

Privy Council Appeal No. 9 of 1928.

Oudh Appeal No. 28 of 1926.

Lala Ram Narain and others - - - - - *Appellants*

v.

Radha Kishen Moti Lal Chamaria (a firm) - - - - - *Respondents*

FROM

THE CHIEF COURT OF OUDH AT LUCKNOW.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 12TH DECEMBER, 1929.

Present at the Hearing :

LORD ATKIN.

SIR JOHN WALLIS.

SIR LANCELOT SANDERSON.

[*Delivered by* SIR LANCELOT SANDERSON.]

This is an appeal by the plaintiffs against a judgment and decree of the Chief Court of Oudh, dated the 29th of November, 1926, which partly affirmed and partly reversed a judgment and decree of the Subordinate Judge of Unao.

The plaintiffs are the representatives of Bilas Rai Hardat Rai, a mercantile firm of Nayaganj, Cawnpore. The defendants were the Pioneer Mills, Ltd., and the respondent firm Radha Kishen Moti Lal Chamaria.

The Pioneer Mills, Ltd. (hereinafter called the Company), was registered under the Indian Companies Act, 1913, and carried on the business of sugar manufacturers; the factory was at Unao and the head office was in Calcutta.

Radha Kishen Moti Lal Chamaria (hereinafter called the defendant firm) carried on their business in Calcutta.

The main question in this appeal is whether a mortgage dated the 31st August, 1922, executed by the Company in favour of the defendant firm, ever took effect as a valid security, the

plaintiffs alleging that there was no consideration in respect thereof.

The learned Subordinate Judge found in favour of the plaintiffs on this issue.

The plaintiffs' suit was for the recovery of 4 lacs of rupees principal and Rs. 18,666 interest on a mortgage dated the 10th of August, 1922, executed by the Company in favour of Bilas Rai Hardat Rai.

The learned Subordinate Judge made a decree in favour of the plaintiffs for the sum of Rs. 2,68,000 and interest thereon, and directed that the plaintiffs should withdraw that amount from the monies held in deposit by the Imperial Bank of Calcutta. The Company was in liquidation and the said monies in deposit represented the proceeds of the sale of the Company's assets.

The defendant firm appealed to the Chief Court of Oudh: the plaintiffs also appealed against that part of the Subordinate Judge's decree which disallowed a portion of the plaintiffs claim on their mortgage.

Both appeals were allowed by the Chief Court, and it was directed that the plaintiffs' claim—

“ Be and is hereby decreed for Rs. 4,18,666-10-0 (Rupees four lakhs eighteen thousand six hundred and sixty-six and annas ten) only with 8 per cent. per annum interest from 15th of March, 1923, till realization against the Liquidators, defendant No. 1, subject to the prior incumbrance in favour of Radha Kishen Moti Lal Chamaria, defendant No. 2, under the deed of mortgage dated 31st of August, 1922.”

No question arises in this appeal as to the amount due to the plaintiffs on their mortgage. The appeal is against that part of the decree which directed that the plaintiffs' claim should be subject to the prior incumbrance in favour of the defendant firm under the mortgage of the 31st August, 1922.

It appears that the liquidation of the Company was in consequence of an application made by the Company on the 9th of April, 1923, to the High Court at Calcutta, which made an order on the 4th June, 1923, for the winding up of the Company. The Company and the liquidators are not parties to this appeal.

The material facts are as follows :—

On the 10th August, 1922, the Company executed a mortgage in favour of the plaintiffs to secure a sum of four lacs and interest at 8 per cent. per annum. The property comprised in the mortgage was the sugar refinery at Unao and the distillery, including engines, machinery, buildings and lands, considered to be part and parcel of the said sugar refinery and distillery.

It was stipulated that the mortgage should be treated as a second mortgage against the sugar mills (which it was agreed meant the refinery), and as a first mortgage against the distillery.

The above-mentioned mortgage was not registered in pursuance of the provisions of the Indian Companies Act of 1913 until the 21st of November, 1922. The time for registration was extended by an order of the High Court at Calcutta dated the

14th of November, 1922, for three weeks from the date of the order.

