(1909) 03 CAL CK 0036

Calcutta High Court

Case No: None

H. Mathewson and Another		APPELLANT
	Vs	
Sri Sri Ram Kanai Singh Deb		RESPONDENT

Date of Decision: March 11, 1909

Judgement

Doss, J.

The suit out of which this appeal arises was brought by the plaintiff, who is proprietor of Pergunnah Barabhum in the District of Manbhoom, to recover khas possession of certain lands after cancellation of a mourasi mokarari lease (which for brevity''s sake shall, hereafter, be referred to as "mokarari") executed in favour of defendant No. 1 by the manager under the Encumbered Instates Act, shortly before the estate was released to the plaintiff. The lease bears date, the 26th May 1903 and is for 241 bighas odd of which 222 bighas odd is situated in mauza Bara Bazar and 19 bighas odd in mauza Machar; and the annual rental for the same is its. 100. The circumstances under which this lease was executed are these:On the 27th February 1883, Raja Brojo Kishore Singh, the father of the plaintiff, in consideration of a loan of Its. 60,000 advanced to him by R. Watson and Co., gave them an ijara, lease for a period of 21 years, at an annual rental of Rs. 20,000 commencing from the beginning of the year 1290 Fuslee (which corresponds to the 28th September 1882) and terminating with the end of the year 1310 Fuslee (which corresponds to the 9th September 1903), of a large portion of Pergunnah Barabhum situated on the north of a certain black line delineated in the survey map of the Pergunnah, save and except certain parcels specified in the lease. Under that lease the lessor agreed, amongst other things, to grant to the lessees, their heirs and representatives, during the currency of the lease, a putni lease of a portion of the Pergunnah situated on the south of the black line mentioned above with the exception of certain mauzas, and the lease also contained the following covenant on the part of the lessor. "If out of the ijara mahal you require any land for the purpose of erecting any indigo factory or silk factory, or excavating any bandh or tank, or for construction of any cutchery house, I shall grant yon a mourasi mokarari patta for it

on proper rent." This covenant forms, as will be seen later, the root of the controversy between the parties. Soon after obtaining this lease R. Watson and Co. proceeded to construct on that portion of the ijara mahal measuring about 200 bighas or thereabouts, (which by reason of subsequent occupation by them, has borne the appellation of Shahebdanga), indigo vats, indigo factory building, a katcha bungalow, amla''s quarters, servants'' quarters, etc.; and about the year 1886 erected a pucca bungalow. They also planted gardens and cultivated indigo on certain portions of the land. On the 8th March 1885, It, Watson and Co., obtained from the plaintiff''s father a putni patta in respect of the mauzas of Pergunnah Barabhum situated south of the black line mentioned above in pursuance of the terms of the covenant in that behalf contained in the lease, at an annual rental of Rs. 4,500 and on payment of a bonus of Rs. 30,000. About 4 years later, i.e., in March 1899, Pergunnah Barabhum was taken over under the Chota Nagpur Encumbered Estates Act for the purpose of liquidating the debts and liabilities with which that estate had become heavily burdened, and the Deputy Commissioner was appointed as manager under the Act. R. Watson and Co. having, on the 25th August 1887, been incorporated as a limited company under the name and style of R. Watson and Co. Limited, the former assigned all their rights and interests in Pergunnah Barabhum, including their rights under the ijara and the putni leases, to the latter company by an Indenture bearing date the 26th May 1890; R. Watson and Co. Ld. again by a similar Indenture dated the 15th April 1896 re-assigned all its rights and interests to defendant No. 1, H. Mathewson. The plaintiff''s father died on the 22nd July 1900. As the ijara lease was approaching its termination, H. Mathewson on the 25th June 1901 applied to the Deputy Commissioner, as manager under the Encumbered Estates Act, for a mokarari lease of the Shahebdanga lands in pursuance of the covenant in the lease the terms whereof I have already quoted, and on the 25th May 1903, the Deputy Commissioner with the sanction of the Commissioner of Chota Nagpur Division executed in favour of H. Mathewson a mokarari lease in respect of 241 bighas 6 cottahs 15 Chittaks of land at an annual rental of Rs. 100 after the Board of Revenue had previously on the 20th April 1903 rejected the petition of the plaintiff objecting to the grant of the moharari lease. On the 1st October 1905, the estate was released from the operation of the Encumbered Estates Act and was restored to the plaintiff. The present suit was brought on the 24th May 1906 against defendant No. 1 alone. With regard to the 222 bighas out of lands covered by the mokarari, lease and which are situated in mauza Bara Bazar, the plaintiff in his plaint alleged that they formed part of the lands excepted from the ijara lease, that they were used for holding certain religious festivals thereon and that the defendant No. 1, by fraudulently misrepresenting to the Deputy Commissioner that they were included in the ijara lease and that under the terms of that lease they were entitled to get a mokarari lease of these lands, had obtained such lease. As regards the remaining 19 bighas of land situated in mauza Machar, the plaintiff alleged that they were not required for any of the purposes for which the lessees under the covenant in the ijara lease were entitled to have a mokarari thereof. The defendant No. 1 in

his written statements objected that the suit could not be maintained without a previous notice to quit; denied that the lands, comprised in the mokarari lease granted to him or any portion thereof, formed part of the lands excepted from the ijara lease; and averred that the Deputy Commissioner, the Commissioner of the Chota Nagpur Division and the Board of Revenue, after hearing the objections raised by the plaintiff to the grant of the mokarari lease, and after a full and complete enquiry, and after satisfying themselves that these lands were outside the excepted lands, had granted a mokarari lease and he submitted that under the terms of the covenant in the ijara lease the lessees or their representatives were entitled to have a mokarari lease of the lands in suit.

2. As the defendant No. 1 in his written statement stated that he had sold his rights in the property to the Midnapur Zemindary Company Limited, the plaintiff applied on the 17th November 1906 for addition of the latter as a defendant. On that date the Court below added the Midnapur Zemindary Company Limited as defendant No. 2 in the suit and ordered that summons he issued. The defendant No. 2 entered appearance and filed a petition asking the Court to treat the written statement filed by defendant No. 1 as one filed on its behalf also.

