CALCUTTA HIGH COURT

Moulvi Ali Hossain Mian

Vs

Rajkumar Haldar

(.K. Mukherjea ,J.)

02.04.1943

JUDGMENT

B.K. Mukherjea, J.

1. This appeal is on behalf of the defendants, and it arises out of a suit commenced by the plaintiffs to enforce a right of pre-emption in respect to certain lands which are described in Schedule (ga) to the plaint. The material facts lie within a short compass and are for the most part undisputed. The plaintiffs' case is that the lands of Schedule (ka) to the plaint constituted a raiyati holding which belonged to the plaintiffs as occupancy raiyats. A one-fourth share of this holding, which is described in Schedule (kha) was let out to defendant 6 as an under raiyat, but the latter by unfair means succeeded in getting his name recorded as a cosharer with the plaintiffs in respect to that one. fourth share. The plaintiffs thereupon in-stituted a suit against defendant 6, and to this suit one Nawab Ali and his wife defendant 7, in whose favour defendant 6 was said to have executed a kobala were made parties. The suit culminated in a compromise to which the plaintiffs and defendants 6 and 7 were parties. Under the terms of the compromise, Plot No. 2 of Schedule (kha) land, which is specified in Schedule (ga) to the plaint, was given entirely to defendant 6, and it was agreed by and between the parties that in case defendant 6 wanted to sell that plot or borrow any money on the security of the same, he would be bound to offer it for sale or mortgage to the plaintiffs in the first instance; and unless the plaintiffs refused to. purchase or accept a mortgage of the said property at the then prevailing rate, the defendant would not be entitled to transfer it to any other person. The solenama further provided that the stipulation would be binding not only on the contracting parties but on their heirs and successors as well. Defendant 6, it is said, in violation of the terms of the solenama sold Schedule (ga) land to defendants 1 to 4 in the benami of defendant 5 for a consideration of Rs. 175 and the purchasers took the property with full notice of the aforesaid covenant. The plaintiffs therefore instituted the present suit to enforce their rights of pre-emption against the defendants on the basis of the solenama mentioned above.

2. The defence in substance was of a two-fold character: It was contended, in the first place, that the covenant giving the plaintiffs a right of pre-emption was illegal and unenforceable in law. The second contention was that the purchasers defendants having purchased the land for value without notice of the covenant, no right of pre-emption could be asserted against them. The trial Court overruled both these contentions and gave the plaintiffs a decree. On appeal this judgment was affirmed by the Additional District Judge of Tipperah. It is against this decision that the present second appeal has been preferred. Mr. Pakrasi, who appears in support of the appeal, has pressed only one point for our consideration, and his contention is, that the covenant for pre-emption is void altogether as offending the law against perpetuities, and it is not enforceable even between the original contracting parties. In support of his contention he has placed reliance upon a number of decisions of this Court. The point raised 4s of some nicety and importance, and it cannot be disputed that there is considerable divergence of judicial opinion regarding it. 'A perpetuity,' as defined by Lewis in his well-known book on the subject, is a future limitation, whether executory or by way of remainder, and of either real or personal property which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests. (Lewis p. 164.)

3. It is well settled that an agreement, which does not create an estate or interest in land either in law or equity, would not come within the mischief of the perpetuity rule. This has been made clear in Section 14, T.P. Act, which codifies the Indian law on the subject, and which provides that no transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of such transfer and the minority of some person who shall be in existence at the expiration of that period and to whom, if he attains full age, the interest created is to belong.

4. In (London & South Western Ry. Co. v. Gomm. (1882) 20 Ch. D. 562, which is the leading English authority on this point, the plaintiff company conveyed certain lands to. Powell in 1865, and Powell covenanted with the company that he, his heirs and assigns, would at any time, on receipt of £100 re-convey the lands to the company. In 1879 the defendant Gomm purchased the land from Powell's heirs with notice of the above covenant, and in 1880 the company gave the defendant a notice to re-convey the land, and on his refusal brought the suit for specific performance. Kay J. gave the plaintiff a decree, being of opinion that as the covenant did not create any estate or interest in the land, it was not obnoxious to the rule against perpetuity. This decision was reversed by the Court of appeal, and it was held that the option to purchase created an equitable interest in the land which attracted the operation of the perpetuity rule. Sir George Jessel, M.Rule, observed in his judgment, that the right to call for conveyance of land was an equitable interest or equitable estate. There was no doubt about it in an ordinary case of contract for purchase, and an option for re-purchase did not stand on a different footing. "It seems to me,"

thus observed the learned Master of the Rolls, that in a Court of equity it is impassible to suggest that there is any real distinction between these two cases. There is in each case the same fetter on the estate and on the owners of the estate for all time, and it seems to be plain that the rules as to remoteness apply to one case as much as to the other.

