Damodhar Tukaram Mangalmurti and Others

Vs

The State of Bombay

Civil Appeals Nos. 181 and 181-A of 1955

(Syed Jafar Iman, S. K. Das, J. L. Kapur JJ)

02.02.1959

JUDGMENT

S. K. DAS, J. -

These two appeals arise out of a litigation which has had a chequered career in the courts below. The short facts are these. The suit out of which the appeals arise was instituted on January 13, 1941, but the plaint was amended on May 4, 1942. The amended plaint was to the effect that in or about the year 1905 the defendant, the then Provincial Government of the Central Provinces and Berar, Nagpur, "opened up" an area Known as the Craddock Town Area which was originally called the Sitabuldi Extension Area or Dhantoli Area. Due to the scarcity of residential accommodation in the city of Nagpur, the then Provincial Government along with some prominent members of the Nagpur Municipal Committee devised a scheme to extend residential accommodation by acquiring agricultural land and making it available for residential purposes. With that object in view, the area in question was acquired and building sites of the average size of about 10,000 sq. ft. each were carved out. These were leased out on a premium of Rs. 350 and an annual rent of Rs. 3-8-0 each. The indenture of lease in each case contained a clause to the following effect :-

> "III. And the lessor does further covenant that he will at the end of the term of 30 years hereby granted and so on from time to time thereafter at the end of each successive further term of years as shall be granted at the request of the lessee execute to him a renewed lease of the land hereby demised for the term of 30 years; Provided that the rent of the land hereby demised shall be subject to such fair and equitable enhancement as the lessor shall determine on the grant of every renewal : Provided also that every such renewed lease of the land shall contain such of the covenants, provisions and conditions in these presents contained as shall be applicable and shall always contain a covenant for further renewal of the lease."

One of the leases was executed on May 24, 1909, and some other leases near about that year. By the year 1939 the first 30 years' period of some of the leases came to an end. The original plaintiffs, who were two in number and who sued in their individual right as also representing the members of an association known as the Craddock Town Plot-holders Association alleged that on the expiry of the terms of the leases in question, during which period some of the lessees had built houses on the leasehold property, the then Provincial Government proposed an enhancement of Rs. 21-14-0 from Rs. 3-8-0 as annual rent and also the insertion of some new terms in the renewed deeds of lease. The plaintiff, on the contrary, said that Rs. 7 per plot was the fair and equitable enhancement. Various representations to the relevant authorities having proved unavailing, the plaintiffs instituted the suit in which they prayed (a) that the enhancement of rent from Rs. 3-8-0 to Rs. 21-14-0 per plot was not

fair and equitable within the meaning of cl. III of the deed of lease; (b) that the offer of Rs. 7 as annual rent made by the association was fair and reasonable; (c) that the defendant do insert in the renewed deeds of lease only such conditions as were to be found in the original deed and not to add to them to the detriment of the lessees' interest; and (d) that in the event of this Court not agreeing that Rs. 7 was a fair and reasonable rent, a fair and equitable rent should be fixed by it. The suit was contested by the defendant on several grounds, with most of which we are not now concerned.

The learned Subordinate Judge of Nagpur, who dealt with the suit in the first instance, took up certain preliminary issues for decision and by a judgment dated April 13, 1942, he disposed of those preliminary issues. One such issue material for our purpose was in these terms : "In case of dispute as to what is fair and equitable rent, has the civil court no right to determine what is fair rent ?" On this preliminary issue, he found "that under the terms of cl. III of the indenture of lease, the defendant was entitled to fix a fair and equitable rent; but the civil court has jurisdiction to enquire whether the rent fixed by the defendant is fair and equitable within the meaning of cl. III". We need not refer to the other preliminary issues on which the learned Subordinate Judge gave his decision, because those issues no longer survive. On the disposal of the aforesaid preliminary issue, the plaint was amended and some more lessees were added, the 30 years' period of whose leases had also expired; therefore the position was that the plaintiffs were those lessees, the 30 years' period of whose leases had expired and as respects the renewal of whose leases the defendant had proposed an enhancement of Rs. 21-14-0. The defendant claimed that it had been very reasonable in fixing the enhanced rent and it further claimed the right of withdrawing the offer of Rs. 21-14-0 and of making a fresh demand at a much higher rent if the lessees did not agree to the terms originally proposed by the defendant. The defendant further denied that the offer of Rs. 7, that is, twice the original rent, made by the lessees was a reasonable and fair enhancement.