3. The Court below has held that it was not necessary for the plaintiff to serve on the defendant any notice to quit; that the lands comprised in the mokarari lease formed part of the lands excepted from the ijara lease and that it included lands on which certain religious festivals are held and certain deities are temporarily placed and worshipped; that before granting the mokarari, the Deputy Commissioner made no judicial enquiry as to whether the lands comprised in it had been excluded from the ijara or whether there were, within the area demised, places where certain religious festivals were annually held nor did he make any enquiry as to whether the purposes for which the mokarari was given were those which were sanctioned by the clauses in the ijara lease; that the Deputy Commissioner was precluded from granting a mokarari, as the claim of the defendant No. 1 had not been notified as required by Section 7 of the Encumbered Estates Act VI of 1876; that even if the Deputy Commissioner had authority to grant a mokarari lease in accordance with the terms of the covenant, he could not specifically perform the covenant and execute the mokarari on behalf of the plaintiff without his consent and concurrence and that in doing so, he acted ultra vires. The Court below also held that the covenant in pursuance of which the mokarari had been executed was void for want of consideration; that it was vague and uncertain; that if specific performance thereof had been sought, it would have been refused on the ground of laches and hardship; that the defendant No. 1 was not the assignee of the covenantee and, therefore, could not have claimed specific performance; that if a suit for specific performance had been brought, it would have been held barred by limitation; that the annual rental, for which the mokarari was granted, was below the prevailing rate and that the defendant No. 1 in obtaining this mokarari had been guilty of fraud and misrepresentation. But as the buildings had been erected and other

improvements had been made during the period of the ijara lease, (and probably on the faith of the aforesaid clause), the Court below was of opinion that the defendant was entitled to get compensation in respect thereof and it assessed such compensation at the sum of Rs. 5,000. The Court below accordingly set aside the mokarari lease and gave a decree to the plaintiff for possession of the lands in suit subject to payment by him to the defendants of a sum of Rs. 5,000.

4. From this judgment the defendants Nos. 1 and 2 have appealed. The plaintiff has filed a cross-objection in respect of the sum of Rs. 5,000 and has also claimed therein mesne profits which arc approximately laid at Rs. 500.

5. The first contention raised on behalf of the appellant is that as defendant No. 2 was added as a party more than three years after the institution of the suit, as against him it is barred by limitation. In support of this contention, reliance has been placed upon two recent Full Bench decisions of this Court, one in the case of Abdul Rahman v. Amir Ali 34 C. 612, and the other in the case of Ram Kinkar Biswas v. Akhil Chandra Chaudhuri 35 C. 519. In the first mentioned case which was a suit by a mortgagee to enforce a mortgage bond, the assignee pendente lite of the original plaintiff was after the expiry of the period of limitation substituted for the latter whose name was thereupon expunged from the record. The Full Bench held that the suit was barred u/s 22 of the Limitation Act XV of 1877, as the assignee had been brought on the record after the period of limitation applicable to the suit had expired. In the second case cited, which too was a suit on a mortgage, the transferee before suit of a portion of the mortgaged property was added as a defendant after the expiry of the period of limitation. The Full Bench hold that the suit as against him was barred u/s 22 of the Limitation Act. I do not think that the last mentioned case is applicable, as the newly added defendant in that case had acquired his right to the mortgaged property prior to the institution of the suit. The same remark applies to the case of Imam Ali v. Baij Nath Ram Sahu 10 C.W.N. 551: 33 C. 613, which also was cited on behalf of the appellant. But in my opinion the ratio decidendi of the ruling in the first mentioned case governs the present case though the facts are not precisely similar. Section 22 of the Act in express terms applies equally to the addition or substitution of a defendant after the expiry of the period of limitation. It was pointed out to us by the learned Vakil for the respondent that the defendant No. 2 was not a necessary, but only a proper party to the suit, and that when he was added as defendant he was added in the same way as beneficiaries are added as parties in suits u/s 437, Civil Procedure Code, between a trustee, executor or administrator and a third person, regarding property vested in the former, and that when a person is added merely as a proper party, in the course of the suit, though after the expiry of the period of limitation, Section 22 of the Limitation Act ought not to apply. In support of this argument our attention was called to the cases of Ravji Appaji v. Mahadev Bapuji 22 B. 672 & Guruvayya Gouda v. Dattatraya Anant 28 B. 11, decided by the Bombay High Court. In those two cases certain persons were added as co-plaintiffs after the expiry of the period of

limitation, the omission of whom from the suit when it was instituted was not a fatal defect in the constitution thereof. It was held that Section 22 did not apply to the case. The view taken in these two cases is opposed to the interpretation put on, Section 22 of the Limitation Act by the decision of the Full Bench in Abdul Rahman v. Amir Ali 34 C. 612 which, we are bound to follow. The point, however, has ceased to be of importance owing to a change in the wording of the corresponding section in the new Limitation Act IX of 1908, by which the anomaly has been removed. But though at the time when the defendant No. 2 was added as a party, the suit as against him was barred, it was conceded in argument that as an assignee pendente lite, the defendant No. 2 would be bound by any decree that might be passed in this suit. In the circumstances of the case, I think that the name of defendant No. 2 was unnecessarily joined as a party, and 1 direct that his name be struck out from the record.

6. It has next been contended on behalf of the appellants that the suit was not maintainable without a previous notice to quit being served upon defendant No. 1, and that as no such notice has been given, the suit ought to have been dismissed. It was said that even if the mokarari lease might be invalid, yet an independent tenancy from year to year was created between the manager under the Encumbered Estates Act, and defendant No. 1 by the payment and acceptance of rent under the mokarari, and that unless and until such tenancy was determined by a valid notice to quit, the suit could not be maintained. In support of this contention reliance was placed upon the opinions of the Law Lords in the case of President and Governors of Magdalen Hospital v. Knotts L.R. 4 A.C. 324. Reference was also made to the case of Doe d. Rigge v. Bell 5 T.R. 471: 2 R.R. 642, and to the notes to that case in 2 Smith''s Leading Cases 10th Edition, pp. 117 and 118, and further to the cases collected in Tudor''s Leading Cases on Real Property, 4th Edition, pp. 21,22, in support of the proposition, stated in the text that "if a person enters under a lease void for some cause, such as non-compliance with the Statute of Frauds, although at first he would only be a tenant-at-will, on payment of rent he may, by presumption or implication of law, become a tenant from year to year." The opinion of Lord Selborne in the President and Governors of Magdalen Hospital v. Knotts L.R. 4 A.C. 324 was followed in the case of Chaitan Singh v. Sadhari Monim 5 C.L.J. 62, but was dissented from in the case of Shama Charan Nandi v. Abhiram Goswami 33 C. 511, where it was held that possession of the lessee under a void lease is adverse to the lessor from the date of the lease, even though the lessee my have continued to pay the rent reserved. In the case of Lala Majlis Sahai v. Mussammat Narain Bibi 7 C.W.N. 90, the father of the plaintiff without any authority granted a mokarari lease in favour of defendant No. 1, who thereupon entered into possession. Subsequently the guardian of the plaintiff, who had been duly appointed by the Court when the latter was a minor, had sued the defendants for arrears of rent and had accepted the sum decreed. This act of this guardian in accepting the rent was held binding upon the plaintiff and was sufficient to create a tenancy from year to year, which