5. In English law a contract for purchase of real property is regarded as creating an equitable interest in the immovable property, and if in the absence of a time limit, it is possible that the option for repurchase might be exercised beyond the prescribed period fixed by the perpetuity rule, the covenant is regarded as altogether void. In the case of an agreement for sale entered into prior to the passing of the Transfer of Property Act, it was the accepted doctrine in India that the agreement created an interest in the land itself in favour of the purchaser. Thus, a suit for specific performance of a contract for sale was dismissed on the ground, that the agreement, which was held to create an interest in the land, was not registered under Section 17, Clause (2), Registration Act of 1866. *Futteh Chund v. Leelumber Singh*[1]Following this principle, Markby J. in *Sreemutty Tripora Soondari v. Juggernath*[2] expressed the opinion that a covenant for pre-emption contained in a deed of partition which was unlimited in point of time was not enforceable in law. The same view was taken by Baker J. in the Bombay High Court in *Allibhai Mahomed Abuji v. Dada Alli Isap*[3] where the option of purchase was contained in a contract entered into before the passing of the Transfer of Property Act. The decision of the Judicial Committee in *Maharaj Bahadur Singh v. Bal Chand*[4] also related to a contract of the year 1872. In that case the proprietor of a hill entered into an agreement with a society of Jains that if the latter would require a site thereon for the erection of a temple, he and his heirs would grant the site free of cost. The proprietor afterwards alienated the hill. The society, through their representatives, sued the alienees for possession of a site defined by boundaries, alleging notice to the proprietor requiring that site and that they had taken possession, but been dispossessed. It was held that the suit must fail. In the opinion of their Lordships, the agreement conferred on the society no present estate or interest in the site, and was unenforceable as a covenant since it did not run with the land and infringed the rule against perpetuity. It is to be noticed that the plaintiffs in this case did not sue for specific performance but sued on their title, apparently on the footing, that the agreement amounted to a grant. In course of their judgment it was observed by their Lordships of the Judicial Committee that if the case was regarded in another light, viz., as an agreement to grant in the future whatever land might be selected as a site for temple - as the only interest created was one to take effect by entry at a later date - and as that date was uncertain, the provision was obviously bad as offending the rule against perpetuity.

6. As has been stated already, the contract was of the year 1872 and their Lordships could not speak of a contract creating an interest in property unless they had in mind the provisions of the English law on the subject. In 1882 the Transfer of Property Act was passed, and Section 54 of

the Act definitely laid down that a contract for the sale of immovable property would not by itself create an interest in or a charge on such property. This expressly abolishes the English doctrine that a contract for sale of an immovable property transfers an equitable estate to the purchaser. The question now is whether in the case of a contract entered into after the passing of the Transfer of Property Act, a covenant for pre-emption, which cannot be said to create an interest in the property sold, is still hit by the rule against perpetuity. On this point there is a marked cleavage of judicial opinion and different views have been expressed by the same High Court at different times. The important decisions on this point can, in our opinion, be classified under three heads : Under the first heading we can place those cases where the view taken has been that a contract giving option of purchase to a person does not create interest in the property as laid down in Section 54, T.P. Act, and consequently does not attract the operation of the perpetuity rule, even though no period is fixed within which the option has to be exercised. This was held in *Avulacharamudi v. Baghavalu*[5] and was followed in the subsequent Bench decision of the Madras High Court in *Chinna Munuswamy Nayudu v. Sagalaguna Nayudu*[6] The point is thus dealt with by one of the Judges in the Bench case: The learned vakeel for the respondent also contended that the option is void as offending the rule against perpetuity. If it created an interest in the land, this contention is correct, but in India it cannot create an interest in land, whatever the rule in England may be.