On the same day, viz., the 10th of August, 1922, the Company executed a mortgage in favour of the Tata Industrial Bank. Ltd. (hereinafter called the Bank). It recited that the Bank had agreed to open a cash credit loan account to the extent of five lacs of rupees, and in consideration of the advances to be made and as security for the repayment of all monies from time to time owing to the Bank in respect of the said account, the Company pledged and hypothecated to the Bank all the stocks of gum, sugar, molasses, coal, gunny bags and other articles from time to time on the premises of the Company's refinery at Unao or at any other place which might be used as a godown. In further consideration of the said advances the Company mortgaged the immovable property and machinery mentioned in Parts I and II of Schedule B, the whole of which were declared to be free from incumbrances.

The premises thus mortgaged were the refinery and the machinery attached thereto. It was on these premises that the plaintiffs held a second mortgage.

The Bank's mortgage contained a provision that the Company should always maintain a margin of 25 per cent. between the sum owing to the Bank and the open market value of the stocks thereby pledged, and a further provision that if the Company when called upon to maintain such margin, failed to do so within 14 days after notice in writing, it should be lawful for the Bank to sell and dispose of by public auction or private sale all or any part of the stocks thereinbefore mentioned.

The above-mentioned mortgage in favour of the Bank was not registered under the Companies' Act until the 22nd of December, 1922. The time for registration had been extended by an order of the High Court at Calcutta dated the 6th of December for three weeks from the date of the order.

It will be necessary to refer to the terms of this order in detail when another part of this case comes to be considered.

On the 31st of August, 1922, the Company executed a mortgage in favour of the defendant firm to secure an advance of five lacs of rupees. This mortgage comprised both the refinery and the distillery and the machinery appertaining thereto.

It was recited therein that the consideration for the mortgage was the sum of five lacs paid by the defendant firm to the Company at or before the execution of the mortgage, the receipt whereof the Company acknowledged. The mortgage contained a proviso for redemption, and the Company covenanted that it was lawfully seised and possessed of the said mills, lands and premises, free from all incumbrances.

The mortgage was executed by three directors of the Company, and at the end of the mortgage deed there was the following memorandum :—

“ CONSIDERATION.

“ By cheque to the Tata Bank, Ltd., No. 1,332, dated this day, for Rs. 5,00,000, on the Imperial Bank, Burra Bazar Branch.”

This was signed by the same three directors.

The mortgage of the 31st of August, 1922, in favour of the defendant firm was duly registered in compliance with the provisions of the Companies Act on the 21st of September, 1922. This is the mortgage to which the plaintiff's claim was made subject by the decree of the Chief Court, and which the plaintiffs allege was in fact without any consideration.

Their Lordships have not seen the actual cheque, but it appears to have been before the learned Judges of the Chief Court, and the following description of the cheque and the endorsement thereon contained in the judgment of the Chief Court may be taken as correct :—

“ It is dated the 31st of August, 1922, and is for a sum of 5 lakhs of rupees. It was drawn by Ram Partab Chamaria, a relation of the mortgagees, as the evidence shows, in favour of Radha Kishen Moti Lal, the mortgagees, or ‘ order ’ on the Bank of Bengal, Burra Bazar Branch. On the reverse of the cheque the original endorsement was ‘ Pay to the Pioneer Mills, Limited, or order. ’ This endorsement was penned through and the following endorsement was substituted in its place : ‘ Please pay to Tata Industrial Bank, Limited, or order. Radha Kishen Moti Lal. ’ ”

Mr. A. C. Bose, an attorney of the Calcutta High Court, was acting on behalf of the defendant firm in respect of the above-mentioned transaction, which was carried out in Calcutta. He was examined as a witness on commission, and in his evidence he stated that the directors of the Company assured him that, apart from the mortgage in favour of the Bank, which was not then registered, there was no other incumbrance on the Company's property, and that by the payment of the five lakhs to the Bank, the mortgage in favour of the Bank would be paid off and the defendant firm's mortgage would be a first charge on all the property comprised therein.