could only be determined by a proper notice to quit. On the other hand, the cases of Harendra Narain Singh Chowdhry v. T.D. Moran 15 C. 40, Sujjad Ahamed Chowdhury v. Ganga Charan Ghose 15 C. 40, Lala Majlis Sahai v. Mussammat Narain Bibi 7 C.W.N. 90, were relied upon on behalf of the respondent. In the first of these cases all that was held was that a lease in perpetuity, which is void by reason of its having been granted by a certificated guardian without the sanction of the District Judge, as required by Section 18 of Act XL of 1858, could not be held to operate as a lease for a term of years. In the second case, the plaintiff sought to recover possession not on the ground that the defendant was their tenant and that he had incurred forfeiture, but on the ground that he was never their tenant and the defendant also said that he was never a tenant of the plaintiff''s. Thus it is clear that in that case tenancy was neither alleged nor denied, and the question for determination of a subsisting tenancy by notice to quit did not arise. As regards the last two cases cited by the respondent, it is clear from the facts just stated that they do not touch the present case; nor do I think that the cases cited on behalf of the appellants can be held to govern the present case. The present suit is essentially one to recover possession of certain lands by setting aside a mokarari lease granted by the manager under the Encumbered Estates Act on the ground that it was obtained by the lessee by fraudulent misrepresentation. The mokarai lease is impugned not on the ground that the manager in granting the lease acted ultra vires and that it was consequently void, but on the ground that it was obtained from the manager by means of fraud. A lease obtained by fraud is only voidable by the lessor and not void ab initio. It is valid and binding between the parties until it is avoided. When rent is paid under a void lease which by the very hypothesis creates no legal relation between the Parties, the payment of rent is not referable to the lease at all, but is a distinct and independent act which proprio vigore establishes a tenancy by legal implication. When, however, rent is paid under a voidable lease, the payment of rent is under the lease and is in satisfaction of the recurrent obligation arising out of the legal relation created by the lease. So long as the legal relation is not dissolved, the obligation to pay rent continues. On the other hand, as soon as that relation is determined the obligation to pay rent which is dependent on the continuance of such relation ceases and the payment of rent made in fulfillment of such obligation must, thenceforth, necessarily cease to have any legal effect. It follows, therefore, that if the mokarari lease is cancelled on the ground of fraud, the lessee cannot resist delivery of possession of the demised land to the lessor on the ground that despite the cancellation and delivery up of the lease, there is yet a subsisting tenancy outstanding which entitles him to retain possession of land until such tenancy is determined by proper notice to quit. I think, therefore, that this contention of the appellant must fail it was also contended by the learned Counsel for the appellant that u/s 17 of the Chota Nagpur Encumbered Estates Act as amended by Act V of 1884, the manager had absolute power to grant a lease in perpetuity in consideration of a fine or even without any fine. On the other hand, it was pointed out to us by the respondent that the power of alienation by way of mortgage or by

sale conferred on the manager by Section 18 of the Act is qualified by the condition that he has power to do so only in case money is required for the settlement of the debts and liabilities of the proprietor.

7. It was urged that if the manager''s power is subject to this qualification in the case of a mortgage or a sale, it ought a fortiori, to be subject to a similar qualification in the case of a demise in perpetuity, with or without nine, of all or any part of the property under his management and that the very purpose and the object of the Act, which is to discharge the debts and liabilities of the proprietor and to set him up in an unembarrassed state, clearly indicates that the power of the manager should be circumscribed within the limits defined by such purpose.

8. Our attention was also drawn to the fact that u/s 17 of the Act, the power of the manager is subject to the rules framed u/s 19 of that Act, and one of these rules, namely Rule No. 3, provides that an Encumbered Estate should be administered in accordance with the general rules for Wards'' Estates as far as practicable. The provisions of Section 18 of the Court of Wards Act (IX of 1879), which empower the Court of Wards to grant leases or mortgage or sell any property under its charge and do all such other acts as it may judge to be most for the benefit of the property and advantage of the Ward," were also referred to.

9. I think the contention of the respondent is sound as being in consonance with the declared policy and object of the Act. Though Section 17 of the Act is apparently wide in its terms and though it probably confers on the manager a somewhat large measure of discretion for the management of the estate, I do not think it enables him to do any act which is demonstrably injurious to the interest of the estate. In Muhammad Mumtaz Ali Khan v. Farhat Ali Khan L.R. 28 I.A. 190; 23 A. 394, their Lordships of the Privy Council observed "that the Court of Wards has of course all the ordinary powers of a guardian over a Ward''s property, supplemented by certain additional powers given by statute;" and they held that the words, "and to do all such other acts as it may judge to be most for the benefit of the property and the advantage of the disqualified proprietors," in Section 172 of the Oudh Land Revenue Act 1876, did not confer upon the Court of Wards the power of making assignments in perpetuity of certain villages out of the Ward''s Estate in lieu of maintenance, payable out of the estate to certain persons, inasmuch as such assignments amounted to a voluntary alienation in perpetuity of the Ward''s Estate. The execution of this lease in perpetuity without a bonus, and that not for the purposes of reclamation of any waste land or other purposes of a similar kind cannot be justified as an act done in the course of prudent management of the estate. The validity of this mokarari as an act within the ambit of the power of the manager must, therefore, rest upon the covenant in the ijara lease and that covenant alone. Consequently if the mokarari lease embraced any one or more of the excepted parcels, it would, in my opinion, be beyond his competence and indeed, Mr. Clark, the Deputy Commissioner in his evidence, admits that he would not have granted

the mokarari if he had known that H. Mathewson was not entitled to have it under the terms of the ijara.

10. This leads me to the consideration of the question, whether the mokarari lease in point of fact includes any one or more of the excepted parcels or any portion thereof. [His Lordship then discussed the evidence on the point and concluded that the whole of the disputed land with the exception of a certain portion was outside the excepted parcels. He then continued:]

11. The whole of the disputed land with the exception of the portion on the south being thus found to be outside the reserved parcels, the next question is whether the Deputy Commissioner, as manager under the Encumbered Estates Act, had power, with the sanction of the Commissioner, to grant the mokarari lease in question.

