# PRIVY COUNCIL

Sachindra Nath Roy

Vs.

Maharaj Bahadur Singh
(Lords Atkinson,CJ, Phillimore and Sir John Edge. JJ.)

12.7.1921

## JUDGMENT

**Lord Atkinson CJ.**

1. The financial dealings between the several parties concerned out of which the appeals in this case have arisen are somewhat complicated. It is, however, necessary to examine them in order to understand clearly the points calling for decision.

2. On March 8, 1836, May 12, 1887, and May 12, 1892, the predecessors -in title of the appellants in this litigation, styled the Roys, borrowed from one Dhanpat Singh three sums of Rs. 3,00,000 Rs. 20,000 and Rs. 15,000 respectively, and secured the re-payment thereof with interest at the rates stipulated by three mortgages bearing the above respective dates of certain immoveable property belonging to them, the Roys.

3. These mortgages were presumably, in the ordinary form, conveyances of the absolute interest in the property pledged with the usual provision for redemption, coupled with covenants by the mortgagors to pay the debt due under them. The Transfer of Property Act permits in Calcutta the creation of equitable mortgages by deposit of deeds. Accordingly Dhanpat Singh on June 3, 1893, created at Calcutta an equitable mortgage of the property of the Roys, comprised in these mortgage-deeds, by depositing these latter documents with a firm trading at Calcutta as Shewaram Khoshal Chand hereinafter styled " the firm," to secure the re-payment of Rs. 70,000 lent by them to him, with interest till paid.

4. It is not clear whether at this particular date the Roys had notice of this transaction. Early in the year 1894,Dhanpat Singh instituted two ordinary mortgagees' suits against the Roys to recover the amount secured by the three first-mentioned. mortgages. The equitable mortgagees, the firm, were not made parties to these suits or either of them. The Roys contested these suits, and, ultimately, a settlement was come to whereby

Dhanpat Singh accepted a sum of Rs. 1,20,000 in full satisfaction and discharge of the amount due to him for principal and interest on the three legal mortgages. The Roys had not this sum of Rs. 1,20,000 available.

5. They were in consequence obliged to raise the money to pay Dhanpat Singh the arranged sum of Rs. 1,20,000. They accordingly borrowed from the Eastern Mortgage Agency Company, hereinafter styled "the Company," a sum of Rs. 2,00,000, and secured the re-payment of it with interest by executing to this Company a mortgage dated April 23, 1894, of all the property comprised in the three first mentioned mortgages. By reason, apparently, of the existence of the equitable mortgage created by the deposit of the mortgage-deeds, an expedient was adopted. A deed of even date with the mortgage namely, April 23, 1894 was executed by Dhanpat Singh by which after he, acknowledging the receipt of the sum stipulated for, released the lands and premises mentioned in the three mortgages from all claims, etc., under these instruments and protected the Roys, by a covenant in the words following, from all claims which might be made against them in respect of any of the matters therein mentioned. The covenant ran thus:

> " 2. The mortgagee both hereby for himself, his heirs, executors, administrators, representatives and assigns, covenant with the mortgagors, their heirs, executors, administrators, representatives and assigns in manner following : (a) that the mortgagee, his heirs, executors, administrators, representatives and assigns shall at all times hereafter keep the mortgagors, their heirs, executors, administrators, representatives and assigns, their and each of their estate and effects, harmless and indemnified against all losses, damages, actions, claims, suits, demands and accounts in respect of the said three several herein before recited deeds of mortgage, or any money owing or due there under or otherwise howsoever or for any act done by him, the said mortgagee, with respect to the said deeds. (b) That the mortgagee shall forthwith cause the said two suits, respectively numbered 75 and 301 of 1894, now pending in the Court of Subordinate Judge in the district of Murshidabad to be forthwith compromised on these terms and petition to that effect filed accordingly."

