Privy Council Appeal No. 21 *of* 1931.

Bengal Appeals Nos. 29 *and* 33 *of* 1929.

Currimbhoy and Company, Limited - - - - - *Appellants*

v.

L. A. Creet and others - - - - - - - *Respondents*

L. A. Creet - - - - - - - - - *Appellant*

v.

Currimbhoy and Company, Limited - - - - - *Respondents*

(*Consolidated Appeals*)

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND NOVEMBER, 1932.

Present at the Hearing:

LORD THANKERTON.
SIR GEORGE LOWNDES.
SIR DINSHAH MULLA.

[*Delivered by* LORD THANKERTON.]

These are two consolidated appeals from a decree of the High Court of Judicature at Fort William in Bengal, dated the 23rd August, 1929, varying a decree of the Additional Subordinate Judge of Asansol, dated the 12th October, 1928.

On the 14th May, 1924, the present suit was instituted by L. A. Creet against Oosman Jamall & Sons, Limited, for *khas* possession of certain coal mining lands in Mouza Khandra, for an account of the coal extracted therefrom by Jamalls, and for damages for breach of contract. In the alternative a somewhat unusual decree for specific performance was asked for.

In June, 1926. Jamalls went into compulsory liquidation, and on the 17th July, 1926, the liquidator was added as defendant No. 2; on the 2nd October, 1926, the liquidator filed a written statement adopting the written statement filed by Jamalls.

On the 28th July, 1927, Currimbhoy & Company, Limited, were added as defendant No. 3, as a party claiming to be interested in the lands in suit under an agreement with Jamalls dated the 13th September, 1922, and filed a written statement on the 12th August, 1927. On the 25th January, 1928, the liquidator of Jamalls assigned to Currimbhoys the whole rights and interests of Jamalls in their alleged contract with Creet, in the subject matter of the present suit and in the plant and equipment of their colliery on the lands in suit, as well as in the monies deposited by them under orders of the Court.

Early in 1920 Creet had obtained mine-prospecting leases in respect of certain of the lands in Mouza Khandra, and had started sinking a shaft. By letter dated the 18th April, 1920, he proposed to Jamalls that they should take over the enterprise from him on certain terms; negotiations followed, mostly by correspondence, in course of which Creet agreed that Jamalls should take over the place immediately, and, in fact, they took possession from Creet of certain lands, which included the shaft, on the 1st June, 1920, and proceeded to develop and work the minerals. On the other hand, Creet, who at that time had only got prospecting leases, proceeded to obtain titles to the minerals, and became involved in certain litigations, which delayed his obtaining some of the conveyances of the mineral rights. Some of these suits were still pending when the present suit was commenced.

The main case for the plaintiff Creet was that a contract was concluded between him and Jamalls in May, 1920, under which the parties were contractually bound to execute a formal agreement embodying the terms of the contract, that Jamalls delayed their execution of the formal agreement, that, finally, in February, 1923, he gave them notice that, if they did not execute the agreement within fourteen days, he would hold the contract to be at an end, and that, in breach of the contract, they failed to do so. In May, 1924, he raised the present suit, claiming *khas* possession, damages for breach of contract, and an account of the coal extracted, on the footing that they were trespassers. Alternatively, he asked, " if the Court finds that the defendants have a right to have any contract specifically enforced," for a decree for such specific performance and a decree for all such sum or sums of money or monies that might be payable by the defendants and for executing agreement and conveyance mentioned above or all such agreements and conveyances as to the Court should seem fit.

The main case for the defendants was that a contract was concluded between Creet and Jamalls in May, 1920, in terms similar to those alleged by the plaintiff, but with the exception of any obligation to execute a formal agreement, and that they

were not in breach of the contract, and they asked for a decree for specific performance. Certain other grounds of defence will be noticed later.

On the 12th October, 1928, the Subordinate Judge gave decree in the plaintiff's favour against all three defendants. He accepted the plaintiff's version of the contract and held that Jamalls were in breach of the contract in February, 1923, and that the plaintiff duly rescinded it at that time. He further held that the defendants were trespassers after that date, and were accountable for the value of the coal extracted, less the cost of raising it to the bank, from the end of February, 1923, until 1928, which he assessed at Rs. 5,69,445. He awarded Rs. 10,000 as damages for breach of contract. As against these sums he allowed a deduction of Rs. 30,000, which Jamalls had advanced to the plaintiff towards the price payable under the contract and which he regarded as earnest money: but he disallowed the deduction of payments by Jamalls to Creet, amounting to Rs. 7,641 15 as. 9 pies, to reimburse the latter for outlays. The learned Judge rejected all the defendants' contentions and gave decree for *khas* possession and for Rs. 5,49,545 with costs.

