Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Ram Chandra Marwari and others v. *Rani Keshobati Kumari and others, from the High Court of Judicature at Fort William in Bengal; delivered the* 11*th May*, 1909.

Present at the Hearing:

LORD ATKINSON.
LORD COLLINS.
LORD SHAW.
SIR ANDREW SCOBLE.
SIR ARTHUR WILSON.

[*Delivered by Lord Atkinson.*]

This is an appeal from a decree of the High Court of Judicature at Fort William in Bengal, dated the 14th January, 1905, affirming a decree of the Subordinate Judge of Dumka, Sonthal Pergunnahs, dated the 4th September, 1901, by which the suit of the Plaintiffs (the Appellants) was dismissed. The facts, so far as it is necessary to state them, are as follows.

On the 27th July, 1885, Raja Udit Narayan Singh, since deceased, executed a mortgage of his taluka of Kasba in favour of one Harbhakt Das, now also deceased, for a sum of Rs.34,000, bearing interest at the rate of 1 rupee per cent. per mensem. The mortgage deed contained a provision that, on default being made in the

[20] P.C.J. 32. L. & M.—18/3/09. Wt. 98.

payment of interest at the stipulated dates, compound interest should be charged at the same rate, *i.e.*, 12 per cent. per annum. At the date of the mortgage, the mortgagee carried on the business of cloth merchant and money-lender at Bhagalpur and Calcutta in partnership with the first three Appellants. On the 3rd January, 1895, Harbhakt Das executed to his partner, the first Appellant, a mortgage of the mortgaged lands and the money secured thereon. On the 11th June, 1896, he executed a similar mortgage in favour of Bansidhar Marwari, the second Appellant. Harbhakt Das afterwards died, leaving the fourth Appellant, his only son, him surviving. During Harbhakt's life-time disputes arose and suits were instituted between him and his co-partners in reference to the business of the partnership, and especially in reference to their respective interests in the moneys secured by the above-mentioned mortgage of Raja Udit Narayan Singh. The Respondents are the widow and adopted son of the Raja, and a second encumbrancer on the mortgaged lands.

Default having been made in the payment of the interest, compound interest became payable and was claimed by the mortgagee. Large sums were from time to time paid by the mortgagor in discharge of it, and ultimately, on the 27th October, 1890, arrears of interest, amounting to Rs.11,829.14.6 were discharged by a payment of Rs.2,606.11.6 in cash and the execution by the mortgagor of a new bond (roka) for Rs.9,223.3.0 with interest at the same rate, *i.e.*, 1 rupee per cent. per mensem. The interest which had accrued due up to this date, and was discharged by payments in cash and the execution of the above-mentioned roka, amounted altogether to Rs.23,403.15.6.

Towards the end of July, 1895, the mortgagor, being anxious to redeem the mortgage, sent one Banwari Lal Panrey to the mortgagee to tender to him a sum of something over Rs.44,000 in full discharge of the only amount the mortgagor alleged to be then recoverable on his bond. This particular sum was fixed upon because it amounted to the difference between Rs.68,000 (double the principal sum advanced) and the amount already paid in respect of interest; and the contention of the mortgagor was that, under s. 6 of Regulation III of the Sonthal Pergunnahs Settlement Regulations, 1872 (as amended by Regulation V of 1893), which would admittedly apply to any suit brought to recover this interest, the most that could be recovered from him was Rs.34,000, a sum equal to the principal money lent. The decision both of the Subordinate Judge and of the High Court turned upon the construction of this Regulation.

Banwari Lal, whose evidence is uncontradicted, states that Harbhakt Das had no objection to receive the money apparently in full discharge, and to give a receipt for it; but that, on the witness's insisting on obtaining delivery of the bond, with the receipt endorsed on the back of it, in exchange for the money, Harbhakt Das stated that his partners had the bond, that they were on bad terms with him, and that he could not obtain possession of it. The witness states that he thereupon refused to pay the money, and that Harbhakt Das asked him to deposit it in Court. The mortgagor accordingly presented a Petition to the Court of the Subordinate Judge of Dumka, under the provisions of s. 83 of The Transfer of Property Act, 1882, praying for liberty to deposit in Court, in favour of the persons entitled to the mortgagee's interest, the sum of Rs.44,596.0.6, and for a return of the bond.

