which formerly belonged to Adit Sahai, with such power of ascertaining the extent of such third part or share by means of a partition as Adit Sahai possessed in his lifetime; and ordering that the appellants be confirmed in the possession of the said eight-anna share of Mouza Bissumbhurpore, subject to such proceedings as the respondents may take in order to enforce their rights above declared. The order should further direct that the costs in the Courts below be apportioned according to the usual practice of those Courts, when the party plaintiff is only partially successful. But the appellants, having succeeded here on a material portion of their claim, are entitled to the costs of this appeal.

Agents for the appellant: Messrs. *Watkins and Lattey.*

Agents for the respondents: *Mr. E. M. Hore.*

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice McDonell.

THE NEW BEERBHOOM COAL CO. (PLAINTIFFS) *v.* BULORAM MAHATA AND OTHERS (DEFENDANTS).*

1878 *April* 25.

Specific Performance—Sale at Fair Valuation—Ascertainment of Price—Limitation Act (IX of 1871), sched ii, art. 113.

In a suit for the specific performance of an agreement entered into in 1858, to grant a patta when required, it appeared that the plaintiffs applied to the defendants for a patta in 1874, and in March 1875 the defendants finally refused to make the grant, and the plaintiffs thereupon instituted their suit for specific performance:

Held, that they were not barred by limitation, as under Act IX of 1871 sched. ii, art. 113, they had three years within which to bring their suit, from the time when they had notice that their right was denied.

Where a contract is made to sell land at a fair valuation, and there is no difficulty in ascertaining what a fair valuation would be, the Court will take the usual means of ascertaining it, and decree performance of the

* Regular Appeal, No. 289 of 1875, against the decree of the Officiating Judge of East Burdwan, dated the 27th of September 1875.

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contract accordingly. But when, having regard to the peculiar character of the property, as in the case of land supposed to contain coal, or valuable minerals, the value of the land must be to a great extent a matter of guess and speculation, the Court will not decree specific performance, as it has no means of ascertaining by the ordinary methods what price the plaintiff should pay.

THIS was a suit for the specific performance of an agreement to grant a mokurari patta in respect of a share of certain lands in Mouza Mohatadihi in the district of Raneegunge, belonging to a joint Hindu family. On the 13th of September 1858, the defendants executed a mokurari patta in favour of one James Erskine, which provided as follows :—"Within that aforesaid mouza we will not give a patta to any other factory person,—that is to say, we shall not give settlement to any body. If you take possession according to your requirements of extra land over and above this patta, we shall settle any such lands with you at a proper rate. Thereat we make no objection." Mr. Erskine took possession of the land, and established a colliery, made roads, and erected buildings; and ultimately on the 16th August 1861 conveyed his interest in the lands to the plaintiffs. In 1874 Mr. Keelan, the manager of the plaintiffs' company, took possession by beat of drum of the whole of the land of which a share had been granted to Mr. Erskine, and demanded a patta from the defendants. In 1875 Mr. Keelan again took possession of the lands by beat of drum, and planted a bamboo pole in the soil, and entered into negotiations with the defendants as to the rate of rent and bonus to be paid. In February 1875, while the negotiations were going on, the plaintiffs agreed to sell a certain portion of the lands in question to the Bengal Iron Works Company, but were unable to make a good title thereto in consequence of the defendants in March finally refusing to grant a patta. This suit was accordingly brought. The defendants stated that they had already leased the lands not covered by the patta of 1858 to the Bengal Coal Co. The suit was dismissed on the ground of limitation, the Judge holding that it should, under Act IX of 1871, sched. ii, art. 118, have been brought within six years from the 13th of September 1858. The Judge found that the patta granted

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to Mr. Erskine was authentic, and that the terms proposed to the defendants never went beyond negotiations. From this decision the plaintiffs appealed to the High Court.

The *Advocate-General* (the Honble *G. C. Paul*) and Mr. *Phillips* for the appellants.—The only question in this case is, whether the Court will compel the defendants to perform specifically a contract to sell their land at a fair valuation. There can be no objection on the ground of perpetuity—*Tagore* v. *Tagore* (1); nor want of mutuality—*Catt* v. *Tourle* (2); nor would the uncertainty as to when performance would be required be a sufficient answer to our claim—*McLean* v. *McKay* (3), *Oxford* v. *Provand* (4). There is sufficient evidence to enable the Court to fix the rate—*Gourlay* v. *Duke of Somerset* (5), *Milnes* v. *Gery* (6), *Valpy* v. *Gibson* (7), *Hoadly* v. *McLaine* (8). The question of limitation does not arise.