12. It was argued on behalf of the respondent that the manager had no such power, firstly, because the right of the lessee under the covenant to call upon the lessor to execute a mokarari lease was barred u/s 7, Chota Nagpur Encumbered Estates Act (VI of 1876), notice of the claim under such covenant not having been given to the manager in the manner and within the time prescribed by the Act.

12. Secondly, because the manager was not competent to execute a mokarari lease without the consent of the proprietor, that is the plaintiff. Thirdly, because if a suit for specific performance of the covenant has been brought by the defendant No. 1 against the manager, it would have been dismissed for the following reasons, namely, (a) that the covenant infringes the rule against perpetuities, (b) that the mokarari lease was not required for any of the purposes specified in the covenant, (c) that the defendant No. 1 was not entitled to the benefit of this covenant; (d) that the defendant No. 1 was guilty of laches in enforcing the covenant and (e) that specific enforcement of the covenant would inflict hardship on plaintiff. Fourthly, because the area leased out by the mokarari was outside the ijara mahal and fell within the excepted parcels.

13. With regard to the first ground, namely that the claim was barred u/s 7 of Act VI of 1876, it was contended that the right of the lessee to enforce the covenant in question created a corresponding liability on the part of the lessor to perform that covenant, that such liability is a liability in the sense in which that term is used in that section and as it had not been duly notified to the manager with in the time and in the manner prescribed by the Act, it had become barred. In support of this contention, reliance was placed on the case of Jagadis Chandra Deo Dhabal v. Satrughan Deo Dhabal 33 C. 1065, in which it was held that a covenant by a proprietor to execute a putni lease was a liability within the meaning of that word in Section 7.

14. Assuming that the covenant in this case imported on the part of the proprietor a liability within the meaning of that term in Section 7 of the Act, but guarding myself

from being understood to assent to this view, I am of opinion that notice of the claim was unnecessary in the present case, because the manager, when he assumed management of the estate which was at the time under ijara, must be deemed to have received under the law constructive notice of the lessee''s right to claim under the covenant in the ijara lease the mokarari lease of any land within the lease-hold for certain purposes. In Baruhardt v. Green-shields 9 Moore''s P.C. 18, their Lordships of the Privy Council thus observed: "With respect to the effect of possession merely, we take the law to be, that if there be a tenant in possession of land, a purchaser is bound by all the equities which the tenant could enforce against the vendor, and that the equity of the tenant extends not only to interests connected with his tenancy, as in Taylor v. Stibbert 2 Ves. (Jun) 437, but also to interests under collateral agreements as in Daniels v. Davison 16 Ves. 249, Allen v. Anthony 1 Mer. 282, the principle being the same in both classes of cases, namely, that the possession is notice that he has some interest in the land, and that a purchaser having notice of that fact is bound, according to the ordinary rule, either to enquire what that interest is, or to give effect to it, whatever it may be."

15. Then again assuming that notice of the claim ought to have been given, I think that as the proprietor appealed to the Commissioner against the order of the Deputy Commissioner, in which he held that the mokarari ought to be granted and that as the Commissioner upheld the order of the Deputy Commissioner, such order is, u/s 10 of the Act, final and the matter cannot be re-opened by a suit. Furthermore, the fifth paragraph of Section 12 of the Act as amended by Act V of 1884, which inter alia enacts that the debts and liabilities barred by Section 7 shall, on restoration of the estate to the proprietor, be revived, necessarily implies that the debt or liability which is barred u/s 7 is not extinguished, but that so long as the estate continues under the operation of the Act, the remedy only is barred, the right subsisting. In my opinion, it does not follow from Section 7 that if the manager without any notice, as required by Section 7, satisfied a debt or liability, the proprietor could, after the restoration of the estate to him, bring a suit to recover back the money so paid, or annul any deed executed by the manager in fulfillment of that liability and do so merely on the ground of absence of notice.

16. This contention must, therefore, fail.

17. As regards the second ground, namely that the manager could not grant a lease without the consent of the proprietor, I think it is equally unsustainable. u/s 18, para. 3 of Act VI of 1876, (before it was amended by Section 8(a) of Act V of 1884), the power of the manager to sell any portion of the property was expressly made subject to the qualification, that he could do so only, "with the previous consent of the holder of the property and of the person (being of full age), who would be his heir if he died intestate," whereas u/s 17 of the same Act, (before it was amended by Section 7 of Act V of 1884), the power of the manager to demise any part of the property for a period not exceeding twenty years, was not subject to any such

qualification at all. It is clear therefore, that under Act VI of 1876, the manager had the power to demise any part of the property for a period, not exceeding twenty years without the consent of the proprietor.

18. The Amending Act V of 1884 has removed the restriction on the power of the manager to sell and has, at the same time, empowered him to demise in perpetuity; so that the manager is now entitled to sell or demise in perpetuity without the consent of the proprietor.

19. The learned Vakil for the respondent referred us to an unreported judgment in the case of Tikait Todal Narain Singh v. Gopal Chandra Sen, being appeal from order No. 406 of 1895, decided by this Court on the 3rd December 1896, which laid down that it is the proprietor and not the manager under the Encumbered Estates Act who has the right to bring a suit to recover possession of immovable property.

20. It is not clear from the judgment what the nature of the suit in that case was, but assuming that it was a suit for possession of immovable property, it does not follow from this decision that a lease granted by a manager is not valid, unless the proprietor joins in the lease or gives his consent to the granting of the lease. The language of the section appears to me to be too clear and explicit to be overridden by an inference drawn from the right of the proprietor to bring suits in certain cases while the estate is subject to the operation of the Act.

21. It is further insisted that inasmuch as all that is vested in the manager u/s 2 of the Act is the "management of the immovable property," the ownership still continues in the proprietor and that unless the proprietor concurs in the lease by the manager, it is not binding upon the former.

22. This argument assumes that during the period the estate is under the operation of the Act, the proprietor possesses the power of concurring in the lease. Clause 3(a) of Section 3 of the Act which deprives the proprietor of his power to mortgage, charge, lease or alienate his immovable property or part thereof, clearly negatives the existence of any such power. It follows, therefore, that a lease in perpetuity granted by the manager which is otherwise valid is not the less binding on the proprietor because he was no party to it or that it was granted without his consent.