After the disposal of the preliminary issues the learned Subordinate Judge proceeded to try the suit on merits and on January 2, 1945, he found on issue no 4 that Rs. 14 per year would be the fair and equitable enhanced rent for each plot of about 10,000 sq. ft. and he fixed that rent for the next term of 30 years to which the lessees were entitled under cl. III; he further directed the grant of a rebate of 25 per cent. to those lessees who agreed to a renewal for a term ending in 1948.

From the decision of the learned Subordinate Judge two appeals, one by the plaintiffs, and the other by the defendant, were taken to the District Judge and they were heard by the Additional District Judge of Nagpur, who by his Judgment dated February 21, 1946, affirmed the decision of the learned Subordinate Judge that under cl. III of the indenture of lease it was open to Subordinate Judge to determine what was the fair and equitable rent. The learned Additional District Judge, however, reversed the finding of the learned Subordinate Judge as to the quantum of the fair and equitable rent. He came to the conclusion that the enhancement of rent should not exceed Rs. 7, as any increase over that amount would not be a fair and equitable one within the meaning of cl. III of the indenture of lease.

From the decision of the learned Additional District Judge, two appeals were taken to the then High Court of Judicature at Nagpur by the defendant Government. The appeals were first placed before a single Judge who directed that they should be heard by a Division Bench. The appeals were then heard by B. P. Sinha, C.J. (as he then was) and Mudholkar, J. The learned Chief Justice came to the conclusion that the suit must fail on the ground that the authority of the court had been invoked in a matter which really lay in contract and the civil court had no jurisdiction to determine the fair and equitable rent. Mudholkar, J., came to a contrary conclusion and held that the suit was maintainable and the courts below could determine the fair and equitable rent. On the question of what should be

the fair and equitable rent, the learned Chief Justice gave no finding except saying that "the decision of the lower appellate court on the question of assessment of fair and equitable rent was not satisfactory, because it had gone more by the rule of the thumb than upon the evidence adduced in the case or upon any other sound basis." Mudholkar, J., however, said that he saw no adequate ground for differing from the view taken by the lower appellate court with regard to the quantum of fair and equitable rent. On this difference of opinion between the learned Chief Justice and Mudholkar, J., the case was referred to a third Judge, namely, Hemeon, J., who agreed with the view of the learned Chief Justice that, on a proper construction of cl. III of the indenture of lease, the civil court had no jurisdiction to determine the fair and equitable rent and the parties had consciously and deliberately stipulated to abide by the lessor's fixation of a fair and equitable enhancement of rent; and in that view of the matter, he expressed no opinion as to what should be the fair and equitable rent.

In accordance with the opinion of the majority of Judges, the appeals in the High Court were allowed and the suit was dismissed with costs. The plaintiffs, who are the appellants here, then asked for a certificate of fitness under Art. 133(1)(c) of the Constitution of India. The High Court granted the necessary certificate by an order dated October 23, 1953, and the present appeals have been filed in pursuance of that certificate. The area in question being now within the State of Bombay, the State of Bombay has been substituted as the respondent before us.

The principal question before us is one of construction of cl. III of the indenture of lease. On behalf of the appellants it has been argued that the construction put upon the clause by the majority of Judges in the High Court is not correct inasmuch as it gives no effect to the words "fair and equitable enhancement" occurring therein. On behalf of the respondent, it has been submitted that the expression "subject to such fair and equitable enhancement as the lessor shall determine" is tantamount to saying "subject to such enhancement as the lessor shall determine to be fair and equitable"; in other words, the argument of learned counsel for the respondent is that the parties had deliberately chosen to abide by whatever was determined to be fair and equitable enhancement by the lessor. Mudholkar, J., had proceeded on the footing that the primary intention of the parties was that the enhancement must be fair and equitable and the adjectival clause "as the lessor shall determine" following the word 'enhancement' being subordinate to the primary intention of the parties could be ignored. Learned counsel for the respondent has very strongly submitted that this view is not correct.