Mr. Bose said that the cheque was at first endorsed to the Company, and then the endorsement was altered and it was endorsed to the Bank in order to ensure payment of the existing charge in favour of the Bank. This was done, he alleged, with the consent of the directors of the Company.

His evidence, further, was to the effect that he sent the cheque enclosed in a letter from him to the Bank at Calcutta with the consent and at the request of all the directors of the Company.

The letter, according to Mr. Bose's evidence, bore on the face of it the consent in writing of Mr. Wilberforce, who was the managing director of the Company, to the terms of the letter. The letter has not been produced. This is somewhat remarkable, for it is almost certain that it would have shown the conditions upon which the cheque was delivered to the Bank.

Their Lordships, however, are of opinion that the conditions on which the cheque for five lakhs was handed to the Bank may be gathered from a telegram which was sent by the Bank at Calcutta to the Bank's Cawnpore branch, which is as follows :—

“ 31st August, 1922. No. 98

“ We have received from Radha Kishen Chamaria and Moti Lal Chamaria rupees five lacs upon trust to be paid to your credit here upon delivering to above all papers, documents and title deeds relating to the Pioneer Mills, Limited, held by you stop Wilberforce has consented on behalf of Mills stop Parties request you despatch papers with instruction and authority to us.”

An entry was made in the books of the Bank in Calcutta under the heading “ Sundry Creditors ” as follows :—

“ August 31st. 1922. By amount to be paid to Cawnpore conditionally as per our wire of date, credit, 5,00,000. Balance 5,00,000.”

It is clear from the terms of the above-mentioned telegram and entry in the books of the Bank that Mr. Bose, acting on behalf of the defendant firm, did not deliver the cheque for five lakhs to the Bank unconditionally, so as to make it or the proceeds thereof the property of the Bank or of the Company. On the contrary, it was obviously delivered to the Bank by Mr. Bose, to be held by the Bank on trust, and the Bank agreed that the five lakhs should not be credited to the Cawnpore branch until all papers, documents and title deeds relating to the Company held by the Cawnpore branch should be delivered to Mr. Bose or the defendant firm.

On the 5th September, 1920, the Bank's Cawnpore branch sent six deeds to the Calcutta office of the Bank, and by their letter of that date the branch asked the Calcutta office to deliver the deeds to the defendant firm against their receipt and to transfer the five lakhs to the branch account.

The Bank's mortgage of the 10th August, 1922, was not among the deeds so sent.

The deeds were not handed to the defendant firm. It was subsequently contended by the Bank that they had been tendered to the defendant firm and that they declined to take them.

There is no correspondence produced between the 5th September, 1922, and the 11th November, 1922, but it appears from the letter of the 11th November, 1922, from the Bank in Calcutta to Mr. Bose that on the 2nd of November Mr. Bose had sent a draft assignment, that the draft assignment was returned by the Bank to Mr. Bose, and another draft, which had been approved by the Cawnpore office, was sent to Mr. Bose for approval by the defendant firm.

The Bank stated that the execution of an assignment was not part of the original arrangement, and it was done merely as a favour on the part of the Bank, with a view to an amicable settlement.

The draft assignments have not been produced, and their Lordships are not aware of the terms thereof and the respects in which the two drafts differed. It appears, however, that the matter was then placed by the Bank in the hands of their solicitors, Messrs. Morgan & Co., and it was arranged that Mr. Avory, representing Messrs. Morgan & Co., should meet Mr. Bose and discuss the matter of the suggested deed of assignment. A meeting was held either on the 6th or 9th of December, 1922, and on the 9th December, 1922, the following letter was sent by Messrs. Morgan & Co. to Mr. Bose :—

Urgent.

“ DEAR SIR,

“ TATA INDUSTRIAL BANK, LTD., AND

MESSRS. CHAMARIA AND PIONEER SUGAR MILLS, LTD.

“ We write as arranged to record the arrangements made at the meeting at the Tata Bank this afternoon, which were as follows :—

“ 1. The Bank will assign to your clients all their estate rights, title and interest in all the property comprised in the deed of mortgage and hypothecation dated 10th August, 1922, and the whole sum owing by the Company, inclusive of interest to date of realization, which it is estimated will be between Rs. 6,60,000 and Rs. 6,70,000, is to be dealt with and paid as follows :—

“ 2. The Rs. 5,00,000 paid on account and already deposited with the Calcutta Office of the Bank will remain there earning interest until completion of the deed of assignment, when that sum, together with the interest earned on it, will be applied in part payment.