Mr. *J. D. Bell* and Mr. *Stokoe* for the respondents.—The plaintiffs should be left to the ordinary legal remedy for breach of contract,—*i. e.*, an action for damages. The Court will not decree the specific performance of a contract so one-sided and uncertain as this is—*Hamilton* v. *Grant* (9), *Gervais* v. *Edwards* (10).

The judgment of the Court was delivered by

GARTH, C. J. (MCDONEL, J., concurring).—This is a suit for specific performance of an agreement to grant a mining lease of some waste lands in the district of Raneegunge. The plaintiffs are a coal mining company, who purchased from a Mr. James Erskine, in the year 1861, his interest in a lease, which he had taken from the original defendants in this suit, or their predecessors in title, of certain waste lands for mining purposes. That instrument was dated the 13th of September 1858. It professed to be a heritable patta of 51 bigas of waste bromottur land, in Mouza Mohatadihi, for quarrying coal, for garden, for

(1) 9 B. L. R., 377.
(2) L. R., 4 Ch., 654.
(3) L. R., 5 P. C., 327.
(4) L. R., 2 P. C., 135.
(5) 19 Vesey, 429.
(6) 14 Vesey, 400.
(7) 4 C. B., 837.
(8) 10 Bingham, 482.
(9) 3 Dow. H. L., 33.
(10) 2 Dr. & War., 80.

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orchard, for road-making, and other uses, at a rent of Rs. 25-8, and a suitable bonus. Mr. Erskine was to quarry coal, erect buildings, and carry on his factory, which he was to build according to any plan he thought best. Then follow these words, upon which the plaintiffs' present claim is founded:

"Within that aforesaid mouza we will not give a patta to any other factory person,—that is to say, we shall not give settlement to any body. If you take possession according to your requirements of extra land over and above this patta, we shall settle any such lands with you at a proper rate. Thereat we make no objection."

The persons who granted this lease were a family of Mahatas, who held jointly, as bromottur ancestral property, a tract of waste land, called Mohatadihi, containing some 1,312 bigas, the Mahatas cultivating only a few of the more fertile patches of it.

The 51 bigas, which were the immediate subject of the lease, were taken possession of by Mr. Erskine, who established there a colliery, with roads and other works, and afterwards, on or about the 16th of August 1861, conveyed his interest to the present plaintiffs, who are now seeking to avail themselves of the agreement in the patta, by which the Mahatas undertook to settle for any additional land with Mr. Erskine, which he might require.

No attempt appears to have been made to enforce this agreement until the year 1874, when Mr. Keelan, the manager of the plaintiffs' company, took formal possession by beat of drum of the whole of the Mohatadihi tract, to which the defendants were entitled, and in order to proclaim the plaintiffs' intention more effectually, he repeated the same ceremony about the middle of February 1875, on which occasion a bamboo pole was planted in the soil.

It appears that the object of the plaintiffs in thus taking possession was, that they might sell several properties of which this was one, to the Bengal Iron Works Company; and this sale they carried out, or professed to carry out, by a conveyance dated the 17th February 1875.

After first taking possession in August 1874, the plaintiffs' manager, Mr. Keelan, endeavoured to arrange with the defend-

ants (the Mahatas) as to the terms of the settlement; and a good deal of evidence has been given as to negotiations upon the subject, which took place between Mr. Keelan and some of the Mahatas.

Mr. Keelan contends upon the strength of this evidence, that an agreement was actually come to as to the terms of the settlement; and if this could have been established, no doubt the plaintiffs might have come to this Court with a better chance of success. But the Judge in the Court below, after a careful consideration of the evidence on this point, has found as a matter of fact, that no definite arrangement was come to, and that what passed between Mr. Keelan and the Mahatas amounted to no more than negotiations.

In this we quite agree with him. The oral communications which are relied upon by the plaintiffs, took place at the end of February and the 1st and 2nd of March 1875; and we find that, on the 1st of March, a letter was sent by the defendants to Mr. Keelan, in which the defendants proposed to Mr. Keelan to settle the terms for the additional land which the plaintiffs required at Rs. 5 per biga for rent, and Rs. 5 per biga for bonus, and the letter concludes in this way:—

"If you should assign, or if you should assume possession of lands outside those already rented by you, you will become liable to us for the above bonus and rent rate; accordingly, we write that if you are willing to take waste jungle lands on demarcation thereof to be made by us, then, on your becoming applicants in writing to this effect, we shall advise you of the necessary steps to be taken. If, within a week, you do not make application for settlement at proper terms, then, in the event of our settling with other parties, no objection of yours will be of any avail."