We think that the clause should be read as a whole and every effort should be made to give effect to all the words used therein. The relevant portion of the clause states - "such fair and equitable enhancement as the lessor shall determine". If the construction is that whatever the lessor determines as fair and equitable enhancement must be treated as binding on the lessee, then the words 'fair and equitable' are not given the meaning and sense which they have according to the ordinary acceptation of those words. 'Fair' and 'equitable' mean fair and equitable in fact, and not what the lessor subjectively considered to be fair and equitable. The words 'fair' and 'equitable' both means 'just or unbiased' (see the Concise Oxford Dictionary, 4th Edn., p. 426 and p. 402). If the intention was to leave the enhancement to the subjective determination of the lessor, the clause would have more aptly said - 'such enhancement as the lessor shall determine'. We consider that the words 'fair and equitable' must be given their due meaning and proper effect. The question then asked is - what meaning is to be given to the words 'such..... as the lessor shall determine'. It is indeed true that these words constitute an adjectival clause to the expression 'fair and equitable enhancement', but we consider that the meaning of the adjectival clause is merely this : the lessor must first determine what it considers to be fair and equitable enhancement; but if in fact it is not so, it is open to the

lessee to ask the Court to determine what is fair and equitable enhancement. We do not think that on a proper construction of the clause, the intention was to oust the jurisdiction of the Court and make the determination of the enhancement by the lessor final and binding on the lessee. We think that the conclusion at which Mudholkar, J., arrived on this point was correct, though not exactly for the reasons given by him.

If the construction stated above is the correct construction, then no further difficulty is presented by cl. III. The learned Judges of the High Court unanimously expressed the view that the lease was not void for uncertainty, and in that view we concur. There is authority in support of the view that a covenant to settle land 'at a proper rate' or 'upon such terms and conditions as should be judged reasonable' is not void for uncertainty (see The New Beerbhoom Coal Company Limited v. Boloram Mahata and Other ((1880) L.R. 7 I.A. 107.) and Secretary of State for India in Council v. Volkart Brothers ((1926) I.L.R. 50 Mad. 595.)). In the former case, Sir Barness Peacock who delivered the judgment of their Lordships said :

> "The High Court affirmed the decision, but not for reasons which their Lordships consider to be correct. They affirmed it upon the ground that it was impossible to determine what was a reasonable rate. Their Lordships cannot think that in the present case the Court, upon a proper inquiry, would have been unable to determine it. There might have been considerable difficulty in fixing the rate; but difficulties often occur in determining what is a reasonable price or a reasonable rate, or in fixing the amount of damages which a man has sustained under particular circumstances. These are difficulties which the Court is bound to overcome."

Our attention has been drawn to some English decisions in which the point arose if a contract which appoints a way of determining the price can be specifically enforced. There are two lines of decisions. In Milnes v. Grey ((1807) 14 Ves. 400; 33 E.R. 574.) the contract provided that the price shall be valued by two different persons to be nominated and if they happened to disagree then those two persons shall choose a third person whose determination shall be final. The question was whether such a contract could be specifically performed and the answer given by the Master of the Rolls can be best put in his own words :

> "The more I have considered this case, the more I am satisfied, that, independently of all other objections, there is no such agreement between the parties, as can be carried into execution. The only agreement, into which the Defendant entered, was to purchase at a price, to be ascertained in a specified mode. No price having ever been fixed in that mode, the parties have not agreed upon any price. Where then is the complete and concluded contract, which this Court is called upon to execute ?"