23. With regard to the first branch of the third ground, namely, that if a suit for specific performance of the covenant had been brought by the defendant No. 1 as against the manager, it would have been dismissed on the ground that it infringes the rule against perpetuities, it is necessary to observe at the outset, and this was also admitted on behalf of the respondent, that the rule applies only to future interests in land, which may, by any possibility, to capable of vesting beyond the legal limit of perpetuity. The passage in the ijara lease in which the covenant is embodied, together with the preceding sentence, runs thus:--"After the expiration of the ijara, you shall have no right what ever to the ijara mahal." "If out of the ijara mahal you should require any land for the purpose of erecting any indigo factory

etc, I shall grant you a mourasi mokarari patta for it on proper rent." I think that the intention of the parties to be gathered chiefly from this context, as also from other parts of the ijara lease, was that the lessor would grant a mourasi mokarari lease in case the lessee during the term of the lease, required any land out of the ijara mahal. To my mind, the clause contains a restriction not only as to the area out of which the mokarari was to be granted, if required, but also a restriction as to time.

24. Reliance was placed on the presence of the words, "If you, within the term of the ijara, wish to take a putni settlement of the mouzas etc." in the lessor''s covenant to grant a putni settlement, and in the absence of similar words in the clause for granting a mokarari, as raising the inference that the lessor intended to confer on the lessee the right to call for a mokarari at any future time, however remote.

25. It does not seem to me reasonable to suppose that after the term of the ijara had expired and after "all rights what-so-ever" of R. Watson and Co. to the ijara mahal had ceased, and their connection therewith had terminated, it was intended by the lessor that R. Watson and (Co. who were foreigners should have the right at any future time, however remote to call upon him or his heirs and representatives to execute a mokarari lease. If the operation of the covenant is confined to the term of the ijara lease, as in my opinion it ought to be, it is conceded that it does not contravene the rule against perpetuity. In this view of the matter, it becomes unnecessary to discuss the cases which have been cited in support of the contention.

26. As regards the second branch of the third ground, namely, that the mokarari lease was not required for any of the purposes specified in the covenant, it was urged that the indigo factory and the cutchery house had been built and amla''s quarters had been erected as far back as the year 1887, and that although the indigo business had been carried on since 1883-84, it had admittedly been stopped in 1895, that the industry was dead and gone, and there was no prospect of its revival; that R. Watson and Co., never started any silk factory at all, and that consequently when the defendant No. 1 appealed to the manager for a mokarari lease, he did not, and could not have, asked for the lease for any of the purposes specified in the covenant.

27. I do not think it can be positively affirmed that there is no possible chance of the indigo business being revived in the locality. But, apart from that fact, there can be little doubt that R. Watson and Co., when they constructed these buildings and made all these improvements, they must have done so on the faith of this covenant in the ijara lease and in the firm and sure belief, that they could obtain the mokarari at any time during the currency of the ijara. If before the construction of the indigo factory and the cutchery house and other buildings, R. Watson and Co., had called upon the plaintiff''s father to execute a mokarari lease, then unless the covenant was invalid on other grounds, it would have been impossible for the plaintiff''s father to resist the demand. Strictly speaking, no doubt, the mokarari was not

required for any of the purposes specified in the covenant, in the sense that such purposes were to be carried out after its execution; but in reality, it was required to secure a legal foundation for, and to give validity to, the possession of the land already taken. The laying out of considerable sums of money by the lessees in the erection of permanent structures on the land for those very purposes that are mentioned in the covenant and hence referrible to the covenant and to the covenant alone, and all this done undoubtedly to the knowledge of the lessor who resided close by must be regarded as part performance, and, indeed, a substantial part performance of the covenant for a perpetual lease such as would entitle the covenantee to claim specific performance of the covenant on the ground that it would be inequitable and fraudulent for the covenantor to refuse to perform the covenant. Farral v. Davenport 3 Gif. 363; s.c. on appeal. 8 Jur. N.S. 862; Howard v. Patent Ivory Co. L.R. 33 Ch. D. 155; see also Section 22, cl. III of the Specific Relief Act. I, therefore, think that a suit for specific performance could not have been resisted on this ground.

28. The case of The New Beerbhoom Coal Company v. Bularam Mahal a L.R. 7 I.A. 1.07; 5 C. 932 was relied upon by the respondent as showing that when the lessor covenants to grant additional lands to the lessee, if he requires them for a certain defined purpose, the lessee or his assignee cannot demand specific performance of such covenant, if he requires the land for some other purpose. In that case the purpose for which the lessor agreed to grant a lease of additional land was the carrying on of the colliery business, whereas the purpose for which lease of the additional land was required was the selling of it to another at a profit. This was held to fall outside the purpose specified in the covenant and hence, specific performance was refused. This case clearly does not touch the present case in which the lease is not required for a different purpose, but one in which the purpose has been already executed in anticipation of the lease.

29. As regards the third branch of the third ground, namely, that specific performance would have been refused on the ground that the defendant No. 1 was not entitled to the benefit of this covenant, it was argued that the covenant in question was merely personal, and not one running with the land, and secondly, if it was personal, that there are no express terms in the ijara lease which would make the covenant binding as between the assignees of the original parties; nor are there words in either of the Indentures of assignment, capable of passing the benefit of the covenant to either R. Watson & Co. Ld., or to defendant No. 1.

30. This contention, it was conceded in argument, is inconsistent with the contention that the covenant infringes the rule against perpetuities. A covenant is not obnoxious to this rule unless it creates an interest in land. A. mere personal covenant is not open to objection on the ground of remoteness or as tending to create a perpetuity (see Walsh v. Secretary of State for India 10 H.L. Cas. 367; Witham v. Vane, decided by the House of Lords and reported as an appendix to

Challis, Law of Real Property). The two contentions were, however, afterwards put forward alternately.

31. In support of the contention that the covenant did not run with the land, the case of Woodall v. Clifton (1905) 2 Ch. 257: 74. L.J. Ch. 555: 93 L.T. 257: 54 W.R. 7: 21 T.L.R. 581 was strongly relied upon. In that case, a, lease of land for 99 years granted in 1867 contained a proviso that in case the lessee, his heirs or assigns, should at any time during the term be desirous of purchasing the fee simple of the land at a certain rate per acre, the lessor, his heirs or assigns, on receipt of the purchase-money, would execute a conveyance of the land in favour of the lessee, his heirs and assigns. The assignee of the lessee brought an action against the assigns of the lessor to compel a conveyance of the land and the question raised was whether the burden of the proviso or covenant ran with the reversion and was binding upon the assigns of the lessor under the Statute of 32 Hen. VIII c. 34. The Court of Appeal held that the proviso or covenant did not fall within the statute, so as to make the burden of the covenant run with the reversion and that consequently the action could not be maintained against the assigns. This case, supposing its authority were binding on us, which, however, it is not, is not decisive of the question before us.