7. It must be noticed, however, that in this case the option was to be exercised at stated times within a certain period, and hence did not offend the rule against perpetuity. The same opinion was expressed by the Allahabad High Court in *Basdeo Rai v. Jhagru Rai*[7] *Mahamed Jan v. Fazal-uddin*[8] and Aulad Ali v. Ali Athar which overruled the earlier decisions of the same Court in *Gopi Ram v. Jeot Ram*[9] and *Balli Singh v. Raghubir*[10] where a contrary view was taken. Walsh, A.C.J., while delivering judgment in the Pull Bench case, observed as follows: The rule against perpetuity is codified in Section 14, T.P. Act, which begins with these words 'No transfer of property can operate etc Documents of mutual rights and obligations contained in contracts such as that with which we are here dealing are not a transfer of property at all. Therefore, Section 14 has no applicability.

8. The decision in Jogesh Chandra v. Asaba Khatun , is the only decision of the Calcutta High Court so far as we are aware of, wherein a covenant by which certain rights were reserved to the proprietor on the one hand and the putnidar on the other, though for an undefined period of time, was held not to contravene the rule against perpetuity. The learned Judges did not, however, refer to Section 54, T.P. Act, but based their decision on the ground that the reservation of rights did not amount to creating an interest in the land. The second class of cases took the view that in spite of Section 54, T.P. Act, there is no substantial difference between the English and the Indian law on the point; and the benefit of the equitable estate is, in substance, given by the Indian law

to a person in whose favour a contract to convey land has been made. These cases place reliance on Section 27, Specific Belief Act, under which an agreement for sale of land can be specifically enforced not only against the person making the contract, but against any person claiming under the vendor's title arising subsequently to the contract, except a bona fide purchaser for value without notice. Reliance is also placed on Section 91, Trusts Act, which provides that a person acquiring property with notice of a prior contract in favour of another person, must hold the rights he obtained under his transfer as a trustee for the prior purchaser who would consequently be in the position of a beneficiary. In the words of Macleod, C.J., although contracts for sale of land do not, according to the law in India, create an interest in land, either equitable or executory, they do create rights which are capable of being enforced with regard to the land in certain circumstances against third parties, and to that extent they are not ordinary personal contracts and stand in a category by themselves, *Dinkarrao Ganpat Rao v. Narayan Vishwanath*[11]

9. This view which was foreshadowed in the judgment of Bhashyam Ayyangar J. in *Ramasami Pattar v. Chinnan*[12] was accepted by the Madras High Court in *Kolathu Aiyyar v. Ranganadhyar*[13] and by the Bombay High Court in *Dinkarrao Ganpat Rao v. Narayan Vishwanath*[14] and this was the basis of an elaborate judgment of a Division Bench of this Court in Kala Chand v. Jatindra Mohan . In the third group, we would place those cases where the principle of English law as laid down in London & *South Western Ry. Co. v. Gomm*[15]. and other cases was applied without considering at all the effect of Section 54, T.P. Act. The majority of cases decided by this Court come under this category. The case in *Nobin Chandra Soot v. Nawab Ali Sarkar*[16] *is* one of the earliest pronouncements on this point, where it was held that a covenant for preemption which was unlimited in point of time offended the rule against perpetuity. The learned Judges followed the English authorities in *Trevelyan v. Trevelyan*[17] and *London & South Western Ry. Co. v. Gomm*[18]. and observed in their judgment that as the Indian Statutes save and except those of a special character, were founded upon the principles of English law, it was always advisable to refer to English cases to discover how the law was construed there. There is no reference in the judgment to the provisions of Section 54, T.P. Act, and it is also not clear from the report as to whether the contract in this case was before or after the passing of the Transfer of Property Act.

10. The case in *Anath Nath v. Keshab Chander*[19] is possibly the next case in point of time, where this question came up for consideration. In this case, there was a covenant between the lessor and the lessee, that on the happening of certain events the lessee would acquire rights to certain lands which were exempted from the lease. It was held that the creation of such a future interest as may possibly vest after the prescribed period, was void as offending the rule against perpetuities. It may be pointed out that in this case there was, strictly speaking, no agreement to transfer, and the document provided that on the happening of certain events the lessee would automatically