In Taylor v. Brewer ((1813) 1 M. & S. 290; 105 E.R. 108.) a claim to compensation was founded on the resolution of a committee which provided that "such remuneration be made as should be deemed right". It was held that the engagement was merely an engagement of honour and no claim could be made on it. An example of the other line of decisions is furnished by Gourlay v. The Duke of Somerset ((1815) 19 Ves. 429; 34 E.R. 576.). In that case the agreement provided for "all such usual and proper conditions, reservations, and agreements, as shall be judged reasonable and proper by John Gale, land surveyor, and in case of his death, by some other proper and competent person to be mutually agreed upon by the said parties". The plaintiff came to court and the question arose whether the reference to settle the lease to be made by the defendant to the plaintiff should be to the Master or to Mr. Gale, the defendant contending that the court decreeing specific performance will

take the whole subject to itself and determine by its own officer, not by a particular individual, what are usual and proper covenants. Sir William Grant, Master of the Rolls, said :-

> "When the agreement is, that the price of the estate shall be fixed by arbitrators, and they do not fix it, there is no contract as the price is of the essence of a contract of sale, and the Court cannot make a contract, where there is none; but, where the Court has determined, that the agreement is binding and concluded and such as ought to be executed, it does not require foreign aid to carry the details into execution. Gale's agency is not of the essence of this contract..... If the parties had gone to Gale, and got him to settle a lease, and one of them had object to the covenants as improper, and the Bill had been filed by the other, the Court would have inspect the lease; and if it were found unreasonable, would not have decreed an execution of the agreement."

We consider that the present case comes within the rule laid down in Gourlay v. The Duke of Somerset ((1815) 19 Ves. 429; 34 E.R. 576.). Learned counsel for the respondent placed strong reliance on Collier v. Mason ((1858) 25 Beav. 200; 53 E.R. 613.). That was a case in which the defendant had agreed to purchase a property at a valuation to be made by AB; the Court, though it considered AB's valuation very high and perhaps exorbitant, decreed specific performance, there appearing neither fraud, mistake or miscarriage. The case was decided on the footing that the contract provided that the property shall be purchased at such a price or sum as should be fixed by reference to AB, and it was pointed out that there being no evidence of fraud, mistake or miscarriage the parties were bound by the contract they had made. There was no question in that case of the court stepping in, under the terms of the contract, to determine what was fair and reasonable. Learned counsel for the respondent also relied on Tekchand Kapurchand v. Mr. Birzabai (A.I.R. 1942 Nag. 119.). The principle laid down therein was that a contract binds the parties to it and their representatives and the court's power to interfere with contracts is limited to such cases as fraud, undue influence or mistake and relief against penalty or forfeiture. Indeed, we agree that if the contract in the present case was that whatever the lessor determined as the enhanced rent would be binding on the parties, then the court has no power to interfere with that contract unless it is vitiated by fraud, undue influence, mistake, etc. If, however, the proper construction of cl. III of the contract is what we have held it to be, then the contract itself provides that the enhanced rent though determined by the lessor in the first instance, must be fair and equitable. On such a construction the determination of the enhancement by the lessor would not be final and it would be open to the court to determine what is fair and equitable enhancement.

We say this with respect, but the Patna decisions (Secretary of State for India in Council v. Nistarini Annie Mitter ((1927) I.L.R. 6 Pat. 446.) and Secretary of State v. Babu Rajendra Prasad (A.I.R. 1937 Pat. 391.)), referred to by the learned Chief Justice in his judgment are not in point. Those decisions were not concerned with interpreting a clause in the agreement like the one before us and it was rightly held that in the absence of a contract between the parties, the court had no power to impose upon the parties a bargain not of their own making.

For the reasons given above, we hold that the decision of the majority of the learned Judges of the High Court with regard to the interpretation of cl. III of the indenture of lease is not correct and these appeals must go back for a fresh hearing by the High Court in accordance with law for determination of what should be the fair and equitable enhancement. On that point there was no concluded finding by the majority of the learned Judges of the High Court, but learned counsel for the appellants submitted that the finding of the Learned Additional District Judge on the quantum of

fair and equitable enhancement was a finding of fact and therefore binding in second appeal. At this stage we express no opinion on such a submission, nor do we express any opinion whether the courts below of any of them have gone wrong in principle in determining what should be the fair and equitable enhancement and whether on merits it should be Rs. 7 or Rs. 14 or Rs. 21-14-0, or even a higher sum. All these points must be considered afresh by the High Court.