Upon this Petition an Order was, on the 17th August, 1895, made to the following effect:—

> "As apparently the suit, if put in, would not be "barred, the amount will be received under s. 83, "Act IV of 1882, and deposited, and a written notice "will issue to the mortgagee to take the amount."

In paragraph 7 of the Plaint in the present Suit it is stated that the Court of the Subordinate Judge issued a notice to the Plaintiffs requiring them to take out the sum deposited. It is further stated, in paragraph 8, that the Plaintiffs, on receipt of this notice, informed the Sub-Divisional Officer of Dumka that the amount deposited was insufficient, that an erroneous calculation had been made, and requested him to require the mortgagor to deposit the balance of the money due over and above the sum lodged.

It is not now disputed that the mortgagor was entitled under this Act to make the deposit, and that, upon his doing so, the rights of the mortgagee, or those representing him, were as follows. He was entitled, on presenting a petition (verified in the manner prescribed) stating the amount due on the mortgage and his willingness to accept the money deposited in full discharge of this amount, and, in addition, on depositing in the Court in which the money was lodged the mortgage deed, if then in his possession or power, to apply for and receive the money. And, under s. 84 of the Act, interest on the principal moneys ceased to run from the date of the tender, or as soon as the mortgagor had done all that has to be done by him to enable the mortgagee to take the money deposited out of Court, as the case might be.

The money deposited was permitted to lie in Court till the 23rd September, 1896. It was

then, by some manœuvre or contrivance, upon which the Appellants. for reasons best known to themselves, have deliberately abstained from letting in the light, drawn out by their agent, and applied to their own use. In the statement of account attached to their Plaint the Appellants, no doubt, credit the Respondents with the sum so drawn out as a payment made on the day on which it was drawn out, but interest was charged at the rate of 12 per cent. for the eleven months on the entire sum shown to be due on the 17th August, 1895.

On the 7th February, 1900, the suit out of which this Appeal arises was instituted, praying for the recovery of Rs.33,698.9—of which Rs.22,859.5 is the balance that remained due at the time when credit was given for the sum paid in, the remainder representing compound interest, calculated from that date till the commencement of the action—and, in default of payment, for the sale of the property mortgaged.

The only information given by the Appellants as to the steps taken by them to draw out, in violation of the above-mentioned provisions of the Transfer of Property Act, the money deposited, is contained in paragraphs 9 and 10 of their Plaint, and in the evidence of Ram Chandra Marwari, the principal Plaintiff. From the former it appears that the Appellants presented a Petition to the High Court at Fort William for the appointment of a Receiver for the withdrawal of the money from the Court of the Subordinate Judge; that on the 26th June, 1896, an order was made on this Petition appointing a Receiver with all the powers conferred by s. 503 of the Civil Procedure Code; and lastly, that the Receiver so appointed, after various attempts, at last succeeded in withdrawing the fund from Court. But neither

the Petition nor the Order is printed in the Record, nor is any information afforded as to the precise nature of the persistent and, unfortunately, successful efforts of the Receiver to defeat the law, while the evidence of Ram Chandra Marwari contains many important admissions. In the course of his cross-examination this witness says that in his Petition to the High Court he stated—

> "that in the latter part of July 1895 the Raja was
> " prepared to pay the whole amount due on the bond
> " in suit, but that Harbhakt prevented his paying it,
> " and that thereupon the said Raja had deposited the
> " money in the Court of the Subordinate Judge of
> " Dumka."

No doubt he states in his cross-examination that he did not in his Petition " admit that the " Rs. 44,000 deposited by the Raja was in full " payment of our dues."

It is apparent from this evidence that the Receiver was appointed solely because Harbhakt and his partners, owing to their quarrels, would not join in an application to draw out the money deposited. There is nothing to show that the Receiver was clothed with any right or authority in reference to the money, or the withdrawal of it from Court, other than, or different from, that which belonged to those on whose behalf he was appointed. As they were bound to comply with the requirements of the statute under which it was paid into Court, so was he. It was not contended, it could not be contended with any show of reason, that either the High Court or the Subordinate Judge had, save with the consent of the mortgagor or his representatives, any jurisdiction to permit the money deposited to be drawn out of Court on any terms other than those imposed by the statute. There is no proof that either of those Courts ever made an order purporting to exercise such a power, while

there is not a particle of evidence to show that the mortgagor, or those who succeeded him, ever gave any consent, express or implied, to the money being drawn out in part discharge, as opposed to full discharge, of his, or their, liability on the bond. There is no proof that any demand was made on the mortgagor after the money was paid into Court, and it is admitted that nothing was paid in respect of the mortgage, either for principal or interest, since that date. It is not suggested that the present is not the first suit instituted to recover any portion of it. In the cross-examination of Ram Chandra Marwari the following passage occurs :—

> " When notice was sent us of the deposit, we sent a " petition of objection to this Court. We did not get " any reply to this objection. I have not filed a copy " of the objection, nor have I called for the " original."