“ 3. The Bank will proceed to place contracts for the sale of the stocks as agents for and on behalf of your clients, and immediately the total quantity has been so covered by contracts, should the total sales amount to the balance of the account, inclusive of interest to that date, your clients will forthwith pay to the Bank the sum representing that balance. The above contracts may be either for immediate or forward deliveries and will be approved (*sic*) only with approved parties, and particulars of the contracts made will be given to your clients.

“ 4. In the event of the total amount of such contracts being less than the balance due to the Bank, inclusive of interest as above, your clients will forthwith pay to the Bank the shortfall (if any) up to but not exceeding Rs. 10,000. The shortfall in excess to be realised by your clients against the mill property under the power of sale contained in the deed, dated 10th August, 1922, the full benefit of which will then have been vested in them by virtue of the deed of assignment, and steps towards such realization are to be taken by your clients at the earliest opportunity, and in any case not later than the 1st April, 1923.

“ If this arrangement is to be carried out, your clients must indemnify the Bank in respect of any claim made or action taken against them by any third party who may be also interested in the stocks, and from all costs and expenses to which they may be put in connection therewith.

“ Will you kindly confirm the above arrangements so that the matter may be proceeded with without delay.

“ Yours faithfully,

“ (Signed) MORGAN & Co.”

In a further letter of the 11th December, 1922, it was stated by Messrs. Morgan & Co. that the Rs. 5,00,000 had not up to that time been earning interest; that it was merely held by the

Bank in suspense account, and that it would not be on an interest-earning basis until confirmation of the agreement set out in the Bank's letter.

Mr. Bose replied on the 15th December, 1922, as follows :—

“ MESSRS. MORGAN & CO.

“ DEAR SIR.

“ *Re* PIONEER MILLS.

“ Yours of the 9th instant received on the 11th. I am instructed by my clients to state that your good selves are labouring under a misapprehension in stating that the terms mentioned in your letter under reply were arranged between the parties. Although there were discussions between the parties, no definite arrangement was arrived at, and the terms suggested in your letter are extremely prejudicial to my clients, having regard to the legal situation under your mortgage of the 10th August, 1920, about which my clients have taken opinion, a copy whereof along with the case on which the same was obtained, is enclosed herewith.

“ Yours faithfully,

“ (Signed) N. C. BOSE.”

It had obviously been ascertained at this time by Mr. Bose and the defendant firm that the said sum of 5 lakhs would not pay off the Company's debt to the Bank, and that the amount of the Company's overdraft was much larger, viz., about Rs. 6,60,000 or Rs. 6,70,000, as estimated in Messrs. Morgan's letter of the 9th December, 1922. The position then adopted by the defendant firm is clearly stated in Mr. Bose's letter to the Bank dated the 15th December, 1922 :—

“ 10, HASTINGS STREET, CALCUTTA.

“ 15th December, 1922.

“ To the Manager, Tata Industrial Bank, Ltd.

“ DEAR SIR.

“ On the 31st August last my clients, Messrs. Radha Kissen Chamaria and Motilal Chamaria, directed you to keep their five lacs of rupees upon trust, to pay the same to your Cawnpore Branch upon their delivering to my clients all papers and documents and title deeds relating to the Mills held by the Bank.

“ At the time when the money was sent to you they were acting in pursuance of a mortgage dated the 31st August, 1922, from the Pioneer Mills to my client, in which there was the following covenant :—

“ ‘ And the said mortgagor doth hereby covenant with the said mortgagees that the said mortgagor is lawfully seised and possessed of the said ‘ Mill lands, premises and hereditaments free from all incumbrances, etc.’ My clients have subsequently received information which lead them to believe that the said covenant amounts to a misrepresentation of facts. They are enquiring into the matter fully to ascertain if their suspicions are really well founded.