acquire an interest in certain lands. The deed therefore purported to create a future interest in the lands, and as the contingencies might happen after the period prescribed by the perpetuity rule, the grant might be held to be void for remoteness. The case in *Nabin Chandra Sen v. Rajani*[20] is another decision of a Division Bench of this Court, where the learned Judges applied the principle of English law without adverting to the provisions of Section 54, T.P. Act. There is another class of cases which are not much relevant to the present enquiry, where the contract sought to be enforced was between the parties to the suit, and although no time limit was prescribed, the contract purported to bind only the parties and not their heirs or successors. The cases in *Harish Paik v. Jahuruddi Gazi*[21] *and Kalimuddin v. Reazuddin*[22] may be mentioned in this connexion. In our opinion, the decisions of the English Courts do not afford a safe guide for the solution of the present problem. For purely historical reasons, there was a dual system in English law which does not exist in India. The Indian law does not recognize any distinction between legal and equitable estates. As the Judicial Committee, observed in *Webb v. Macpherson*[23] The law of India, speaking, broadly, knows nothing of the distinction between legal and equitable property in the sense in which that was understood when equity was administered by the Court of Chancery in England : vide also Chatra Kumari y. Mohan Bikram

11. In the Indian law the rule of perpetuity & is codified in Section 14, T.P. Act, which brings only an interest created by a transfer, within the mischief of the rule. If we take this section along with Section 54, T.P. Act, which lays down in clear words, that a mere contract does not create any interest in the property, the conclusion in our opinion is irresistible that the rule of pergetuity cannot be applied to a covenant for pre-emption, even though there is no time limit within which the option has got to be exercised. We are inclined to agree with the view expressed by Sulaiman J. in *Basdeo Rai v. Jhagru Rai*[24]*,* that a contract for pre-emption, though it does not create an interest in or an easement on land, certainly creates a benefit of an obligation in favour of the other party and is attached to the property. Such a contract, therefore, can be enforced against all gratuitous transferees and also transferees with notice under Section 40, T.P. Act. A fortiori it can be enforced against the heirs of the contracting parties. In our opinion, the answer to the question before us can be found in Sections 14, 54 and 40, T.P. Act, and the importation of English principles which have a different historical origin, cannot be just or proper.

12. The opinion that has been expressed in the second group of cases referred to above is undoubtedly entitled to the highest respect, particularly as this view was taken by a Division Bench of this Court presided over by M.N. Mukherji J. We think, however, that it would not be quite correct to say that in spite of Section 54, T.P. Act, the Indian law creates an equitable interest in favour of the purchaser when there is a contract for sale of immovable property. Section 27(b), Specific Relief Act, cannot in our opinion, be construed as creating such equitable right. If, as laid down in Section 54, the contract does not create an interest in the land as between

1 the parties to it, it is somewhat difficult to imagine that an interest should spring up when the liability under the contract is assigned to a third party. Furthermore, Section 27 read with Section 22, Specific, Relief Act, gives a discretion to the Court to enforce a contract specifically. Surely, if an interest is created in law, it cannot be in the discretion of the Court to recognize such interest or refuse to recognise it. Under Section 91, Trusts Act, the purchaser with notice of a previous contract might occupy the position of a constructive trustee and be made liable as such, but the liability would arise only when the contract is specifically enforced against him. It may be that this is a remnant of the English doctrine according to which a purchaser, even before the purchase is completed, is treated as a beneficial owner of the land, but we cannot extend the doctrine beyond what is expressly recognized by the Legislature itself. As we are taking a view different from that taken by other Division Benches of this Court it is necessary that the conflict should be settled by a Full Bench. There is another question arising in this appeal which also we think should be referred to the Full Bench, viz., whether a contract for pre-emption can be looked upon as a purely personal contract when the suit is between the contracting parties themselves. It is true that if a contract is void for remoteness, then it fails altogether and cannot be enforced even as against the immediate contracting parties. But a question has been raised in several cases as to whether the contract can be split up and that portion of the contract which tends to create an interest in the property, be separated from that which is purely personal in its character. The leading English authority on this point is *South Eastern Railway v. Associated Portland Cement Manufacturers, Ltd*[25]. There it was pointed out that Sir George Jessel in London & *South Western Ry. Co. v. Gomm.*[26] referred only to that portion of the contract which purported to create an interest in the land. Cozens-Hardy M.Rule observed as follows:

So far from that being an authority that Powell would not have been bound by the covenant, and that the London and South Western Railway Company could not have enforced the covenant against Powell, I think the observations of all the members of the Court plainly indicate that in that case there would have been a perfectly enforceable covenant by Powell at the instance of the London and South Western Railway Company and the whole doctrine of the rule against perpetuity would have absolutely nothing to do with it.