This is the only evidence going to show that any objection was made to accept the sum of Rs. 44,000 in full discharge of the mortgage debt. Yet after a delay of close upon 4½ years—*i.e.*, from the 17th August, 1895, the date of the deposit, till the 1st February, 1900, the date of the institution of this suit — and in face of this evidence, Mr. De Gruyther, on behalf of the Appellants, invites their Lordships, notwithstanding the state of ignorance of the actual facts in which his clients have deliberately left them, to assume that the deceased Raja assented to the Receiver's drawing the money out of Court, in part satisfaction of the former's liability—because, it is said, the Receiver could not have obtained it otherwise without violating the law—or, if not, to send the question back for further enquiry to the Subordinate Judge.

In their Lordships' opinion they can make no such assumption as that suggested. The

assumption which they are entitled to make, and indeed bound to make, is precisely the opposite. The Act provides that money lodged, as this was, "in full discharge" of a liability can only be drawn out by a creditor in full discharge of that liability. The agent of the Appellants appointed *ad hoc* drew out this money. It is for them to show that he acted under such conditions that the statutory result does not follow from his act. If they fail to do this, as they have failed in the present case, then there is nothing to defeat or modify the operation of the statute, and the consequences must be those which it prescribes. Mr. De Gruyther objected to their Lordships considering this question, on the ground—quite legitimate if well founded—that the Defendants rested their defence solely on s. 6 of the above-mentioned Regulation, and that the question of the circumstances under which the Receiver drew out the money, or the legal consequences of his doing so, was not in issue in the suit.

It is quite true that no issue has been framed in which the fact of the withdrawal is specifically mentioned. But the second issue is quite wide enough to cover it. The issue runs thus :—

> "Are the Plaintiffs entitled to recover more than "Rs.68,000, the amount they admit having received ?"

This issue, as framed, leaves it open to the Defendants to contend that the Plaintiffs are not entitled to recover more than Rs.68,000, either because Section 6 prohibits it, or because they have received "in full discharge" the sum paid into Court. And in the statements contained in paragraph 7 of the written statement of the first Defendant, and in paragraph 5 of that of the second Defendant, as well as in the evidence of Ram Chandra, Bansidhar, and Banwari Lal it is distinctly put forward that the sum of Rs.44,000

was tendered by Banwari in full satisfaction of the bond, and that both Harbhakt and Ram Chandra were, apparently, willing to accept it as such.

In the memorandum of appeal filed in the High Court by the Appellants, the second of the three grounds of appeal against the decision of the Subordinate Judge set forth runs as follows:—

> 2.—For that the Court below has erred in holding that the receipt of the amount already paid operated as a bar to the recovery of the amount in claim.

It cannot, therefore, be contended that the Plaintiffs had not notice that the receipt of the money deposited would be relied on as a defence.

Their Lordships are therefore of opinion that the Plaintiffs must be held bound by the act of their agent with all its results; that if he has omitted to perform any of the conditions necessary to entitle him, on their behalf, and for their use and benefit, to draw this money out of Court, they cannot rely upon his default in this respect, to escape from the consequences which would, of necessity, have followed the withdrawals, if everything prescribed by the statute had been rightly done; and that the money drawn out must, therefore, be held to have been drawn out in full discharge of the mortgagor's liability. The sum now sued for is, consequently, not due, and the suit must accordingly be dismissed.

The conclusion at which their Lordships have arrived on this point is in itself sufficient to dispose of the Appeal, and renders it unnecessary for them to express any opinion on the proper construction of s. 6 of the 3rd Sonthal Pergunnahs

Regulation. They will, therefore, humbly advise His Majesty that the Appeal should be dismissed.

The Appellants must pay the costs of the Appeal.

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