“ My clients advanced the moneys on the faith of the above covenant being true, and in the circumstances they hereby revoke your authority to make over the five lakhs of rupees to your Cawnpore Branch on the terms mentioned in the letter of 31st August, 1922, or on any other terms. On behalf of my clients I call upon you to forthwith refund to me as their attorney the said sum of five lakhs of rupees, with such interest as the amount has actually earned.

“ Yours faithfully,

“ (Signed) N. C. BOSE.”

At this time the position seems to have been as follows :— The Bank was holding the 5 lakhs in a suspense account, and was willing to assign to the defendant firm the whole of the debt owing to the Bank by the Company, viz., Rs. 6,60,000 or Rs. 6,70,000, and all the Bank's right, title and interest in the property comprised in the mortgage and hypothecation deed of the 10th August, 1922. It was part of the proposed arrangement that the said Rs. 5,00,000 should be taken as part payment, and there was a proposed plan for placing contracts for the sale of the stock and for payment of the balance by the defendant firm, as specified in the Bank's letter of the 9th December, 1922.

On the other hand, the defendant firm was alleging misrepresentation of facts by the Company ; the said firm revoked the Bank's authority to pay the 5 lakhs of rupees to the Bank's Cawnpore branch, and demanded the return of the said sum on the ground that the conditions on which the money was paid to the Bank had not been fulfilled.

The situation at this stage was described in the evidence of Mr. N. L. Puri, who was the manager of the Central Bank of India at Calcutta, with which the Tata Bank had been amalgamated in July, 1923, as follows :—

Before assignment the contention of the Tata Bank was that unless the whole amount due to them was paid, they could not assign their rights as regards the stocks, plants, machinery and mills, etc., mortgaged to them. Radha Kishan Moti Lal Chamaria's contention was that the stocks were not mortgaged to them and they wanted the assignment on payment of five lakhs.

If the matter had stopped there, there could be no doubt, in their Lordships' opinion, that up to that time there had been no consideration passing from the defendant firm to the Company.

On the 30th of December, 1922, the Bank gave notice to the Company pursuant to the provisions of the Bank's mortgage of the 10th of August, 1922, requiring the Company within fourteen days to make up and maintain the margin of security mentioned therein, or, alternatively, to repay to the Bank the sum then owing by the Company to the Bank. The Company failed to comply with such requisition, and thereby the Bank became entitled to sell and realise the stocks of the Company which were hypothecated to the Bank.

On the 2nd of January, 1923, Messrs. Morgan & Co. sent to Mr. Bose a deed of assignment, which had been executed by the Bank in favour of the defendant firm of the property charged by the deed of the 10th of August, 1922, made between the Company and the Bank and of the debt thereby secured. It was stated in Messrs. Morgan's letter that the Bank had on execution of the deed of assignment appropriated the said sum of five lakhs in part payment of the agreed consideration of the assignment, which was alleged to be the sum of Rs. 6,76,757-9-11.

On the same day Messrs. Morgan & Co. sent the title deeds relating to the above-mentioned property to Mr. Bose.

It appears that the indenture of the 10th of August, 1922, was already in Bose's possession. It was alleged that he had received this deed on the 31st August, 1922. It is not clear for what purpose the said indenture had been handed to Mr. Bose.

Mr. Bose replied by his letter of the 3rd January, 1923, as follows :—

“ MESSRS. MORGAN & CO.

“ DEAR SIRS,

“ *Re* PIONEER MILLS, LTD.

“ TATA INDUSTRIAL BANK, LTD., AND MESSRS. CHAMARIAS.

“ I am surprised to receive your letter of yesterday's date, enclosing a deed of assignment purported to be executed by your clients, the Bank, in favour of my clients of a debt amounting to Rs. 6.76.757-9-11, alleged to be due to them under an Indenture of Mortgage dated the 10th August, 1922, knowing fully well that the said indenture only secured an advance of Rs. 5,00,000, and after my letter to the Manager of the Bank, Calcutta Branch, dated the 15th ultimo, revoking the authority of the said Bank to make over the 5 lacs of rupees deposited with them by my clients to the Cawnpore Branch of the Bank on the terms mentioned in my letter to them of the 31st August last or on any other terms, and after my letter to you also dated the 15th ultimo, sending counsel's opinion on your client's rights under their said mortgage, and pointing out that the Bank could not claim anything more than rupees five lacs under the mortgage and the proposed assignment could not be taken. Your clients had no authority to appropriate the said deposited amount after the revocation of their authority to pay as aforesaid, and after being pointed out that they could not claim or recover anything more than five lacs under the mortgage nor assign their alleged claim over and in excess of five lacs under the said mortgage.