There is a further point which must also be dealt with in the High Court. The learned Subordinate Judge decided on issue no. 7 with regard to the conditions for a renewal of the lease that the Government were not entitled to make any alterations in the clauses relating to re-entry and notice of demand as contained in cl. II of the original lease. The learned Addl. District Judge said :

> "As regards the new form of lease, it is clear that the clause regarding building would be deleted if it is found to be superfluous or redundant. while that in respect of right of lessor to enter on the land without a demand of ground rent (in case of failure to pay it on the appointed date) it is not necessary to interfere as it would amount to making a contract for the parties. It is better to leave the matter to the parties and their legal advisers."

Whether the view of the learned Subordinate Judge or of the District Judge is correct or not was not considered by the High Court and as the appeals are going back on remand this point should also be dealt with by the High Court.

Accordingly, we allow the appeals and set aside the judgment and decree of the High Court dated September 30, 1952. The appeals must go back for a fresh hearing by the High Court in accordance with law and in the light of the observations made above. In the peculiar circumstances of this case, there will be no order for costs of the hearing of the appeals in this Court. Costs incurred in the two courts below and costs incurred in the High Court, both before and after remand, will be dealt with by the High Court when finally disposing of the appeals.

KAPUR, J. -

I regard I am unable to agree in the proposed judgment that it is open to the Court in the circumstances of this case to go into the question of the valuation and to determine as to what, in its opinion, would be fair and equitable enhancement in rent and to interfere with the enhancement as determined by the lessor under the terms of the indenture of lease executed on May 24, 1909. The original lease was for a term of 30 years with a provision for renewal for another 30 years with the proviso that the rent of the land demised was "subject to such fair and equitable enhancement as the lessor shall determine".

The facts are set out in the judgment of my learned brother, S. K. Das, J., and it is not necessary to repeat them. Plots of land measuring about 10,000 sq. ft. were given on lease by the Government to the appellants and others, for which the premium to be paid was Rs. 350 and the rent Rs. 3-8-0 per annum or Re. 1 per cent. of the premium. Lease deeds were executed in 1909 under clause III of which the lessor determined the enhanced rent at Rs. 21-14-0 and thus raised it from Rs. 3-8-0 per plot to Rs. 21-14-0. The appellants brought a suit for declaration that the enhancement proposed was excessive and the fair and equitable rent should be Rs. 7 per plot and if the Court was of the opinion that Rs. 7 was not a fair and equitable rent then it should fix such sum as it considered fair and equitable. The respondent pleaded that such a suit was incompetent. The question for decision is what is the effect of using the adjectival words "fair and equitable". For the appellants it was argued

that because in the lease deed the enhancement contemplated was qualified by the words "fair and equitable" the determination became clothed with a qualification which made it subject to judicial review and determination because it was for the Court to say whether the determined enhancement conformed to the standard prescribed in the disputed clause or not. The respondent contended on the other hand that the rule applicable to determinations by valuers is that it is conclusive and cannot be overhauled except upon proof of fraud and imposition of gross misconduct. Thus according to the submission of the appellant the clause in dispute means such enhancement as the lessor shall determine and which determination shall, in the opinion of the Court, be fair and equitable and according to the respondent it means that the amount of enhancement shall be fair and equitable shall be determined by the lessor, such determination being conclusive. The appellants do not contend that the lessor is not a valuer and that if the qualifying words "fair and equitable" had not been used then the enhancement determined would not be conclusive but the contention is that by using these words the quality and the quantity of enhancement is no longer in the sole determination of the lessor but the final determination must be of the Court because otherwise any fanciful amount would have to be accepted as fair and equitable and that the parties intended that the lessor was not the final determiner of the quality and quantity of enhancement and his determination was not conclusive but the lessee if dissatisfied could get the matter reviewed by the Court.