Within a week of the date of this letter, *viz.*, on the 7th of March 1875, Mr. Keelan, on behalf of the plaintiffs, answered it by a letter to the defendants in the following terms:—

"Whereas several notices have been sent to you to enter into a settlement for the lands in Mohatadihi, which we occupy under the terms of a former patta, and whereas you also have sent a notice requiring me to enter on a settlement, with which

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notice I have acquainted myself, I hereby write to you that I am ready to enter into a settlement.

"That letter about the arrangement, which I sent to Calcutta after writing in your presence, has been replied to, and the reply is with me.

"Therefore, if you, with all your co-sharers, will repair quickly to mofussil kutchari at Roghunath Chak, a settlement is likely to be made.

"If you fail to appear quickly, then in accordance with the law, the rental money will be paid into Court, and application will be made to the Court for a settlement.

"You are not to show any negligence in this matter. We are ready to enter into a regular settlement. Dated Bengali 24th Falgoon 1281 = 7th March 1875."

It appears to us quite clear from these letters, that whatever oral communication may have taken place between the parties previously to the 7th of March, no arrangement as to terms had taken place on that date. Mr. Keelan's letter is quite inconsistent with any such supposition.

As Mr. Keelan's last letter did not contain an acceptance of the offer proposed by the defendants, the latter appear to have taken steps at once to carry out the threat contained in their letter of the 1st of March, *viz.*, that in the event of no settlement being made within a week, they would dispose of the land to other persons. The Bengal Coal Company Ld. had been then in treaty with them for a lease of the property in question, and on the 17th of March we find that they conveyed it to the Bengal Coal Company (the defendants) at a jama of Rs. 1-8 per biga, and a bonus of Rs. 6,000, by a mokurari patta of that date, and on the 20th April 1875 a second mokurari patta to the same effect (so far as the conveyance of the land, the rent and the bonus were concerned) was made by the defendants to the Bengal Coal Company.

In the first of these pattas there is an express allusion to the patta of 1858, which was made to Mr. Erskine, and it was admitted on the argument before us, that the Bengal Coal Company had sufficient notice of the plaintiffs' rights arising from that document, whatever those rights might be.

There is no doubt, therefore, that the Bengal Coal Company are the parties really interested in defending this suit, and that the true question is, whether this lease to the Bengal Coal Company is to stand, or whether the plaintiffs are entitled under the agreement of 1858 to have the land conveyed to them upon such terms as the Court should think fit.

Upon this ground it was contended in the Court below, that the Bengal Coal Company ought to be made parties to the suit as being the persons mainly interested in it; but the Judge overruled the objection, and ultimately dismissed the suit upon the point of limitation. This point we shall notice more fully hereafter. Upon the case coming before us in appeal, the objection was again raised by the appellants, that the Bengal Coal Company ought to be made parties to the suit, and we considered that the objection ought to prevail. We thought it quite clear that they were the persons really interested in the result of the proceedings, and that as such, and for the purpose of avoiding future litigation, they ought clearly to be made parties under s. 73 of the Code.

We accordingly made an order to this effect:

"Having regard to the point which was argued on Tuesday last by Mr. Stokoe, we think it right and advisable in the interests of all parties concerned, that the Bengal Coal Company should be made parties to this suit. The Judge should have made them parties in the Court below.

"We accordingly adjourn the hearing of this appeal to a future day, of which due notice will be given to the parties, and in the meantime we direct, under s. 73 of Act VIII of 1859, that the Bengal Coal Company be made defendants, and that notice of that fact be served upon them as prescribed in that section. The plaintiffs, if so advised, will be at liberty to file, within a week from this date, an amended plaint, so as to include in it any claim which they may have against the Bengal Coal Company, and the Bengal Coal Company will be at liberty to file their written statement within a week of the filing of the amended plaint. The Bengal Coal Company will also be at liberty to produce any evidence they may think proper, when the case comes on again before this Court.

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"After the Bengal Coal Company have filed their written statement, a day will be fixed for the further hearing of the case."

The case was, accordingly, adjourned; the Bengal Coal Company were made defendants, and put in their answer; and the case came before us again for rehearing.

The Bengal Coal Company, however, have raised no other points of defence than those which were urged by the Mahata defendants in the Court below; and we have no doubt that the Judge was quite right in supposing that the Mahata defendants were in fact fighting the battle of the Bengal Coal Company.

We will now proceed to deal with the point of limitation, upon which the Judge in the Court below dismissed the suit.