Defendant No. 3, Currimbhoys, appealed against this decree to the High Court, which disposed of the appeal on the 23rd August, 1929, by setting aside the decree of the Subordinate Judge so far as it related to Currimbhoys, save as to costs, and in lieu thereof decreed (*a*) that Currimbhoys should make over possession of all lands, surface and underground, mentioned in the plaint save and except the lands covered by the conveyance from the Sarkars in their favour, dated the 25th November, 1924, with a declaration that the plaintiff Creet was entitled to recover damages to the extent of his share in the lands at Karabagan during the period from the 28th July, 1924, to the 25th November, 1924; and (*b*) that in respect of such damages Currimbhoys should pay to Creet a sum out of Rs. 51,563 in proportion to his (Creet's) share in the lands at Karabagan, with interest. They further remanded the case to the lower Court to ascertain the sum so payable, and otherwise affirmed the decree of the lower Court.

It will be necessary later to explain and deal with the defence grounded on the conveyance by the Sarkars, but the decision of the High Court was based on a view of the contractual relations between the parties, which was repudiated by both parties before this Board. After February, 1923, certain negotiations took place between the parties, which finally terminated early in 1924. These negotiations were expressly stated to be without prejudice, but the High Court took the view that they culminated in December, 1923, in a concluded and binding contract, which superseded any previous contract there might have been. They took a slightly more liberal view of the deductions to be allowed in calculating the value of the coal extracted, and they omitted the damages for breach of contract as against Currimbhoys.

While previously there may have been some doubt current as to the law in India, it is remarkable that, throughout the pleadings, the judgments and the cases of appeal before this Board—indeed, until Counsel's attention was called to it at the hearing before their Lordships—no reference was made to the decision of this Board, dated the 20th December, 1922, in *Harichand Mancharam* v. *Govind Luxman Gokale,* 50 Ind. App. 25, which made clear that the principle of the English law which is summarised in the judgment of Parker J. in *Hatzfeld-Wildenburg* v. *Alexander* [1912], 1 Ch. 284, at p. 288. applies in India. Parker J. states :—

> It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored.

In the present case, if the execution of a formal agreement, as the plaintiff maintained and the Subordinate Judge held, was intended to be a condition of the bargain of May, 1920, it followed that the latter never became an enforceable contract and the finding of breach of contract disappeared. If, on the other hand, as maintained by the defendants, it was a mere expression of the desire for a formal agreement, it could be ignored, and any case of breach of contract by refusal to sign it equally disappeared. It follows, as conceded before their Lordships by plaintiff's Counsel, that it is no longer possible to treat the defendants as trespassers, their possession having been originally granted by the plaintiff.

The claim that the defendants were in breach of contract and that they were trespassers after February, 1923, being thus out of the way, their Lordships are of opinion, in the view that they take of the case, that it is immaterial whether there was a concluded contract or not, but it is necessary, first of all, to dispose of certain contentions maintained before them on behalf of Currimbhoys.

It was maintained on behalf of Currimbhoys that, as assignees of Jamalls, they were entitled to a decree for specific performance of a contract concluded in May, 1920, as maintained by them, or, failing that, a contract to be implied from the possession then obtained by them and the subsequent actings of both parties, whether these amounted to a waiver of the condition as to a formal agreement, leaving the remaining terms as a concluded contract, or necessarily implied the conclusion of a new agreement. While a perusal of the correspondence from May, 1920, to February, 1923, satisfies their Lordships that the demand for a formal agreement was repeatedly made and never

departed from by the plaintiff, and that no new agreement can be implied from the *res gestæ*, as the plaintiff's attitude precludes any such conclusion, any claim by the defendants for specific relief is now clearly barred by limitation and cannot be entertained. It was admitted by the defendants' Counsel that in the *mofussil* Court a counterclaim is incompetent, and any such claim must be enforced by a separate suit. No such suit has been raised, and any such claim has long ago suffered limitation under Article 113 of Schedule I to the Limitation Act, which prescribes a period of three years from the date fixed for performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused. The defendants' Counsel sought to found on a passage in the judgment of this Board in *Ariff* v. *Jadunath Majumdar* (1930), 58 Ind. App. 91, at p. 101 ; the passage is as follows :—

> Their Lordships find themselves in agreement with the High Court in the view that *Walsh* v. *Lonsdale*, 21 Ch. Div. 9, has no application to this case, owing to the fact that the respondent's right to enforce the verbal contract had been barred long before the commencement of the present suit. The respondent was not in a position to obtain specific performance of the agreement for a lease from the same Court and at the same time as the relief claimed in this action. Had he been so entitled, the position would be very different, for then the respondent could claim to have executed in his favour by the appellant an instrument in writing which he could duly have registered, the appellant's ejectment action being stayed in the meantime. In these circumstances the respondent would obtain complete protection, but consistently with and not in violation of the provisions of the Indian statute.