32. The question we are concerned with here is not whether the burden of the covenant runs with the reversion, but whether the benefit of the covenant runs with the land, or in other words, the question here relates not to the liability to fulfil the covenant, but the right to exact fulfillment thereof. With this latter question the statute of Henry VIII does not profess to deal.

33. It is worthy of note that the Courts in America have held that a covenant in a lease giving the lessee option to purchase is a covenant running with the land, and passes to the assignee of the lease, and is specifically enforceable by him; Kerr v. Day 14 Pa. St. 112: 53 A D 526: Laffan v. Naglee 9 Cali. 662: 70 Am. Dec. 678: Blakeman v. Miller (26); House v. Jackson 136 Cali. 138; 89 Am. St. Rep. 120. Upon this point there is consensus of judicial opinion in that country.

34. Returning to the case of Woodall v. Clifton (1905) 2 Ch. 257: 74. L.J. Ch. 555: 93 L.T. 257: 54 W.R. 7: 21 T.L.R. 581, Romer, L.J., in delivering the judgment of the Court of Appeal, took care to distinguish the covenant then before the Court from a covenant for the continuance of a term. He observed: "It, i.e., the covenant, is not a provision for the continuance of the term, like a covenant to renew, which has been held to run with the reversion, though the fact that a covenant to renew should be held to run with the land has by many been considered as an anomaly which it is too late now to question, though it is difficult to justify." Later he continues, "it is to our minds concerned with something wholly outside the relation of landlord and tenant with which the statute of Henry VIII was dealing."

35. It is clear that the performance of the covenant with which we are dealing, has not the effect of putting an end to the relation of landlord and tenant in regard to that portion of the ijara mahal for which the mokarari might be granted. It is in essence a covenant for an extension or continuance of that relation in perpetuity at a fixed rent concerning a portion of the land demised. It can not be predicated of this covenant that it is one "concerned with something wholly outside the relation of landlord and tenant."

36. One very important test whether the benefit or burden of a covenant or contract in any particular case runs with the land or not is whether such covenant or contract in its inception binds the land. If it does, it is then capable of passing with the land to subsequent assignees, if it does not, it is incapable of passing by mere assignment of the land. There can hardly be much doubt that the covenant in question is one which in its inception binds the land. In the case of Rogers v. Hosegood (1900) 2 Ch. 388: 69 L.J. Ch. 652: 83 L.T. 186 :48 W.R. 659, Collins, L.J., (now Lord Collins) in delivering the judgment of the Court of Appeal after discussing several authorities observed as follows: These authorities establish the proposition that when the benefit has been once clearly annexed to one piece of land, it passes by assignment of that land and may be said to run with it in contemplation as well of equity as of law without proof of special bargain or representation on the assignment. In such a case it runs, not because the conscience of either party is affected, but because the purchaser has bought something which inhered in, or was annexed to, the land bought." This observation was no doubt made with reference to the case of vendor and purchaser but I apprehend it is equally applicable to the case of lessor and lessee. Another test laid down by the House of Lords, in the recent case of Dyson v. Forster (1909) A.C. 98, is, whether the covenant affects the nature, quality or value of the land. The ijara lease, with a covenant for a mokarari is undoubtedly more valuable than it would be without such covenant.

37. I, therefore, think that this contention equally fails. In this view, it is perhaps needless to notice the argument of the respondent, namely, that there are no express words in the ijara lease which would make the covenant binding as between the assignees of the parties, or in either of the two Indentures which are capable of passing the benefit of the covenant to the assignee. But as this point has been argued at some length, I desire to state my view in regard to it. The ijara lease expressly provides that "all the terms of this Patta shall be fully binding upon me and my heirs and representatives and upon you, and your heirs and representatives." It was said that the words "terms of this Patta" referred to the usual covenants between a lessor and a lessee and did not include any unusual or collateral covenant like the one in question. I am tumble to assent to this argument. Taken along with the rest of the document, the words are too clear to admit of any such interpretation. If this argument were sound, it would lead to this result that if the lessor died the day after the execution of the ijara lease, the covenants for the Putni lease and the mokarari lease respectively would cease to be operative. This

indeed is clearly opposed to the manifest intention of the parties.

38. By the indenture dated the 26th May 1890,"all rights whatsoever and interest in, or over the land" and all claims and demands whatsoever of the said vendors in, and to the property" are assigned by R. Watson and Co., to R. Watson & Co. Ld., and by the indenture dated the 15th April 1906, "all manner of rights" are assigned by R. Watson and Co. Ld., in favour of the defendant No. 1. It follows, therefore, that the defendant No. 1 was entitled to the benefit of this covenant and to enforce specific performance of it, if not debarred from doing so, on any other grounds.

39. The fourth branch of the third ground is that specific performance would have been refused on the ground of laches. As regards this, the Court below has held that as the buildings on the land had been completed before 1887, if R. Watson & Co., or their assigns were entitled to have a mokarari of those lands under the covenant, time began to run against them from that year and consequently Mathewson''s application to the manager for the mokarari which was made in June 1901 was hopelessly barred. I do not think that this is a correct view of the land. Time could not run against the covenantees or their assigns unless there were demand on their part and refusal on the part of the covenantor or his assigns. There is no suggestion, far less any evidence, that any demand for the mokarari had been made previous to June 1901.

40. The fifth branch of the third ground is that specific performance would have been refused on the ground of hardship. The Court below has held that specific performance would have been refused because, on the land for which mokarari has been given, certain religious festivals are annually celebrated by the Raja of Birbhum and his people.

41. It seems to me that this hardship is more apparent than real, because not with standing the occupation of this area by R. Watson and Co., ever since 1883, religious festivals have continued to be held there annually, without any difficulty.

42. I shall briefly notice a point, mentioned in the judgment of the Court below, but not relied upon by the respondents, in the argument before us that the covenant is void for want of consideration and specific performance would have been refused on that ground too.

43. It is enough to say that R. Watson & Co.. advanced to the plaintiff''s father a loan of Rupees sixty thousand, for the purpose of liquidating his debts and it was in consideration of this advance that the plaintiff''s father executed in their favour the ijara lease containing, among others, the covenant in question. This loan is a sufficient consideration for each and every one of the covenants on the part of the lessor.