“ As regards the agreement referred to in the operative part of the deed and alleged to have been arrived at between the parties on the 6th ultimo, I have already stated in my letter to you of the 15th December last that no conclusive agreement had been arrived at, but there were merely suggestions made by both parties with a view to arrive at a settlement. My clients regret that they cannot accept the assignment enclosed with your said letter, which even does not contain the usual covenants, and under their instructions I return you herewith the same.

“ I am further instructed by my said clients to call upon your clients, which I hereby do forthwith, to return to my said clients or to me as their attorney the said sum of rupees five lacs so deposited with them as aforesaid, with such interest thereon as may be payable by the Bank on deposits.

“ Yours faithfully,

“ (Signed) N. C. BOSE.”

On the same day Mr. Bose returned the title deeds to Messrs. Morgan & Co.

The positions thus taken up by the Bank and the defendant firm were maintained, and on the 2nd February, 1923, Mr. Bose wrote to the effect that unless the Bank complied with the defendant firm's requisition and returned the amount deposited with the Bank the defendant firm would take legal proceedings to recover the same.

The Bank did not repay the sum of 5 lakhs to the defendant firm, with the result that a suit was instituted by the defendant

firm against the Bank in the High Court of Calcutta for the recovery of the said sum of Rs. 5,00,000 and interest.

On February 21st, 1923, the manager of the Company wrote to the manager of the Cawnpore branch of the Bank saying that he had been informed by the Bank's solicitor in Calcutta that the sum of 5 lakhs deposited by the defendant firm had been appropriated in January 1923, by the Bank, and desired to know why the sum had not been credited to the Company, as it did not appear in the Company's pass books. The answer, if any, to the above letter has not been produced.

The fact, however, is that it was not until the agreement of April, 1923 (to be hereinafter referred to), was concluded, that the said sum of 5 lakhs was credited to the current account of the Company.

On the 14th March, 1923, the suit which is now under consideration was instituted by the plaintiffs against the Company and the defendant firm.

At the end of March a resolution for winding up the Company was passed, and on the 9th April, 1923, an application was made to the High Court of Calcutta, and an order for winding up was made on the 4th of June, 1923.

Apparently, early in April, 1923, Messrs. Dutt & Sen, attorneys in Calcutta, had assumed charge of the defendant firm's interests in respect of the above-mentioned matters, and on the 7th a meeting between Mr. Sen and Mr. Avory took place, the result of which was a settlement of the matters in dispute between the Bank and the defendant firm. The terms of settlement were embodied in an agreement: the copy, which was before their Lordships, did not bear the actual date, but having regard to the correspondence which was exhibited, it must have been about the 18th or 19th of April, 1923.

The agreement referred to the mortgage of the 31st August, 1922, and recited that the defendant firm had made over to the Bank a cheque for Rs. 5,00,000 under an agreement that the Bank should hold the cheque or the proceeds thereof on behalf of the defendant firm until the Bank handed over to the defendant firm the mortgage of the 10th of August, 1922, and the other documents of title relating to the immovable property of the Company then held by the Bank; that the defendant firm had called on the Bank for an assignment of all the estate, right, title and interest of the Bank under the said deed of the 10th August, 1922; that disputes had arisen between the Bank and the defendant firm; that the Bank had executed the deed of assignment on the 2nd January, 1923; that the defendant firm had refused to accept the said deed; that the Bank had required the Company to maintain the specified margin of security; that the Company had failed to comply; that the Company owed the Bank Rs. 6,76,757-9-11; that the defendant firm had agreed to pay the Bank the said sum upon having the assignment hereinafter contained made by the Bank; it referred