6. The deed containing this covenant was duly registered on the day it bears date. The plaintiff Dhanpat Singh in each of the two suits instituted by him lodged, in pursuance of the terms of settlement, a petition praying that these suits might be disposed of according to the terms of the settlement which had been arrived at. The Court granted the prayer of this petition, and made in the first suit a decree dated May 5, 1894, and

in the second suit a decree dated May 7, 1894, whereby it was in each suit respectively decreed that the suit having been amicably settled it should be disposed of, that the claim of the plaintiff should be taken to have been satisfied, and that each party should bear his own costs.

7. On July 17, 1896, Dhanpat Singh paid to the firm on foot of the hundis he had made to them, Rs. 42,000, and procured from the firm a release from all further liability on all these hundis on the terms that this compromise was to be without prejudice to the company's rights to enforce their lien against the properties comprised in the three mortgages.

8. On May 11, 1897, the firm instituted a suit against the Roys and the Company into the Court of the Subordinate Judge of Murshidabad, to recover the sum due under their equitable mortgage, which latter they claimed had priority over the legal mortgage executed to the Company on April 23, 1894, and further, that they were entitled to enforce their claims against the properties comprised in the three original mortgage, deeds deposited with them, and also against the Roys personally.

9. The heirs and personal representatives of Dhanpat Singh deceased, were by the order of the High Court made defendants in the suit. They are the first four respondents in the present appeals. The Roys and the Company contested this suit, and on February 28, 1903, the Subordinate Judge delivered judgment in favor of the plaintiff firm, holding that they, under their equitable mortgage, were entitled, as regards the Roys to the sum of Rs. 27,223-4-9 for principal, interest, and costs with interest at 6 per cent, till paid, subject to the mortgage to the Company of April 23, 1894, which he held had priority over the equitable mortgage of the firm. He made the decree usual in ordinary mortgage suits that the Roys should pay the sums found to be due, with 6 per cent, interest, within six months from the date of the decree, failing which the properties cover.ed by the three first-mentioned mortgages should be sold subject to the lien of the Company.

10. Against this decree both the Roys and the firm appealed to the High Court of Fort William. The appeal of the Roys was dismissed with costs. The Court held that the mortgage of the Company had not priority over the equitable mortgage of the firm, that the appeal of the latter should be allowed, and made a decree on August 26, 1905, declaring that the firm was entitled to a valid equitable charge on the lands covered by the three mortgages, and that in default of payment either by the Company or the Roys of what was due upon that security, the mortgaged property or a sufficient part of it

should be sold to meet the plaintiffs' claim, and that unless the parties should agree as to the amount due to the plaintiffs, an account should be taken of what was due.

11. No absolute order for sale in default of payment of the sum due was ever made on this decree. Against these two decrees the Roys obtained from the High Court liberty to appeal to His Majesty in Council.

12. The record was printed, No. 56 of 1910, and sent to the office of the Privy Council. Meanwhile, however, the firm, by deed dated June 28, 1907, reciting in execution of all the deeds herein before mentioned, the creation of the equitable mortgage, the granting of the several decrees made in the litigation which had taken place between the parties, and further, that the two decrees of the High Court dated August 26, 1905, made in the appeals, Nos. 184 and 208 of 1903 respectively, were still unsatisfied, that there was due thereon to the firm; the sum of Rs. 45,377-5-6 with interest calculated up-to date, that the firm had agreed to assign the said decrees to one Edward Hugh Bray (party thereto) at the "price or sum" of Rs. 23,000 assigned to him the two aforesaid decrees dated. August 26, 1905 and all moneys now or hereafter to become due thereunder respectively and all benefit and advantage: under the said decrees respectively, including the charge created on the lands and premises described in the schedule thereto, to hold the decrees and all the other premises thereby assigned or mentioned or intended so to be assigned unto the said Edward Hugh Bray his executors, administrators and assigns, absolutely and for ever. This deed was duly registered.