13. Farwell L.J. further observed: The fact that there is some connexion with or reference to land does not make a personal contract by A, less a personal contract binding on him, with all the remedies arising thereout, unless the Court can by construction turn it from a personal contract into a limitation of land and a limitation of land only. As regards the original covenantor it may be both; he may have attempted both to limit the estate, which may be bad for perpetuity, and he may have entered into a personal covenant which is binding on him because the rule against perpetuity has no application to such a covenant.

14. This was approved of in *Kolathu Aiyyar v. Ranganadhyar*[27] The decision was referred to by Mukerji J. in Kala Chand v. Jatindra Mohan , but the learned Judge was of opinion that though a promise may be treated as divisible under certain circumstances, the case was no authority for the proposition, that the rule against perpetuity may be got over by ignoring a part of each of the reciprocal promises and making a new contract for the parties. In our opinion the principle of divisibility can be applied with perfect propriety to the facts of the present case. Even if the covenant is held to be otherwise bad as offending the perpetuity rule, the solenama makes it clear that the agreement was a personal agreement between the plaintiffs and defendants 6 and 7, and it was a general clause at the end which made not only this term but all the other provisions of the solenama binding on the heirs and successors of the parties. As a contrary view has been taken in Kala Chand v. Jatindra Mohan mentioned above, we think it proper to refer this question also to the Full Bench. The points which we refer to the Full Bench will be as follows: (1) Whether a covenant for pre-emption in respect of land unrestricted in point of time and expressed to be binding on the parties, as well as upon their heirs and successors, offends the rule against perpetuity; and (2) whether in such a case the contract can be split up and can be enforced as a personal agreement between the immediate parties to it. As this question arises in a second appeal, the whole case according to the rules is referred to the Full Bench for decision.

Biswas, J.

15. I agree.

16. Six persons, Krishna Kumar, Raj Kumar, Mohanta, Arjun, Bhim and Judhisthir instituted a suit, being No. 123 of 1921 of the Second Court of the Munsif at Chandpore, against Nobin and Ayesha for a fourth share of the lands of Schedule Kha of the plaint, which is a portion of a ryoti holding comprising lands described in Schedule Ka. That suit terminated in a compromise on 31st Manch 1921. All the aforesaid persons joined in that compromise. By the compromise the land of Schedule Ga, which forms a part of the lands of Schedule Kha, was given to Nobin. There were many terms, one of them being that if Nobin wanted to sell the land so allotted to him he would be bound to offer it to the plaintiffs of that suit in the first instance for a proper price and if he wanted to mortgage he would be bound to apply for a loan to the plaintiffs, and that he would be entitled to sell or mortgage it to others only on their refusal. All the terms of the compromise were made binding on - the executants, their heirs and representatives. Four of the contracting parties namely Raj Kumar, Arjun, Bhim and Judhisthir and the heirs of the other two, are the plaintiffs in the suit, which is before us. Defendants 1 to & are the persons to whom Nobin sold the land of Schedule Ga in the benami of defendant 5 in February 1936 without making an offer to the plaintiffs. The purchasers took with notice of the aforesaid covenant for pre-emption contained in the compromise. Nobin and Ayesha are defendants 6 and 7

respectively. In the suit the plaintiffs claim specific performance against the transferees, defendants 1 to 5. The substantial question of law that was raised in the suit was whether the covenant for preemption was obnoxious to the rule against perpetuities. Both the learned Munsif and the learned Additional District Judge held that it was not bad in law. A second appeal was preferred in this Court; by defendants 1 to 5 and defendant 7. That appeal was heard by a Division Bench (Mukherjee and Biswas JJ.) who dissenting from a series of decisions of this Court, which had held that such a covenant for pre-emption offends the rule against perpetuities, have referred the following questions to the Full Bench:

(1) Whether a covenant for pre-emption in respect of land unrestricted in point of time and expressed to be binding on the parties, as well as upon their heirs and successors offends the rule against perpetuities; and (2) Whether in such a case the contract can be split up and can be enforced as a personal agreement between the immediate parties to it.