In the case suggested in the latter part of that passage, if the respondent had delayed until, at a date subsequent to the raising of the ejectment action, his right to institute the counter-action became barred by limitation, he would have been no better off than he was with the limitation bar in operation when the ejectment action was instituted.

There remains the contention of Currimbhoys based on the registered lease by the Sarkars in their favour, dated the 25th November, 1924, of their rights as co-sharers to the coal lying under 100 *bighas* of *bajeapti khas* and *khas khalasi* lands in Mouza Khandra, and, in particular, under Karbagan, which is part of the lands of which recovery of possession is sought by the plaintiff in this case. They maintain that the plaintiff's claim to *khas* possession must be limited accordingly, and that any claim to the value of coal extracted after 25th November, 1925, must also be so limited. The Subordinate Judge held that possession of all lands in the *mouza* by the defendants must be attributed to the possession given to Jamalls by the plaintiff and that, in view of Section 116 of the Evidence Act, they could not question the title of the plaintiff till they had surrendered possession to him. The High Court sustained the contention of Currimbhoys and, as already stated, found that the plaintiff's claim for *khas* possession and his claim for the value

of coal extracted must fail in so far as the property, surface and underground was covered by the lease of 25th November, 1924. It is difficult to follow their reason for excluding the operation of Section 116, especially as they found that Currimbhoys were in possession of the disputed colliery from September, 1922. Their Lordships agree with the finding of the Subordinate Judge that the possession of both Jamalls and Currimbhoys must be attributed to the possession given to Jamalls by the plaintiff in May, 1920, and they further agree with his conclusion that both defendants are barred by Section 116 from questioning the plaintiff's title until they have surrendered possession again to him. It was argued that Section 116 only excluded a challenge of the plaintiff's title as at the time when he gave possession to Jamalls, and that the plaintiff's title was only challenged as from and after the lease by the Sarkars, but the Sarkars only communicated to Currimbhoys the same title as they had held in May, 1920, for the plaintiff's action against the Sarkars proved, in its result, that he had no right to a title from them. Accordingly, any right of challenge open to Currimbhoys was equally open to the Sarkars in May, 1920, when Jamalls were given possession.

Their Lordships are therefore of opinion that the plaintiff Creet is entitled to *khas* possession of all the lands, surface and underground, in Mouza Khandra which are in the possession of the defendants, and that the defendants must account to the plaintiff for the value of the coal extracted by them during the period of their possession from the 1st June, 1920, onwards on the lines hereinafter indicated, subject to adjustment as regards certain payments which the plaintiff has received. For this purpose it will be equitable to revise the decree of the Subordinate Judge against defendants Nos. 1 and 2, as the claim for damages for breach of contract is not tenable, and all the defendants should be included in the same decree.

In the account to be taken, the plaintiff will be credited with the gross value of the coal, calculated, so far as available, on the prices actually realised by the defendants in open market and *quoad ultra* at current market prices, as nearly as these can be fixed by the Court. As against the gross value of the coal there will be charged all expenses properly incurred by the defendants in getting the coal, bringing it to bank and marketing it including any rents or royalties so incurred; if these are not ascertainable, the Court will fix a proper rate to be deducted from the gross value in respect of these matters. A deduction from the gross value will also be allowed, to be based on a reasonable rate of depreciation on any capital expenditure by the defendants in respect of development of the mines, structures above and below ground, boilers and machinery, properly incurred for colliery purposes. Any amount realised on their removal under decree of the Court is not

necessarily relevant to the determination of a proper rate of depreciation. The nett amount thus arrived at will form the first item in the account.

The defendants will be credited with the following amounts, viz. : (1) the sum of Rs. 30,000 advanced by them to the plaintiff, which was allowed as a deduction by the Subordinate Judge, (2) the sum of Rs. 7,641 15 as. 9 pies, paid by the defendants to Creet, which was disallowed by the Subordinate Judge, and (3) the sum of Rs. 55,000 paid into Court by the defendants, and subsequently paid out to the plaintiff.

It will be necessary to recall the decrees dated the 12th October, 1928, and the 23rd August, 1929, and to remand the case to the High Court to ascertain the balance due on an account taken on the above lines, the Court determining what interest, if any, should properly be allowed on any of the items, and to dispose of the case. Their Lordships will humbly advise His Majesty accordingly. No costs will be allowed in the lower Courts up to the present stage or in the present appeals ; any further costs will be dealt with by the Court in India.

In the Privy Council.

CURRIMBHOY AND COMPANY, LIMITED

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L. A. CREET AND OTHERS

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DELIVERED BY LORD THANKERTON.

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