regard to the lease of the 51 bighas and the purpose for which it was granted?" Assuming that the words, "you are to quarry coal," and "you are to build a factory," were not obligatory, still they show that the object of Erskine in taking the lease was that he might quarry within the 51 bighas; that he might erect a factory, and carry on mining operations. Then comes the stipulation, which must be read in the sense that if, using the 51 bighas for the purpose for which you have taken them, you should require adjoining land as incidental to the lease, then we agree to grant it you at a reasonable rate. Could Erskine have assigned the lease of the 51 bighas to one person and then sold his interest with regard to the adjoining land to another person, so as to separate the two? Their Lordships are of opinion that he could not. It appears to them that the true construction of the contract was, that if Erskine or his assigns should require additional land for the purpose of carrying out the objects for which the lease was granted, then the Mahatas would settle as much of the adjoining land with them as might be necessary for the purpose of such requirements. It is unnecessary to make any distinction between the waste land and the cultivable land in that view of the construction, because the land was not taken possession of by the company as requiring extra land for the purposes of the lease, but merely for the purpose of selling it. The Beerbhoom Company, to whom Erskine had assigned the agreement, ask the Court to compel a specific performance of it, because they had entered into a contract of sale to the Bengal Iron Company for a sum of money which they say would give them a profit of Rs. 26,000 odd. They say in their plaint, "Having got this agreement, we afterwards negotiated

with the Mahatas for a lease of the adjoining land" (not that the Mahatas agreed to grant a lease) "upon the terms that we were to pay Re. 1 an. 8 for the waste land, and Rs. 3 for the cultivable land." And then they ask the Court to grant them specific performance of the agreement by compelling the Mahatas to grant them a lease at those rates; or if the Court will not order a lease at those rates, then at such rates as the Court shall think reasonable.

Their Lordships are of opinion that the Judge of the first Court came to a correct conclusion upon the sixth issue, on which he found that, apart from the 51 bighas, the assignees could not compel the Mahatas to grant a lease of the remaining lands of the mouza. Their Lordships are not bound by, nor do they concur in, the reasons which the learned Judge gave for that decision. The High Court affirmed the decision, but not for reasons which their Lordships consider to be correct. They affirm it upon the ground that it was impossible to determine what was a reasonable rate. Their Lordships cannot think that in the present case the Court, upon a proper inquiry, would have been unable to determine it. There might have been considerable difficulty in fixing the rate; but difficulties often occur in determining what is a reasonable price or a reasonable rate, or in fixing the amount of damages which a man has sustained under particular circumstances. These are difficulties which the Court is bound to overcome. Their Lordships therefore, without concurring in the reasons of either of the lower Courts, have come to the conclusion that the Beerbhoom Company were not entitled to compel the Mahatas to settle the remainder of the land at reasonable rates, and they will therefore humbly advise Her Majesty that the decision of the High Court be affirmed, with the costs of this appeal.

Appeal dismissed.

Solicitors for the appellants: Messrs. *Lawford, Waterhouse,* and *Lawford.*

Solicitors for the respondents: Messrs. *Bailey, Shaw,* and *Gillett.*