13. This Edward Hugh Bray was a director of a company which acted as agents, for the Company, the mortgagees in the deed of April 23, 1894. The Roys desired to pay to Bray the sum of Rs. 50,000 due under the two decrees assigned to him. They apparently had not money at their command for that purpose, and accordingly they borrowed from the principal, the Company, to pay that company's agent Bray, this Rs. 50,000.

14. By deed bearing date February 1, 1910, made between the Roys and the company reciting that the Roys had requested the company to lend them the sum of Rs. 50,000 to enable them to pay and satisfy the amount then due to Edward Hugh Bray under the two decrees of August 26, 1905, which the company agreed to do on having the re-payment thereof with interest secured on the lands of the Roys therein mentioned, these lands were thereby mortgaged to the company.

15. The deed expressly stated that these lands were subject to the encumbrance

created by the two decrees of August 26, 1905, alleged to be vested in Edward Hugh Bray, of 8, Clive Street, Calcutta.

16. To carry out this arrangement the parties had recourse, probably having regard to their conflicting interests, to the worst and most dangerous of all economies.

17. The three parties, the Roys, Bray and the Company, employed the same solicitors, Messrs. Morgan and Co., by which imprudence each party had imputed to him or them all the information dealing with the transaction which the common solicitor had derived from both the other parties.

18. The payment of the Rs. 50,000 was made in this way. The company drew a cheque in favor of Morgan and Co. for Rs. 50,000. Morgan and Co. endorsed this cheque : " to Babus Shyama Charan Roy, Parbati Charan Roy and Sachindra Nath Roy, or order," and these three indorsees in their turn indorsed it to " E. H. Bray, Esq., or order." The cheque was paid to Bray, and he, having thus been paid, the Roys ceased further to prosecute the appeal to His Majesty in Council, On April 16, 1910, the appeal was, by an order made in the usual course in the office of the Privy Council, dismissed for want of prosecution.

19. On November 15, 1910, Bray filed an application in the Court of the Subordinate Judge certifying that these two decrees had been fully paid and praying for an order that they were fully satisfied. The first four respondents got notice of this application and did not object. On May 24, 1911, the Subordinate Judge made an order to the following effect : that "the decree be noted as finally disposed of in full satisfaction."

20. Sir George Lowndes for the appellants contended that no absolute order on the decrees for sale having been obtained, the equitable mortgage was, under Sections 88 and 89 of the Transfer of Property Act, 1832, still alive and did not merge in the decrees. He also assured the Board that at this period it was considered in Calcutta that the period of limitation under the Statute of Limitation of 1877 ran when a decree was dismissed for want of prosecution, not from the date of the decision of the decree appealed against, but from that of the dismissal.

21. of course the Board accepts with the utmost confidence that assurance, but it is not the law. Two cases decided in the year 1914 establish this. The first is the case of *Abdul Majid v. Jawahir Lal* [1] and the second, *Batuk Nath v. Munni Dei,* [2] in the first the judgment of the Board was delivered by Lord Moulton. It was decided that under the Indian Limitation Act, 1877, Schedule II, Article 179, the period of three years

named there in ran in such a case from the date of the decree appealed against and not from the date of the order to dismiss the appeal for want of prosecution. The ground on which the decision was based was thus stated by Lord Moulton.

> " The order (i. e., the formal order) dismissing the appeal for want of prosecution, did not deal judicially with the matter of the suit, and could in no sense be regarded as an order adopting or confirming the decision appealed from. It merely recognized authoritatively that the appellant had not complied with the conditions under which the appeal was open to him, and that therefore he was in the same position as if he had not appealed at all."

22. The period of limitation ran from the date of the decree. The decision in the second of the last-mentioned cases is to the same effect.

23. The next question to be considered is which of the two Limitation Acts, that of 1877 or that of 1908, applies to this case. That must, it appears to the Board, be determined by the condition in which the decrees stood when the latter Act cams into force on January 1, 1909.

