Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Gregson v. *Raja Sri Sri Aditya Deb, from the High Court of Judicature at Fort William in Bengal; delivered* 14*th May* 1889.

Present:

LORD HOBHOUSE.
LORD MACNAGHTEN.
SIR RICHARD COUCH.

[*Delivered by Lord Hobhouse.*]

The Plaintiff seeks specific performance of an agreement under very peculiar circumstances. The agreement, at first oral, was afterwards reduced to writing. At that time the Defendant, who is the zemindar of Patkum in Chota Nagpore, was subject to the operation of Act VI. of 1876, passed to relieve the owners of encumbered estates in that district. The transactions between him and the Plaintiff were intended to release him from that restraint, and had the effect of doing so. When released he continued to deal with the Plaintiff on the footing of the agreement. And the question is whether he has thereby rendered himself liable to a decree for specific performance.

The Defendant's estate was put under management on his own application in July 1879. He is a man in middle life and of at least average mental capacity. But during the management he was placed under legal disability, which continued until his estate was released in the year 1884. By September 1884 his debts, which in 1879 were about Rs. 26,000, were reduced to Rs. 7,639.

56978. 125.—5/89. A

The material provisions of Act VI. of 1876, as amended by Act V. of 1884, with regard to property put under management and its owners, are as follows. The manager is to ascertain the debts and liabilities and to schedule them, and make a scheme for discharging them out of the surplus income. While the property is under management the holder is made incapable of mortgaging, charging, leasing, or alienating the same, and of entering into any contract which may involve him in pecuniary liability. On payment of all the scheduled debts and liabilities, or if an arrangement is made for their satisfaction which is accepted by the creditors and approved by the Commissioner, the holder is to be restored to the possession and enjoyment of his property.

In the early part of the year 1884 the Plaintiff and Defendant were in negotiation for a lease of the Patkum estate, by the latter to the former, but it was not till the month of September that the Defendant would offer terms acceptable to the Plaintiff. On the 5th of that month the Defendant presented the following petition to Mr. Clay, the Deputy Commissioner in the Encumbered Estates Department :—

"Petition of Maharaj Udoy Aditya Deb, inhabitant of Ichagurh, pergunnah Patkum, is to the following effect :—

"For the liquidation of my debts and for the improvement of my estate, my ancestral zemindari, pergunnah Patkum, in zillah Manbhoom, is under the management of the Encumbered Estates Department under Act VI. of 1876. Considering that there would be a great improvement in my zemindari if I let out the same in ijara to Mr. C. B. Gregson, I made a proposal to grant that ijara settlement at a rent of Rs. 16,441. 13. 6 pie, and to take a loan of Rs. 40,000 within three months from this date for the purpose of discharging my liabilities to the mahajuns. As the aforesaid Saheb Bahadoor agreed to these proposals, so, preparing a draft of the ijara pottah, determining to grant the ijara settlement to the aforesaid Saheb for a period of nineteen years from the beginning of the present year 1291 up to the year 1309, I have been filing it along with this petition ; and I pray that receiving from the aforesaid Saheb

Bahadoor the amount of my liabilities in the account of the Encumbered Estates, you will kindly pass an order for releasing the mehal from the management under Act VI. On the release of the aforesaid mehal from the Encumbered Estates management, I shall properly grant the pottah and receive the kabulyat according to the draft filed along with it, and separately execute registered bonds, and receive Rs. 15,000 for the present. The money that will be deposited by the aforesaid Saheb Bahadoor in the Encumbered Estates Department shall be credited against the rent of the ijara mehal for the present year. If on the release of the mehal I delay the granting of the ijara, then the aforesaid Saheb Bahadoor shall be able to take possession of the aforesaid mehal in ijara right and to get the pottah executed according to the draft filed along with it. As the property is under the control of the Encumbered Estates Department, I am now incompetent to grant the aforesaid settlement. I therefore pray that your worship will release the aforesaid mehal from the control of the Encumbered Estates Department. The ijara pottah and kabulyat will have to be executed on stamped papers, and at that time I shall enter the boundaries in the same. At present a draft only being prepared, is filed along with this petition.

"The 21st Bhadro 1291.

"MAHARAJ UDOY ADITYA DEB."