In my view the correct interpretation to be put on this clause of the lease deed is what is contended for by the respondent. The lessor was given the authority to determine the enhancement but such enhancement was to be fair and equitable and what would be fair and equitable in any particular case was also to be determined by the lessor. The lease deed entered into between the parties is dated May 24, 1909. In the first clause are given the usual obligations of the lessee as to payment of rent, the purpose of the building to be constructed, the period in which it was to be completed, the design of the building and keeping it in proper condition. In the second clause of the agreement the lessor covenanted peaceful possession subject to the right of the lessor to recover rent as arrears of land revenue and other remedies for non-observance of the obligations contained in the first clause with a provision for re-entry upon failure of certain conditions. In the third clause the lessor covenanted for grant of lease for further periods of 30 years at the request of the lessee with the following proviso :

> "Provided that the rent of the land hereby demised shall be subject to such fair and equitable enhancement as the lessor shall determine on the grant of every renewal".

This is the disputed clause. Now it appears that this further covenant was for the benefit of the lessee and the reservations made are couched in such language which left the discretion in regard to enhancement of rent to the lessor. What the enhancement was to be and what would be fair and equitable was left to the determination of the lessor. It is not an unusual provision in a lease for a long term of years with provision for renewal to leave the question of rent to be determined by the lessor or an outside valuer and it would not, in my respectful opinion, be a correct interpretation to say that the enhancement by a valuer would be unchallengeable if the adjectival words "fair and equitable" are not used but would be subject to court's review if these words are employed. That is going contrary to the very notion of valuations and their legal incidence. The extent of the power of courts over valuations by valuers has been stated in text books and in certain decided cases. In Williston on Contracts, Vol. 3, s. 802, at p. 2252 the law is stated thus :

> "In the absence of fraud or mistake, the price fixed by agreed valuers is conclusive upon the parties. Though an excessively large or an unreasonably small price involves some element of penalty or forfeiture, the possibility of this is not enough to

> overcome the express terms of the contract in the absence at least of fraud, gross mistake, or such arbitrary conduct as is outside what the parties could have reasonably contemplated".

And it is not a far step to say that in all cases of valuation the parties do contemplate a fair and equitable amount to be fixed or determined and not any price fanciful or otherwise.

In Collier v. Mason ((1858) 25 Beav. 200; 53 E.R. 613.) the defendant agreed to purchase a property at a valuation to be made by a third party. The defendant repudiated the value as exorbitant and refused to complete his contract and the plaintiff-vendor instituted a suit for specific performance. The Court held that the valuation was very high and perhaps exorbitant but it decreed specific performance of the contract as there appeared no fraud, mistake or miscarriage. It was said by the Master of the Rolls. "It may have been improvident as between these parties to enter into a contract to buy and sell property at a price to be fixed by another person, but that cannot avoid the contract. Here the referee has fixed the price, which is said to be evidence of miscarriage, but this Court, upon the principle laid down by Lord Eldon, must act on that valuation, unless there be proof of some mistake, or some improper motive, I do not say a fraudulent one; as if the valuer had valued something not included, or had valued it on a wholly erroneous principle, or had desired to injure one of the parties to the contract; or even, in the absence of any proof of any of these things, if the price were so excessive or so small as only to be explainable by reference to some such cause; in any one of these cases the Court would refuse to act on the valuation". It does not appear that in that case the words "fair and equitable" were used but that is implied in every reference for valuation to be made by an agreed referee. He cannot act in a fanciful or a corrupt manner or with puerile motives nor can he make a valuation which he does not consider to be fair and equitable.