17. On the facts of this case, the second question does not arise, as the contract is sought to be enforced against the transferees from one of the contracting parties, namely Nobin. We do not therefore express any opinion on the point. The defendants appellants have pressed the following points before us : (a) The agreement for pre-emption as embodied in the compromise is illegal, as much as it is hit by Section 23, Contract Act, and (b) even if it is not so, the covenant for pre-emption is bad, in as much as it offends the rule against perpetuities. We do not consider the first point to be of any substance. Moreover, in the way it has been put it would not be an independent point, for, it would depend upon the decision on the second point. Section 23, Contract Act, enacts that the consideration or object of an agreement is lawful, unless

(i) it is forbidden by law; or (ii) is of such a nature that, if permitted, it would defeat the provisions of any law, or (iii) the Court regards it as opposed to public policy.

18. We are quoting, only those portions of Section 23 on which reliance has been placed by the learned advocate appearing for the defendants-appellants. We do not see how the consideration for the agreement can be said to be not lawful. The compromise of the claims preferred by the parties in the suit of 1921 is the consideration and it is perfectly legal. There is nothing illegal in the object either. In the act of making a conveyance there is nothing illegal, that is to say, if the covenantor or his heirs or representatives chose to convey the land to the covenantee or his heirs or representatives he or they would be performing a perfectly legal act. If the covenantor or his heirs or legal representatives sold to a third person in breach of the covenant an action for damages would be maintainable: Worthing Corporation v. Heather (1906) 2 Ch. 532 at pp. 538 and 539. The consideration or object is thus not forbidden by law. In any event it would not defeat the provisions of law or would be regarded by the Court to be opposed to public policy unless the covenant offends the rule against perpetuities. The rule against perpetuities is

embodied in Section 14, T.P. Act, but as the argument of the appellant's advocate is that that section has not embodied the whole doctrine, we proceed upon general principles. We do not propose to deal with the cases decided by this Court or by other High Courts, as all the important cases on the subject have been noticed and analysed in the referring order. Perpetuity has been denned thus in Lewis on Perpetuities at page 164:A perpetuity is a future limitation whether executory or by way of remainder, and of either real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within the period fixed and prescribed by law for the creation of future estates and interests.

19. It is thus a branch of the law of property and its true object is to restrain the creation of future conditional interest in property. The rule against perpetuities is not concerned with contracts as such or with contractual rights and obligations as such. Thus, a contract to pay money to a person, his heirs or legal representatives upon a future contingency, which may happen beyond a life or lives in being and 18 years thereafter, would be perfectly valid : Walsh v. Secretary of State for India (1863) 10 H.L.C. 367. It concerns rights of property only and does not affect the making of contracts which do not create rights of property:

What the rule applies to is not the contract, which in itself is not illegal, but the right of property or limitation which arises from the contract : 25 Halsbury's Laws of England, p. 108, Articles 198 and 199, 2nd Edn.

20. The rule does not apply to personal contracts which do not create interest in property : Per Farwell L.J., in *South Eastern Railway v. Associated Portland Cement Manufacturers, Ltd*[28]. even though the contract may have reference to land. In Withan v. Vane, of which a full report is given in Appendix V of Challis's Real Property, p. 440, 3rd Edn.,29 William Harry, Earl of Darlington, sold in 1824 the manor of Hutton Henry and other hereditaments to George Silvertop. In the conveyance there was a covenant that the said Earl, his heirs, executors, administrators or assigns would pay six pence for each chaldron of coal, which would be wrought or gotten out of the lands so sold and which would be shipped for sale, to George Silvertop, his heirs, executors, administrators or assigns. The covenant was enforced in 1888 at the instance of an assignee from the legal representatives of George Silvertop against the executors of the Earl. The Lord Chancellor (Earl of Selborne) overruled the plea that the covenant offended the rule against perpetuities on the ground that though the covenant had relation to land it did not amount to a reservation of any interest in land. In our judgment the law has been correctly summarised in the following passage at page 307 of 3rd Edn., of Grey on 'The Rule against Perpetuities': The rule against perpetuities concerns rights of property only, and does not affect the making of contracts which do not create rights of property. Thus a promise to A to pay him or his executors or administrators a sum of money on a future event is good, although such event

may not happen within 21 years after lives in being, and this is not altered by the fact that the covenant runs with the land (as for instance, a covenant of warranty) or can, in any way, be enforced by or against other persons than the original parties and their representatives, nor that the obligation has a right of distraint attached to it, for that is only a matter of remedy, and not a future limitation of any particular property.