44. The fourth ground is that the manager had no power to execute a mokarari lease of any land falling within one or more of the excepted parcels. This point I

need not discuss as I have already held that, with the exception of the portion on the south, the mokarari does not embrace any land forming part of the excepted parcels. The Lower Court has held that the Deputy Commissioner hold no judicial enquiry in the sense that he did not examine witnesses on oath in order to determine whether the mokarari included any of the excepted parcels. I do not think it was necessary for the Deputy Commissioner in conducting his enquiry before granting the mokarari to examine witnesses on oath or record their depositions. It would be enough, in the circumstances of this case, if he made a full and complete investigation in the matter and this, in my opinion, he did. He gave the proprietor every opportunity of representing his views on the matter, he took the opinion of the Government pleader and he personally inspected the spot and examined though not on oath, several persons in the locality for the purpose of verifying the correctness of the statement of the parties. This is shown by the orders recorded in the continuous order sheet and by Mr. Clark''s evidence.

45. I think, however, that through mistake on the part of H. Mathewson and the Deputy Commissioner, the land which I have held to form part of Indkuri Bazar, was included in the mokarari, which should, therefore, be rectified by excluding that area from it.

46. Besides, in the mokarari lease the right of the zamindar of Barabhum and of his people to hold once every year the usual Ind festival only on the site called Indtar has been reserved. The right to hold the other religious festivals has not been reserved. I think that in addition to the Ind festival, the right of the zamindar of Barabhum and of his people to hold the annual Bunbhojan and Bheja benda festivals, as here to fore, should also be reserved in the lease in express terms. It is clear from the evidence adduced on both sides, that these festivals are old religious institutions in which the Raja and all the people of Pergunnah Barabhum take part. They were in vogue when the ijara lease was granted and have been celebrated annually at fixed periods since that time. The plaintiff''s father, if the mokarari had been executed by him during his life-time, could not have deprived the people of Barabhum of these rights, which are in the nature of customary rights. Moreover, when R. Watson and Co. selected this particular site for occupation in anticipation of the mokarari lease, they were fully cognizant of the nature of the locality, and of the burdens to which it was subject. They and their successive assignees have ever so long submitted to these burdens without any demur. Presumably therefore, this inconvenience is not so substantial in degree as to interfere with the free and comfortable enjoyment of the land.

47. The result, therefore, is that the appeal is partially decreed, the judgment and decree of the Court below are set aside and it is ordered that in lien thereof a decree be made rectifying the mokarari lease, dated the 25th May 1903, by excluding from it the land enclosed within the thick black line drawn by us and marked on the Commissioner''s map with the letters P.Q.R.S.T.U.V.W. and X. (which map with the

lines so drawn shall form part of this decree) and by declaring its subject not only to the right to hold the Ind festival, but also to the right of the zamindar of Barabhum and of his people to hold once annually at fixed periods and in the same manner as heretofore the bheja bendo or otherwise called Lakya, bendya and the bunbhojan festivals, and declaring that subject to this rectification, the mokarari lease stands good and is binding and operative upon the plaintiffs.

48. As the appellant No. 1 has only partially succeeded he is entitled to three-fourths of the cost.

49. As the defendant appellant No. 2 was made a party upon the objection of defendant No. 1 he is not entitled to any costs either in this Court or in the Court below.

50. Against the decree of the Court below directing that the plaintiff do get possession of the mokarari lands on payment of Rs. 5,000 as compensation, the respondent has preferred a cross appeal and it has been contended on his behalf that as the ijara lease was for a limited period, the lessees or their assignees are not entitled to any compensation for the structures built by them on the land. As the appeal is decreed this cross appeal necessarily fails. We make no order as to costs in the cross appeal

Richardson, J.

51. I agree generally in the conclusion arrived at by my learned brother, but with great deference I am not prepared to commit myself to all the reasoning on which he has founded himself. It is perhaps right, therefore, that I should as briefly as possible state my opinion in my own way.

52. In regard to the preliminary plea, of limitation which is raised on behalf of defendant No. 2, I agree that in this Court we are bound by authority to accept this plea. Abdul Rahman v. Amir Ali, 34 C. 612. The law has now been altered and the matter possesses no interest for the future. I am doubtful, however, whether it can be said that the defendant No. 2 was improperly joined as a party to the suit u/s 32 of the Old CPC or Rule 10 of Order 1 of the Now Code. In the circumstances, however, having regard especially to the late stage at which the plea was raised I assent with some doubt to the order which my learned brother proposes to make.

53. As to the omission to serve a notice to quit, on defendant No. 1, we are dealing with a claim to hold land under a permanent lease (mokarari mourasi) and it appears to me that the current of authority in this country is decidedly in favour of the view that when such a lease; is attacked on the ground that it is void or voidable, the case which it is sought to establish is that the person who has been purporting to hold as tenant under the lease, was never a tenant in fact but a trespasser all initio. It would seem to follow that while on the one hand he is at liberty to rely on adverse possession for the statutory period as a defence, though of course he

cannot obtain a larger interest than he affects to have exercised, on the other hand he is not entitled to a notice to quit. Money paid as for rent under an invalid lease may perhaps be regarded as money paid on account of mesne profits. The question has often been discussed and I. need not do more than mention some of the reported cases. The cases of Ram Kanai Ghosh v. Raja, Sri Sri, Hari Narayan Singh Deo Bahadur 2 C.L.J. 546 and Shama v. Abhiram 33 C. 511, decided in this High Court may be cited and reference may also be made to the judgment of Batty, J. in Thakore Fatesingji Dipsangji v. Bamanji Ardeshir Dalal 27 B. 515 and to the cases of Seshamma Shettati v. Chickaya Hegade 25 M. 507 and Parameswaram v. Krishnan Tengal 26 M. 535.

54. These preliminary pleas being disposed of, I agree that the plaintiff''s case was based in the plaint entirely on fraud and misrepresentation. The statement in para. 10 of the plaint that the Deputy Commissioner as manager of the estate had exceeded his powers and jurisdiction appears to mean this that he had exceeded his powers in giving a lease of lands to which the covenant in ijara patta did not apply, and is merely a corollary to the charge of fraud. I agree also that there is no evidence to support the charge of fraud and no reason to suppose that the Deputy Commissioner suffered himself to he misled by any thing which was said by the defendant No 1. On the contrary the defendant No. 1 was held at arm''s length throughout the negotiations. It is stated in the plaint that the application for a lease was made in October 1901. As a matter of fact the correspondence began some months earlier in June. The lease was not executed till the 25th May 1903. in the meantime the Deputy Commissioner had heard all that the plaintiff had to say, had consulted the Government pleader of the district and besides directing enquiries through his officers, had himself made a local investigation as to, and formed an independent opinion upon, the question whether the lands, of which a lease was claimed, were in whole or part lands excluded from the operation of the ijara patta. The plaintiff No. 1 is ready enough to attribute mistake to the Deputy Commissioner but his animus against the defendant No. 1 is such that he will not admit the possibility of any honest mistake on the part of the latter. In regard to the opinion of the Subordinate Judge on this part of the case, his mind seems to have been coloured by the importance which he attached to the assertion that the lease interfered with the conduct of certain religious festivals and he appears, therefore, to have been unable to give a dry and dispassionate consideration to the evidence.