24. Sir George Lowndes contended that where a decree nisi for sale is made in a mortgage suit the period of limitation mentioned in the Act of 1877 is in effect three years plus six months the period given by the decree for redemption. Their Lordships cannot accept that view. The sale is merely something to be done under the decree. A certain time is fixed by the decree within which it is to be done, but the decree is operative from its date and it is the length of time during which it is operative that the Limitation Act looks to.

25. The date of the decrees being August 26, 1905, they became unenforceable by proceedings commenced after August 26, 1903. Bray was paid the amount due upon February 2, 1910, one year and three months after the statutory period had elapsed, and over thirteen months after January 1, 1909, when the latter Act had come into operation.

26. There is no provision in this latter Act so retrospective in its effect as to revive and make effective a judgment or decree which before that date had become unenforceable by lapse of time. The payment of these decrees by the Roys on February 2, 1907, was voluntary in the sense that they could not, by any legal proceedings founded upon the decrees in which these facts had been elicited and relied upon, have been compelled to make them.

27. The suit out of which this appeal has arisen was instituted on September 9, 1912, by the Roys in the Court of the Subordinate Judge, as above mentioned, against the representative of Dhanpat Singh and others, claiming to recover under the deed of indemnity of April 23, 1894, the amount paid by the Roys to Bray, with interest thereon till paid, and Bother sums amounting in all to Rs. 27,000.

28. The plaint is long and involved. It states fully, however, the creation by Dhanpat Singh of the equitable mortgage by the deposit with the firm of the three mortgage-deeds and the transfer of the two decrees of August 26, 1905, to Bray on June 23, 1907, and then avers that Bray was about to execute those decrees, and that " considering it was more advisable to amicably pay off the decretal debt than bear the cost of execution," the Roys borrowed a sum of Rs. 50,000 from the company on a mortgage and paid the same to Bray for the satisfaction of the debt due upon the decrees.

29. In para. 11 of the plaint it is submitted that under the deed of indemnity the Roys were entitled to recover the whole of the debt due to the firm and the costs of the suits relating to it, which the Roys were obliged to pay.

30. Maharaj Bahadur Singh, one of the defendants, filed in reply to this plaint a written statement, raising many quite untenable defenses to which it is unnecessary to refer. In its third paragraph he, however, avers that the suit of the plaintiffs is barred by limitation in respect of the different sums of money sought to be recovered, and in its fifteenth paragraph further avers that even if the Roys had paid to Bray the sum alleged, it was a mere voluntary payment, and that the plaintiffs were therefore not entitled to recover it from the defendants, the representatives of Dhanpat Singh deceased. The defendant No. 2 also filed a written statement raising the same defenses.

31. The Subordinate Judge held (1) that the claim of the Roys under the indemnity deed was not barred by limitation, that under Article 83 of the Limitation Act the right to sue ran from the time they, the plaintiffs, were dignified, which was February 2, 1907, when they paid Bray the Rs. 50,000 ; and (2) that it was too late for the defendants to raise the defense that the payment was a mere voluntary payment and that therefore the plaintiffs were entitled to recover the sums claimed. On both these points the High Court came to a different conclusion.

32. They held that as the decrees of August 26, 1905, had not been kept alive by obtaining an absolute order for sale the remedies upon them were barred by limitation,

that the decrees were not enforceable and that the defendants were not precluded from raising this point. They therefore allowed the appeal.

33. Their Lordships concur with the High Court in the two conclusions above mentioned, but they differ from them as to the consequences which the High Court apparently thought necessarily followed from these conclusions.

34. The words of the indemnity are very wide and far reaching. They provide that the Roys are to be indemnified from and against all losses, damages, actions and claims, and for any act done by Dhanpat Singh with respect to the three mortgage-deeds.

35. It was perfectly open to the plaintiffs to have replied to this plea that, though the decrees could not have been enforced against them by Bray, Dhanpat Singh had by his own act in depositing the deeds as a security with the firm, blistered, encumbered and lessened in value their equity of redemption in the property mortgaged by these deeds, and that they were under the words of this indemnity entitled to recover from his representatives what it had cost them, the Roys, to remedy the damage he had done to their property by paying off the encumbrance upon it which he had by his own acts created.