The draft lease filed with the petition specified a number of particulars with respect both to the loan of Rs. 40,000 and to the demised property, and to the payments by the lessee, which it is not necessary now to mention. And it contained the following stipulation:—

"Except the land fit for indigo cultivation you "shall not be able to take any settlement or "ijara of any lands within the ijara mehal from "any tenants, and especially from Birinchi "Narain, and if you take it I shall not be bound "by this pottah."

The draft lease was communicated to the Plaintiff, who on the 9th September objected that it omitted certain stipulations relating to limestone and to iron smelters. On this point there is dispute between the parties. It is not of any great importance, nor if it were decided against the Plaintiff would it impair his right to have the rest of the agreement performed.

The High Court have expressed no opinion which of the parties is right on this point. The Sub-Judge has found in favour of the Plaintiff, and no reason for disputing his opinion has been assigned.

On the 10th September the Plaintiff paid into the Collectorate Treasury the sum of Rs. 7,639 5 a. 10 p., and got a receipt as follows :—

By whom brought.	On what account.	Amount.
		R. A. P.
Mr. C. B. Gregson. Through Anund Chunder Roy.	On the proposal to take an ijara of pergunnah Patkum, according to the prayer of the zemindar of the aforesaid pergunnah, and under the order of the Commissioner, deposited on account of (illegible) estate for the purpose of releasing the aforesaid mehal from the control of the encumbered estates - - -	7,639 5 10
		7,639 5 10
	Total Rs. 7,639. 5. 10.	

" Examined and entered.

" T. CHATTERJI, Accountant.

" (Illegible) SINGH, Treasurer."

On the 15th September the sub-manager reported to the Deputy Commissioner as follows :—

" Dated Purulia,

" Sir, the 15th September 1884.

" I have the honour to report for your information that Mr. Gregson having deposited Rs. 7,639. 5. 10 for releasing the Patkum encumbered estate from attachment under Act VI. of 1876, all the scheduled debts have been paid off, and that from the balance still at credit of the estate, the law charges and other management charges still due by that estate can be easily paid. It is therefore not necessary to apply for Commissioner's sanction to release of the estate."

The Deputy Commissioner however thought that it was necessary to obtain the Commissioner's sanction, and he applied for it on the same day, stating the circumstances as stated

to him by the Sub-manager. The formal order for release, which is not in the record, was not made until the 8th October.

It is contended by the Plaintiff that on and after the 15th September the Defendant was freed from the operation of the Act, and that in the whole of his subsequent action with reference to the agreement he must be taken to have been *sui juris*. So far as regards the question whether the agreement has been validated or called into action so as to bind the Defendant, their Lordships think it makes little difference which of the two dates is taken as the date of emancipation. But the personal position of the Defendant bears on another portion of the case, viz., whether such an agreement as this is the proper subject of a decree for specific performance against a person so situated. The High Court have thought that it is not, and the correctness of their opinion is challenged in this appeal. Their Lordships certainly think that there is nothing in the transactions themselves to operate as a release of the estate. The scheduled debts were not paid; they were only transferred to another creditor, and the transfer was coupled with an agreement for a fresh loan by which the Defendant was loaded with debt more heavily than in 1879 when he sought the benefit of the Act. It is a matter of wonder to their Lordships that any order for release should have been made under such circumstances; but at all events they are clear that the Defendant was not *sui juris* until the order was made.

Returning to the narrative of transactions between the parties, we find a considerable amount of correspondence, oral and written, after the 15th September. Each deals with the other on the footing that the agreement is valid and binding. On the 3rd October the Defendant

wrote to the Plaintiff requesting him to pay the current instalment of revenue, Rs. 633. 9. 8, and the Plaintiff did pay that sum on the 6th. The Defendant never offered to repay that sum nor the larger sum paid to meet the scheduled debts.