55. By way of further comment on the allegation of fraud, the remark may be made that while the fraud attributed by the plaintiff to the defendant No. 1 consisted in fraudulent misstatements as to the lands included in the ijara patta, his own statements as to the land excluded from the patta are now found to be, to say the least, much exaggerated.

56. As the charge of fraud cannot be supported, it might have been thought that the case would end here. But a number of other issues were raised in the lower Court

apparently without objection by the defendants and consequently a number of other questions have been discussed by the Subordinate judge in a confused and somewhat unintelligible judgment it was no doubt natural that when the case came into Court and its legal bearings come to be better understood by the plaintiff''s advisers an attempt should be made to set aside the lease not only on the ground of fraud but on any other ground which ingenuity might suggest it is these subsidiary contentions which give rise to the greatest difficulty.

57. The most plausible of these contentions is this that, fraud or no fraud, the lease was beyond the powers of the Deputy Commissioner under the Chota Nagpur Encumbered Estates Act. I agree that the wide powers conferred by Section 17 of the Act must be limited on general principles in the way suggested. I agree further that in spite of the limitation, the existence in the present case of the covenant in the ijara patta must be taken into account, and I think that unless there are any other provisions of the Act which stand in the way, the Deputy Commissioner had jurisdiction u/s 17 in the ordinary course of management to grant, with the sanction of the Commissioner, a reasonable lease in pursuance of the covenant. But then it is urged that the covenant was a liability to which the holder of the estate or the estate itself was subject and that the Deputy Commissioner WAS barred by Section 7 from admitting the claim because no notice of it had been given. Moreover the defend ant No. 1 was barred from instituting a suit to enforce the covenant both u/s 7 and u/s 3, the latter section having been held to apply not only to proceedings pending at the date of an order u/s 2 but also to proceedings thereafter taken. Kameshar Prasad v. Bhikhan Narain 20 C. 609.

58. As to these contentions while I think that the Act requires express notice of "debts" and "liabilities" and that constructive notice is not sufficient, I agree that having regard to the scheme of the Act, the mere absence of notice of the claim is not a valid ground for setting aside the lease. The Act is not scientifically drawn, but is a rough and ready measure applicable to a backward part of the country. I think that it may, in the respect referred to, be reasonably interpreted in the manner indicated by my learned brother. It may be mentioned in passing that the scheme of this Act differs from that of the Act which the Privy Council had to consider in Waghela Rajsanji v. Shekh Masludin L.R. 14 I.A. 89: 11 B. 551.

59. I do not think that it is necessary to consider in detail the various arguments employed at the bar to support the proposition that the covenant is not one of which specific performance could have been enforced. This contention was urged for the purpose of showing that the lease is not one which the Deputy Commissioner should have granted, but as Mr. Hill observed there is a considerable difference between a suit for specific performance and a suit to set aside a completed conveyance. By way of illustration I may refer to Wilde v. Gibson 1 H.L. Cas. 605. There is no such vice in the covenant as would render it void and ineffectual for all purposes, so that there would be no consideration at all for its

performance. The covenant was capable of being interpreted and acted upon as between lessor and lessee. The estate being under the management of the Deputy Commissioner, he took legal advice and executed a lease which he considered to be a fair lease in the circumstances. His bona fides has never been disputed and it has now been found that there is no ground for impugning the bona fides of the defendant No. 1. No doubt the Deputy Commissioner says that he would not have executed the lease, if he had not thought that the estate was bound by it. But an arrangement was concluded and the covenant was resolved into the executed lease. So far as the covenant was vague and uncertain, its meaning has now been fixed. If it did not run with the land, I think the contrary is the case, but if that be assumed for the purposes of argument, it has now been made fast to the land. And so on as to other contentions. No doubt again there is a permanent alienation of the land, but it is not a voluntary alienation because a rent is reserved, and it has not been shown that the rent is inadequate. The Deputy Commissioner and the defendant No. I appear to have been mistaken in regard to a portion of the land demised and that mistake is being dealt with. For the rest, if the Deputy Commissioner was mistaken at all, his mistakes were mistakes of law and I can find no common mistake of fact and no common mistake of law of the kind equivalent to a mistake of fact which goes to the root of the executed contract and would justify us in saying that it is inequitable that the defendants should be allowed to retain the benefit of this lease. (For illustration see Bingham v. Bingham 1 Ves. (Jun.) 126, Soper Y. Arnold 14 A.C. 429 and Watson & Co. v. Sham Lal Mitter 15 C. 8: L.R. 14 I.A. 178). It appears to me in the circumstance that in reference to this aspect of the case as in reference to the charge of fraud the plaintiff cannot take higher ground than the Deputy Commissioner might have taken if he had been the plaintiff. I hold, therefore, that the lease cannot be set aside for any of the reasons given to show that the covenant was not specifically enforceable.

60. It may be mentioned that the defendants are patnidars of a considerable portion of the zamindari and they require the cutchery on the land for the purpose of transacting their zamindari business. The covenant in the ijara patta no doubt contemplated the building of cutchery for this purpose.

61. It has been already indicated that the powers conferred by Section 17 are not absolute and unlimited, and the substantial question which arises is whether in view of the facts and history of the case and the course of the dealings in regard to the land in dispute, the lease granted is a fair and reasonable lease in the circumstances. Subject to certain reservations the question may be answered in the affirmative. The Deputy Commissioner was acting in a fiduciary capacity and the defendant No. 1 knew this. But I can find nothing which amounts to a breach of trust on the part of the Deputy Commissioner. And it is only by establishing a clear breach of trust or confidence that the plaintiff can succeed. The reservations relate to part of the land which has been included in the lease and to the omission of any provision in the lease in respect of two of the three religious festivals which

according to the evidence are celebrated on or in the neighbourhood of the land demised. It was urged by Mr. Hill that the suit was not a suit for rectification bat the issues framed in the lower Court are wide enough to enable us to deal with these points to which indeed the evidence was mainly directed.

62. In regard to costs, I am inclined to think that as the plaintiff charged fraud and failed and has also substantially failed on the whole case, he should pay the whole of the costs of defendant No. 1. But I am not prepared to go so far as to differ in this point from the order which my learned brother proposes to make.

63. With these observations, I concur in the conclusions which have been arrived at.