In cases of transfer of property the form of contract to buy and sell may make a provision and very often such a provision is made that the price payable shall be that which a certain valuer shall fix. Such a requirement is an express condition or a condition implied in fact qualifying the obligation of the buyer to pay the price and such a contract cannot be performed unless the valuation first takes place. Such a condition is a necessary condition or an inherent condition. Williston on Contracts, Vol. 3, s. 800; Firth v. Midland Railway Co. ((1875) L.R. 20 Eq. 100, 112.). In such contracts it must be assumed that the parties laid weight on the particular individuality of the valuer. Accordingly if the valuer dies or refuses to act the buyer cannot be compelled to pay the price. A similar condition is common in long-term leases and in provisions for renewal of leases and where the parties choose to abide by the determination of a valuer and that valuation is not acceptable to one of the parties, Courts will not interfere, the only exception being fraud, mistake or misconduct.

In Vickers v. Vickers ((1867) L.R. 4 Eq. 529.) which was a suit for specific performance of a contract enforcing an option of purchase where the stock was to be valued in the usual way by two valuers and one of the valuers was not allowed to proceed, it was held that there was no contract between the parties which the Court could specifically enforce. Sir W. Page Wood, V.C., said at p. 535 :

> "If a nomination of that kind fails, or if the two persons named do not make their award, this Court has said there is no constat of the price; the contract is not a complete contract, and there is nothing on which it can act".

In Weekes v. Gallard ((1869) 21 L.T. 655.) where a contract was entered into for the sale of certain property, the price to be fixed by two valuers who afterwards valued the property at inadequate

price, it was held that in the absence of fraud or collusion on the part of the valuer, the buyer was entitled to specific performance of the contract. Lord Romilly said :-

> "The court has really no discretion in the matter. The discretion of the court is bound, as Lord Ellen-borough says, by fixed rules. In one case of this kind a house and furniture were valued at three times their value, and yet there was a decree for specific performance. The only defence to such a suit would be fraud or collusion".

A valuer may, in one sense, be called an arbitrator but not in the proper legal sense of the term. Per Lindley, L.J., In re Carus Wilson & Green ((1886) 18 Q.B.D. 7, 10.). But there is this difference between arbitration and valuation that the object of the former is to settle a dispute which has arisen and of the latter to avoid a dispute arising. The arbitrator is called in to settle judicially any matter in controversy between the parties and the valuer by the exercise of his knowledge and skill has to make a valuation the object being to prevent disputes from arising. A valuer like an arbitrator is required to act fairly and diligently. He cannot act in a fanciful or a perverse manner and his determination must be fair and equitable whether the authority given to him uses these words or not. But once a valuation is properly made the valuation is conclusive as between the parties and the Court in the absence of fraud, mistake or collusion can no more go into whether it is fair and equitable than a Court can sit in appeal against the award of an arbitrator as to what would be fair amount of damages in a particular case of breach of contract. See also Emery v. Wase ((1801) 5 Ves. 846, 847, 848; 31 E.R. 889.).

The decision in Gourlay v. Somerset (Duke of) ((1815) 19 Ves. 429; 34 E.R. 576.) was relied upon by the appellants in support of their case. That does not, in my opinion, deal with the matter now before us. There the suit was for specific performance of an agreement to grant a lease. One of the conditions of the contract was that the farm was to be let on conditions, reservations and agreements "as shall be judged reasonable and proper by John Gale.....". The Court was of the opinion that Gale's agency was not of the essence of the contract and that it could not be contended that the contract was to end if Gale refused to settle a lease. The Court said :

> "Suppose the reference is made to Gale; is his decision liable to exception ? If it is, the decision with regard to the propriety of the lease will ultimately be that of the Court. If not, the Court may be carrying into execution a lease, which it may think extremely unreasonable and improper. If the parties had gone to Gale, and got him to settle a lease, and one of them had objected to the covenants as improper and the Bill had been filed by the other, the Court would have inspected the lease; and if it were found unreasonable, would not have decreed an execution of the agreement".

That was a case relating to covenants other than fixation of price. With regard to the valuation or fixation of price it was said that if an agreement was that the price of the estate would be fixed by arbitrators and they did not fix it there was no contract of sale as the contract as to the mode of fixing the price was of the essence of the contract of sale and the Court could not make a contract where there is none. Similarly it may be said that where the valuation is fixed by a valuer the court will hold it conclusive in the absence of fraud or mistake or misconduct. The Court will not enter into the propriety of the valuation made or substitute its own valuation in place of that determined by the valuer because that will not be an execution of the contract of the parties but making a contract for them.