21. In England a covenant for pre-emption unlimited in point of time has been held to be bad as being obnoxious to the rule against perpetuities. The point was settled by the Court of appeal in London & *South Western Ry. Co. v. Gomm*[29]. where the case in (1879) 11 Gh. D. 42130 at p. 432 in which a different view had been. taken, was expressly overruled. In delivering his judgment Sir George Jessel, M.Rule made the following observations: Whether the rule applies or not depends upon this, as it appears to me, does or does not the covenant give an interest in land? If it is a bare or mere personal contract it is of course not obnoxious to the rule, but in that case it is impossible to see how the present appellant can be bound. He did not enter into the contract but is only a purchaser from Powell who did. If it is a mere personal contract it cannot be enforced against the assignee. Therefore, the company must admit that it somehow binds the land. But if it binds the land it creates an equitable interest in the land. The right to call for a conveyance is an equitable interest or equitable estate. In the ordinary case of a contract for purchase there is no doubt about this, and an option of purchase is not different in its nature. A person exercising the option has to do two things; he has to give notice of his intention to purchase, and to pay the purchase money; but as far as the man who is liable to convey is concerned, his estate or interest is taken away from him, without his consent, and the right to take it away being vested in another, the covenant giving the option must give the other an interest in land.

22. Later on he observed that there was no substantial distinction between a contract for purchase, an option of purchase and a conditional limitation, and gave an illustration for the purpose of adding strength to what he had held before, namely, as the option of purchase, like a contract for purchase, creates an equitable estate in the land the rule against perpetuities applies. Later on he held that the principle laid down in Tulk v. Moxhay (1848) 2 Ph. 774 could not be invoked against the assignee of the covenantor taking with notice, as the same is not applicable to affirmative covenants, covenants which require the covenantor to do something. Sir James Hannen and Lindley L.J. who agreed with Sir George Jessel, took the same view of the case of Tulk v. Moxhay (1848) 2 Ph. 774, but in coming to the conclusion that the rule against perpetuities applied they rested their decision on the sole ground that the covenant giving the option of purchase created an equitable estate in the land. In all the cases which have been decided in the English Courts after London & South Western Ry. Co. v. Gomm. (1882) 20 Ch. D. 562(supra) the decisions have been rested on the sole ground that such a covenant creates an equitable interest in land. It has, in our judgment, been rightly pointed out in the referring order

that decisions in cases arising in India on such or similar covenants entered into before the passing of the Transfer of Property Act, which have taken the view that the rule against perpetuities applies to covenants for pre-emption, proceed upon the assumption that an interest in land is created by such a covenant. In *Maharaj Bahadur Singh v. Bal Chand*[30] the agreement was entered into before the Transfer of Property Act.

23. In determining the question as to whether a covenant for pre-emption or a covenant giving an option of purchase creates an interest in land or not, when such a covenant is made after the Transfer of Property Act, we must see whether an ordinary contract for purchase entered into after the Transfer of Property Act creates an interest in land. Section 54, T.P. Act, is clear on the point. Such a contract does not by itself create any interest in land. Paragraph 2 of Section 40, T.P. Act, taken with the illustration establishes two propositions : (1) that a contract for sale does not create any interest in the land, but is annexed to the ownership of the land and (2) that the obligation can be enforced against a subsequent gratuitous transferee from the vendor or a transferee for value but with notice. The obligation of the promisor is annexed to the ownership of the land, for, it is in the quality as owner that he undertakes the obligation, and the obligation concerns the land, for it is an obligation to offer the land to the promisee. The second proposition makes a substantial departure from the English law, for, an obligation under a contract which creates no interest in land but which concerns land is made enforceable against an assignee of the land who takes from the promisor either gratuitously or takes for value but with notice. None of the reasons given by Sir George Jessel in his observations which we have quoted in extenso would accordingly apply to a covenant for pre-emption made after the Transfer of Property Act. A contract of this nature no doubt does not stand on the same footing as a mere personal contract, for, it can be enforced against an assignee with notice, but at the same time it is pertinent to observe that it is not made enforceable against such an assignee on the footing that it creates an interest in land.

