Privy Council Appeal No. 74 *of* 1919.
Bengal Appeal No. 11 *of* 1917.

Sachindra Nath Roy and Others - - - - - *Appellants*

v.

Maharaj Bahadur Singh and Others - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 12TH JULY, 1921.

Present at the Hearing :

LORD ATKINSON.
LORD PHILLIMORE.
SIR JOHN EDGE.

[*Delivered by* LORD ATKINSON.]

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. On the 8th March, 1886, the 12th May, 1887, and the 12th May, 1892, the predecessors in title of the appellants in this litigation, styled the Roys, borrow from one Dhanpat Singh three sums of Rs. 3,00,000, Rs. 20,000 and Rs. 15,000 respectively, and secured the repayment thereof with interest at the rates stipulated by three mortgages bearing the above respective dates of certain immovable property belonging to them, the Roys. 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 the 3rd June, 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 Shewaran Khoshal Chand, hereinafter styled the firm, to secure the repayment of Rs. 70,000 lent by them to him, with interest till paid. 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.

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 repayment of it with interest by executing to this Company a mortgage dated the 23rd April, 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, the 23rd April, 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 doth 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, administratives, 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 hereinbefore recited deeds of mortgage, or any money owing or due thereunder 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 petitions to that effect filed accordingly."

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 the 5th May, 1894, and in the second suit a decree dated the 7th May, 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.

On the 17th July, 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.

On the 11th May, 1897, the firm instituted a suit against the Roys and the Company, in 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 the 23rd April, 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. 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 the 28th February, 1903, the Subordinate Judge delivered judgment in favour of the plaintiff firm, holding that they, under their equitable mortgage were, as regards the Roys, entitled 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 the 23rd April, 1894, which he held had priority over the equitable mortgage of the firm, and 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 covered by the three first-mentioned mortgages should be sold subject to the lien of the Company.

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 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. 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. The Record was printed, No. 56, 1910, and sent to the office of the Privy Council. Meanwhile, however, the firm, by deed dated the 28th June, 1907, reciting the execution of all the deeds hereinbefore 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 the 26th August, 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. 45,377–5–16 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 the 26th August, 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 other the 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.

This Edward Hugh Bray was a director of a company which acted as agents for the Company, the mortgagees in the deed of the 23rd April, 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. By deed bearing date the 1st February, 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 the 26th August, 1905, which the Company agreed to do on having the repayment thereof with interest secured on the lands of the Roys therein mentioned, these lands were thereby mortgaged to the Company. The deed expressly stated these lands were subject to the encumbrance created by the two decrees of 26th August, 1905, alleged to be vested in Edward Hugh Bray, of 8, Clive Street, Calcutta.

To carry out this arrangement the parties had recourse to, probably having regard to their conflicting interests, the worst and most dangerous of all economies. The three parties, the Roys, Bray and the Company employed the same solicitors, Messrs, Morgan & Company, 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. The payment of the Rs. 50,000 was made in this way. The Company drew a cheque in favour of Morgan & Company for Rs. 50,000. Morgan & Company endorsed this cheque : " to Babus Shyama Charan Roy, Parbati Charan Roy and Sachindra Nath Roy, or order," and these three endorsees in their turn endorsed 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 the 16th April, 1910, the appeal was by an order, made in the usual course in the office of the Privy Council, dismissed for want of prosecution.

On the 15th November, 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 the 24th May, 1911, the Subordinate Judge made an order to the following effect : that " the decree be noted as finally disposed of in full satisfaction."

Sir George Lowndes for the appellants contended that no absolute order on the decrees for sale having been obtained, the equitable mortgage was, under the 88th and 89th Sections of the Transfer of Property Act, 1882, 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 the decision of the decree appeal against, but from that of the dismissal. 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*, *I.* L.R. 36, *All.* 350, and the second, *Batuk Nath* v. *Munni Dei and others*, L.R. 41, I.A. 104. In the first the judgment of the Board was delivered by Lord Moulton. It was decided that under the Statute of Limitation Act, 1877, Schedule 2, Article 179, the period of three years named therein 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 recognised 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." 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.

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 Statute came into force on the 1st January, 1909.

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 Statute of Limitation looks to. The date of the decrees being the 26th August, 1905, they became unenforceable by proceedings commenced after the 26th August, 1908. Bray was paid the amount due upon the 2nd February, 1910, one year and three months after the statutory period had elapsed, and over thirteen months after the 1st January, 1909, when the latter Act had come into operation. There is no provision in this latter Statute 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 payments of these decrees by the Roys on the 2nd February, 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.

The suit out of which this appeal has arisen was on the 9th September, 1912, instituted by the Roys in the Court of the Subordinate Judge, as above mentioned, against the representatives of Dhanpat Singh and others, claiming to recover under the deed of indemnity of the 23rd April, 1894, the amount paid by the Roys to Bray, with interest thereon till paid, and other sums amounting in all to Rs. 27,000. 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 the 26th August, 1905, to Bray on the 23rd June, 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. In paragraph 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.

Maharaj Bahadur Singh, one of the defendants, filed in reply to this plaint a written statement, raising many quite untenable defences 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 defences.

The Subordinate Judge held (1) that the claim of the Roys under the indemnity deed was not barred by limitation, that under the 83rd Section of the Limitation Act the right to sue ran from the time they, the plaintiffs, were damnified, which was the 2nd February, 1907, when they paid Bray the Rs. 50,000; and (2) that it was too late for the defendants to raise the defence 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. They held that as the decrees of the 26th August, 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.

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.

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 or for any act done by Dhanpat Singh with respect to the three mortgage deeds. 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.

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 26th August, 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 the 1st February, 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 the 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. It was suggested that this question was raised before the High Court. That is a mistake. The passage in the judgment of the High Court on which that suggestion was founded runs as follows :—

> " For the defendants, appellants, three arguments were addressed to us :—(1) That the payment by the Roys to Mr. Bray was voluntary, and so they could not recover it ; (2) that the contract of indemnity was in fraud of the sub-mortgagee, Raja Gokul Das, and that the plaintiffs being parties with Rai Dhanpat Singh Bahadur to that fraud were not entitled to recover the amount from their joint wrong-doer ; and (3) that the payment was really a payment by the Eastern Mortgage and Agency Company and not by the plaintiffs.
>
> " The third argument has not been seriously pressed. There can be no doubt whatever that the plaintiffs got credit for the amount of the decree as part of the cheque of Rs. 50,000, which undoubtedly passed through their account."

The point here raised was that it was the Company who really paid Bray, and it was supposed to be answered by the fact that the Company's cheque was endorsed to the Roys.

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 the 2nd February, 1907, with interest, as it apparently has been measured by the decree of the Subordinate Judge dated the 12th August, 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 the 12th August, 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.

In the Privy Council.

SACHINDRA NATH ROY AND OTHERS

v.

MAHARAJ BAHADUR SINGH AND OTHERS.

DELIVERED BY LORD ATKINSON.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1921.