36. The difficulty, however, is not in discovering a principle of law entitling the plaintiffs to recover; it is in finding evidence in the case to show that the principle is applicable. This is possibly due to the fact that the whole litigation was based on the two decrees and on those alone. If the task of those conducting the case for the plaintiffs had been to elicit the irrelevant and leave the relevant hidden and obscure, they could not well have succeeded better. It seems incredible, but so it is, that there is not a particle of evidence written or parol as to what was done with the three mortgage-deeds, by the deposit of which the encumbrance on which the two decrees of August 26, 1905, were based was created. It is not shown whether the firm delivered them to Bray when the decrees were assigned to him, or whether Bray delivered them to the Roys when the decrees were paid, or whether they were delivered by Bray or by the Roys to the company when the mortgage of February 1, 1910, was executed and the company's cheque endorsed over to the Roys. On these important points the Board is left to conjecture what would be the natural and probable course for prudent men in their own interest to take. But that is not all. Not a particle of evidence is elicited to prove the important statement in the plaint that Bray was about to execute the two decrees, and that Roys thought it wiser to settle the decrees amicably than to incur the costs of a sale. If this were true the fact that the Roys had to

borrow money from the company to pay these decrees, even though they might have been mistaken as to their enforceability, would not alter the position. Their expenditure would still have been incurred to cure the injury Dhanpat Singh had done to them by pledging the mortgage-deeds. This point has been raised before their Lordships for the first time, and the difficulty which the Board have in dealing with it illustrates forcibly the wisdom of the rule which prohibits the raising of new points involving questions of fact after the trial is over, when evidence of fact could have been given touching those questions had they been then raised.

37. To send the case back to the Court of the Subordinate Judge to ascertain what has been done with these mortgage deeds, what was the arrangement made in respect to them and who has got possession of them, would involve considerable expense, and might afford an almost too tempting opportunity for the concoction of evidence. Their Lordships are driven, in order to deal with the case, to assume that matters were conducted in a business way, and that what would have occurred had they been so conducted did in fact occur. In the ordinary course of business the mortgage-deeds would have been delivered by the firm to Bray when the decrees were assigned, they would have been delivered by Bray to the Roys or more probably to the company to fortify their legal mortgages when Bray was paid off. Their Lordships will therefore assume that they were so delivered. It would be the natural consequence of the proved acts of the parties. As has been already pointed out, the fact that the Roys were obliged to borrow money on mortgage to get rid of the encumbrance-placed upon their property by the act of Dhanpat Singh does not prejudice in any way their rights under the covenant to indemnify. The expenditure to get rid of the encumbrance was equally incurred at their expense, but the amount of that expenditure must be measured by the sum paid to Bray on February 2, 1907, with interest, as it apparently has been measured by the decree of the Subordinate Judge dated August 12,1914. Their Lordships are, for these reasons, of opinion that this appeal should be allowed, the judgment of the High Court reversed and the aforesaid decree of August 12, 1914, affirmed, and they will humbly advise His Majesty accordingly. But as the grounds upon which they base their judgment were not put forward in the High Court at all and for the first time mentioned before this Board, the respective parties must each bear their own costs in the Courts in India and of the appeal to His Majesty in Council.

Appeal allowed.

Cases Referred.

1. AIR 1914 PC 66: 36 All 350 : 12 ALJ 624 : LW 483 : (1914) MWN 485 : 27 MLJ 17: 19 CLJ 626 : 18 CWN 963 : 16 Bom LR 395 (PC)

2. AIR 1914 PC 65: 36 All 284: 41 IA 104 : (1914) MWN 437: 27 MLJ 1 : 16 4 Bom LR 360 : 19 CLJ 574 : 18 CWN 740 :12 ALJ 596 (PC)