On the 12th November, five weeks after the formal release of the estate, the Defendant wrote on the subject of Birinchi Narain. It has been seen that in the draft lease he stipulated that the Plaintiff should not acquire Birinchi's interest in the property; and both the written correspondence and the oral evidence of the Plaintiff show that he attached great importance to that matter. In point of fact the Plaintiff had received a lease from Birinchi before the Defendant presented his petition of the 5th September, and the Defendant knew all about it. In his letters previous to the 8th October he recurs more than once to the requisition that Birinchi's lease to the Plaintiff shall be cancelled as a condition of the Defendant executing his lease to the Plaintiff. On the 12th November he wrote to Anund Roy, the Plaintiff's agent, thus :—

"If the Saheb has come back from Calcutta, please speak to him and get the pottah of Birinchi Narain Aditya Babu returned. When this is done, I will go to Purulia, and I shall have no objection to register it. Before this, my only condition (*lit.* objection) was that the pottah of Birinchi Narain Aditya Babu should be returned, and I still hold to this condition. After these matters are settled, you will write to me in reply, and on that I will go and get it registered. Settle the matter and write to me in reply.

"The 28th Kartick 1291."

The Plaintiff answered this on the 18th November :—

"Yesterday I came here from Calcutta. The ijara settlement that was made with Birinchi Narain Aditya Babu has been cancelled. I am now sending you the palki and bearers, and hope that you will without delay come to this place and finish the execution, &c."

It is not suggested that Birinchi's lease was not cancelled as stated in this letter.

The negotiations still went on, the Plaintiff urging performance of the agreement, the Defendant making excuses but always treating the agreement as a subsisting one. On the 30th November he wrote to his own agent, but for the purpose of communicating with the Plaintiff, excusing himself for not having gone to Purulia to execute the lease, asking that the Plaintiff would come to the Defendant's residence, and adding "I will surely execute the instrument. I "have no objection," with more assurances to the same effect. On the 4th December he wrote requesting an advance of the whole loan at once, "albeit it has been arranged that the Rs. 40,000 "should be taken in two instalments." Not long after this the Plaintiff became convinced that the Defendant was trifling with him, and commenced the present suit.

In support of the decree of the High Court, which reversed that of the Sub-Judge and dismissed the suit, Mr. Mayne first argued that the transactions of September were wholly void as against the Defendant; and then that what is wholly void cannot be validated. But the answer is that such an argument does not meet the facts of this case. It is quite competent to a person emerging from a state of disability to take up and carry on transactions commenced while he was under disability in such a way as to bind himself to the whole. The present Defendant has done that and more than that. Not only has he taken, and, up to the time of suit and for aught that appears till now, retained the benefit of the Plaintiff's payments, but he has since the 8th October 1884 exacted from the Plaintiff a part of the consideration which was to move from him. At the Defendant's instance the Plaintiff

has given up the lease that he had obtained from Birinchi Narain, nor is it possible for the Defendant to replace the Plaintiff in his former position. The Defendant therefore is clearly bound by the contract, though its terms are to be ascertained by what passed when he was disabled from contracting.

Then it is contended that, though the contract may be binding, specific performance is not the proper remedy, and that on two grounds. First, because it is a contract for mortgage. But it is also a contract for a lease, and the two parts are easily separable. So far as the Plaintiff is concerned, he is bound, if he asks for the lease, to grant the loan. And he is willing to do that, but he is also willing to take the lease without insisting on the loan. It is true that it would be an idle thing to compel the Defendant to receive a loan which, there being no contract to the contrary, he might repay at once, or on reasonable notice. But if he wishes to be released from that part of the contract, it will not be carried into effect by the Court.

The second reason alleged for not awarding specific performance is that the contract is against the policy of the Encumbered Estates Act; and on this point their Lordships confess to having felt much difficulty, owing to the very peculiar circumstances of the case. But after careful consideration they think that they must not look beyond the order of the 8th October 1884. They have before intimated that the order is difficult to reconcile with the policy, or indeed with the literal terms, of the Act. But *factum valet;* the Commissioner was acting within his jurisdiction, and his order is not under review. By it the estate was in fact released from management; and it must be taken that its owner then became as free to manage his affairs as any other man. He has used his freedom to adopt the documents

of the 5th September 1884 as binding on himself, and he must now be compelled to act according to their tenor.

In their Lordships' judgment the High Court should have dismissed with costs the appeal from the Sub-Judge; and that decree should now be made. If the Plaintiff desires to have an account of the profits of the property during the time he has been kept out of possession, he has a right to that, he on his part accounting for the rents which would have been due from him. The Respondent must pay the costs of this appeal. Their Lordships will humbly advise Her Majesty accordingly.