We will assume for this purpose, that the contract contained in the patta of 1858, was one capable of being enforced in this Court by a suit for specific performance, and assuming this, we are quite unable to understand the grounds upon which the Judge has decided in the defendants' favor.

In the first place we do not see why a six years' limitation should be applicable to a suit of this kind at all; nor, in the next place, if it were applicable, why the time should run from the making of the contract, instead of from the breach of it. It appears to us quite clear, that art. 113 of sched. ii of the Limitation Act is expressly made applicable to suits of this nature; and by that article the three years' limitation runs, not from the time of the making of the agreement which is sought to be enforced, but *from the time when the plaintiff has notice that his right is denied.*

Suppose, for instance, an agreement made with A. on the 1st of January 1870, to grant him a lease of certain lands, and A. applies for his lease on the 1st May 1871, when his application is refused. The three years' limitation in this case would run from the latter date; and A. might bring a suit for specific performance of the agreement at any time before the 1st of May 1874.

We think it clear, therefore, that in this respect the Judge has made a mistake; and that, as the plaintiffs' right in this instance was not denied till the month of March 1875, the plaintiffs had three years from that time to bring their suit.

The other questions as to covenants running with the land, and the time during which the agreement was to remain in force, if it were capable of being enforced at all, it will not be necessary for us to decide; because we are of opinion, that upon another ground, which specially applies to this particular case, the plaintiffs' suit must be dismissed.

Their claim is to have the agreement of the 13th of September 1858 enforced with reference to the whole of the property, of which they took symbolical possession in February 1875; and as no terms were fixed by that agreement as to rent and bonus, they ask the Court to say, or to ascertain by reference to the Registrar, what would be the proper rent and bonus to be paid by them for such additional lands.

Now there certainly does appear to be authority for the proposition, that where a contract is made to sell land at a fair valuation, and there is no difficulty in ascertaining what a fair valuation would be, the Court would take the usual means of ascertaining it, and decree performance of the contract accordingly; see *Gaskarth* v. *Lord Lowther* (1); Sugden's Vendors and Purchasers, 11th edn., p. 327.

The price or the rent of land might readily and fairly be fixed as between buyer and seller, where the property is of an ordinary character, and its market-value generally known or ascertainable. But having regard to the peculiar character of the property in question in this suit, and the uncertainty that must necessarily exist as to its true value, it really is quite impossible for the Court to ascertain by any means in their power, what would be the fair terms of the proposed settlement.

If the land contains, as both parties now believe it does, a quantity of coal and other valuable mineral, there is no doubt that 51 bigas, which were taken by the plaintiffs under the patta of 1858, were sold by the defendants at a price infinitely below their proper value: and it is also pretty clear, upon the same supposition, that the Bengal Coal Company have also made a very advantageous purchase of the land in question.

The truth is, that the value of land under these circumstances must always be to a great extent a matter of guess and specula-

(1) 12 Vesey, Jun. 107.

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tion; and the Court have therefore no means of ascertaining by the ordinary method what rent or bonus the plaintiffs should pay.

For these reasons we are of opinion, that, upon this ground alone, apart from the other objections which have been taken, and upon which we give no opinion, that this appeal must be dismissed with costs as against all the defendants.

Appeal dismissed.

Attorneys for the appellants: Messrs. *Roberts, Morgan, & Co.*

Attorneys for the respondents: Messrs. *Sanderson & Co.*

APPELLATE CRIMINAL.

Before Mr. Justice Ainslie and Mr. Justice Broughton.

1879
April 26.

BHOKTERAM (COMPLAINANT) *v.* HEERA KOLITA (ACCUSED).*

Penal Code (Act XLV of 1860), *ss.* 182, 211—*Preliminary Enquiry—Act X of* 1872, *s.* 471.

An offence under s. 211 of the Penal Code includes an offence under s. 182; it is, therefore, open to a Magistrate to proceed under either section, although, in cases of a more serious nature, it may be that the proper course is to proceed under s. 211; see *Raffee Mahomed v. Abbas Khan* (1).

REFERENCE to the High Court under s. 296 of Act X of 1872.

One Heera brought a charge of theft against Bhokteram at the police thanua. The police, after investigation, reported the case to be false. Thereupon Bhokteram instituted before the Assistant Commissioner a charge against Heera under s. 211 of the Penal Code.

The Assistant Commissioner, without first giving Heera an opportunity of proving his case against Bhokteram in Court, if he wished to do so, placed him on his trial on a charge under

* Criminal Reference, No. 16 of 1879, made by W. E. Ward, Esq., C. S., Judge of the Assam Valley Districts, dated the 10th April 1879.

(1) 8 W. R., Crim., 67.