24. In India there is no such conception as legal estates and equitable estates. All interests in property - whether the full ownership or an interest carved out of full ownership - are rights in rem. It is the essence of a right in rem that where it is infringed, the Court has no option but to give relief, provided the remedy is invoked within the period of limitation. The Court cannot refuse relief in the exercise of its discretion. Section 27(b), Specific Relief Act, cannot, in our judgment, be invoked for supporting the argument that an interest in property is created by a contract for sale, as under the provisions of Section 22 of that Act a discretionary power is given to the Court either to grant or to refuse specific performance. It is difficult to see how an interest in land can be considered to be created when it is in the discretion of the Court whether to recognise it or not. If an interest had already existed there can be no power in the Court to take away the existing rights of the parties. Moreover, the Specific Belief Act embodies what in

essence is adjective law and the substantive law must be looked for elsewhere. In our judgment the substantive law, the foundation for specific relief provided for in Section 27(b), Specific Relief Act, is to be found in para. 2 of Section 40, T.P. Act. That foundation is not the same on which the relief of specific performance against a subsequent purchaser without value or with value but with notice is rested in the Courts of England. We are further of opinion that Section 91, Trusts Act, does not indicate that the purchaser under a contract for sale has an interest in the land. There is no provision in the Trusts Act to the effect that the vendor is to be a trustee for the purchaser. That section occurs in chapter 9 which deals with "obligations in the nature of trust."

25. The last argument that has been advanced by the appellants' advocate is that the rule against perpetuities has been applied even to cases where no interest in property is concerned. For establishing this proposition he says that rule has been applied to trust, although in India the beneficiary - the cestui que trust - has no interest in land. For supporting the last mentioned proposition he has drawn our attention to the definition of trust in the Trusts Act and to the observations of the Judicial Committee of the Privy Council in (1883) Challis's Real Property, App. V. p. 440, 3rd Edn. In the last mentioned case Sir George Lowndes laid down the proposition that the cestui que trust cannot maintain as owner a suit for possession against a trespasser, as under the Indian law the owner would be the trustee. That decision or the definition of trust in the Trusts Act does not necessarily imply that the cestui que trust under the Indian law has no interest in the land conveyed in trust. No question of perpetuities arose in that case and those observations were made in connection with question as to whether the plaintiff could get the benefit of twelve years' limitation as provided for in Article 142, Limitation Act. The Transfer of Property Act itself indicates that for the purpose of perpetuities the cestui que trust is to be considered as having interest in land (see the illustration to Section 13, T.P. Act). We do not accordingly accept this argument. We accordingly answer the first question in the negative. We do not answer the second question as it does not arise on the facts of this case. The result is that the second appeal is dismissed. The parties to bear their respective costs throughout.

Cases Referred.

1 ('70-72) 14 M.I.A. 129
2('75) 24 W.B. 321
3('31) 18 A.I.R. 1931 Bom. 578
4('22) 9 A.I.R. 1922 P.C. 165
5('16) 3 A.I.R. 1916 Mad. 298
6('26) 13 A.I.R. 1926 Mad. 699
7('24) 11 A.I.R. 1924 All. 400
8('24) 11 A.I.R. 1924 All. 657
9('23) 10 A.I.R. 1923 All. 514
10('23) 10 A.I.R. 1923 All. 511
11('22) 9 A.I.R. 1922 Bom. 84 at p. 206
12('01) 24 Mad. 449
13('16) 3 A.I.R. 1916 Mad. 856

14('22) 9 A.I.R. 1922 Bom. 84
15(1882) 20 Ch. D. 562
16('01) 5 C.W.N. 843
17(1886) 53 L.T. 853
18(1882) 20 Ch. D. 562
19('10) 14 C.W.N. 601
20('21) 8 A.I.R. 1921 Cal. 162
21('98) 2 C.W.N. 575
22('09) 14 C.W.N. 295
23('04) 31 Cal. 57
24('24) 11 A.I.R. 1924 All. 400
25(1910) 1 Ch. 12
26(1882) 20 Ch. D. 562
27('16) 3 A.I.R. 1916 Mad. 856
28(1910) 1 Ch. 12 at p. 33
29(1882) 20 Ch. D. 562
30('22) 9 A.I.R. 1922 P.C. 165