The Transfer of Property Act contains no provision by which the Court is empowered to fix rent of

premises demised although by legislation in the case of agricultural holdings certain tribunals have been set up to make such determinations. The appellant relied on The New Beerbhoom Coal Company v. Boloram Mahata ((1880) L.R. 7 I.A. 107.). The covenant between the parties was :-

> "Within that aforesaid mouzah we will not give a pottah, let give settlement to anybody. If you take possession according to your requirement of extra land over and above this pottah, and we shall settle any such lands with you at a proper rate".

A suit was brought by the lessees against the lessor to obtain specific performance to execute a permanent lease of a large area of land claiming benefit of the covenant above given and contended that the defendants were bound to let them the land whenever called upon to do so. The appellant company stated that they had negotiated with the lessor for lease of the adjoining land (not of land which they had agreed to lease) upon the terms that they were to pay Rs. 1-8-0 for waste land and Rs. 3 for cultivable land and the suit was for the grant of specific performance of the agreement by compelling the lessor to grant them the lease at those rates and if the Court would not order the lease at those rates then at such rates as the Court shall think reasonable. The trial Court held that apart from 51 bighas mentioned in the covenant the lessor could not be compelled to grant a lease for the remaining land of the mouzah. The High Court affirmed this decision but on the ground that it was impossible to determine what was the reasonable rate. Sir Barnes Peacock said :-

> "Their Lordships cannot think that in the present case the court, upon a proper inquiry, would have been unable to determine it (proper rent). There might have been considerable difficulty in fixing the rate; but difficulties often occur in determining what is a reasonable price or a reasonable rate, or in fixing the amount of damages which a man has sustained under particular circumstances. These are difficulties which the Court is bound to overcome".

These observations of the Privy Council are relied upon by the appellants to support the argument that it is open to the Court to determine what the reasonable rate would be. This was not a case where any question of valuation arose nor was it a case where a valuation made by a valuer was sought to be reviewed as not being proper and apart from the fact that the observations are mere obiter this case is no authority for saying that the determination of a valuer is subject to review by courts.

Another case which the appellant relied upon was The Secretary of State for India v. Volkart Brothers ((1926) I.L.R. 50 Mad. 595.). There, in a deed of lease granted for 99 years by the East India Company there was a clause for renewal for another like period on the lessee paying a sum of money and "upon such terms and conditions as should be judged reasonable". The Secretary of State assigned a major portion of the holding to a third party and Volkart Brothers before the expiry of the original lease period tendered the due amount and asked for renewal of the lease which the Secretary of State refused to renew and sued to eject the lessees and the latter sued for specific performance of the covenant for renewal. It was held by a majority that the covenant was not unenforceable on account of uncertainty. Krishnan, J., was of the opinion that such a covenant was too vague and uncertain and unenforceable because the clauses to be inserted in the contract were themselves uncertain and the contract could not be enforced. Venkatasubba Rao, J., was of the opinion that if the parties would not agree to a reasonable rent the Court will intervene and fix it; The New Beerbhoom Coal Company v. Boloram Mahata ((1880) L.R. 7 I.A. 107.) was relied upon. Coutts Trotter, C.J., was also of the opinion that the covenant was not too vague to be enforced. But this again was case not of interfering with the determination of a valuer but of specific performance

of a contract of renewal and it was held that by taking evidence even a vague and indefinite covenant relating to renewal could be made definite.

In my opinion, therefore, the Court cannot go into the question of correctness or otherwise of the determination of the lease and the appeal should therefore be dismissed with costs.

By Court. - In view of the opinion of the majority, the appeals are allowed, setting aside the judgment and decree of the High Court dated September 30, 1952. No order as to costs of the hearing in this Court.

Appeals allowed.

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