to the above-mentioned suit instituted by the defendant firm and the agreement to withdraw from all further proceedings and to enter satisfaction in respect thereof. By the terms thereof the Bank guaranteed that the said sum of Rs. 6,76,757-9-11 was due from the Company to the Bank on the 2nd of January, 1923, and that the Bank was entitled to recover the said sum out of the securities comprised in and pledged and mortgaged by the indenture of the 10th August, 1922, and it was agreed that upon the execution of the agreement and payment by the defendant firm of the balance due to the Bank after deducting Rs. 5,01,924-8-3, the said indenture of the 2nd of January, 1923, together with all deeds and documents relating to the property of the Company and held by the Bank, shall be delivered by the Bank to the defendant firm.

The agreement contained provisions that the Bank, as agents for the defendant firm, should continue to realise the stocks and movable property of the Company included in the hypothecation and mortgage of the 10th of August, 1922, and that the proceeds of such realisation should be placed to the credit of an account to be opened in the name of the defendant firm at the Bank.

The defendant firm paid by cheque dated the 18th April, 1923, the sum of Rs. 1,18,353-6-1 to the Bank. This sum and the above-mentioned sum of Rs. 5,01,294-8-3 were credited to the Company's account under date April, 1923, and thereby the balance which was then due on the Company's current account with the Bank was paid off. The larger balance which was due in January, had been reduced, by realisation of stocks and other matters, to the amount of the above-mentioned cheque.

On the above-mentioned facts the learned Judges of the Chief Court, over-ruling the decision of the learned Judge who tried the suit, held that the mortgage of the 31st August, 1922, was not only for consideration, but that the entire consideration agreed to was paid by the defendant firm, the mortgagees.

With respect to the learned Judges of the Chief Court, their Lordships are unable to adopt that view of the facts. In their opinion, in the first instance the sum of 5 lakhs was not paid to the Company or to the Bank for and on behalf of the Company. The documents and the evidence go to show that the said sum was paid by the defendant firm to the Bank upon trust and on the condition that the cheque for Rs. 5,00,000 or the proceeds thereof should be held by the Bank on behalf of the defendant firm until the Bank's mortgage of the 10th August, 1922, and the other documents relating to the immovable property of the Company then held by the Bank should be delivered to the defendant firm.

That this is a correct description of the position is evident from the recital in the agreement of April, 1923, which was made between the Bank and the defendant firm, and to which reference has already been made.

The above-mentioned condition was not carried out, and there were two, if not more, reasons therefor.

In the first place, the amount owing to the Bank by the Company was considerably more than Rs. 5,00,000, and the Bank were not prepared to part with their security until the whole amount of the overdraft was paid off. In the second place, the Bank had a charge not only upon the immovable property, viz., the refinery, which was included in the mortgage to the defendant firm, but also upon all the stocks and movable property of the Company, upon which the defendant firm had no charge.

The result was that disputes arose between the Bank and the defendant firm, and correspondence and negotiations passed between them, and, as far as their Lordships are aware, without the Company being consulted in respect thereof.

Finally, the defendant firm demanded the return of the Rs. 5,00,000 from the Bank and instituted a suit to recover the same.

Having regard to the facts of this case, their Lordships are unable to see what defence the Bank would have had to the said suit, and the defendant firm's claim for the recovery of the Rs. 5,00,000 if there had been no settlement and the suit had gone to trial. The facts of the case show clearly that the defendant firm could have successfully claimed the said sum on the basis that the Bank had received the money from the defendant firm on certain conditions, which had not been carried out, and consequently that the Bank was holding the money on behalf of the defendant firm.

The learned counsel for the plaintiff-appellants suggested several other tests of what the legal position was before the Bank and the defendant firm came to an agreement in April, 1923. It is not necessary to refer to them in detail, but their Lordships are in agreement with that part of the appellants' argument, viz.: that, prior to the agreement of April, 1923, the said sum of Rs. 5,00,000 did not become the property of the Company; it was not under the Company's control; it was not held by the Bank on behalf of the Company, and it was not applied to the payment or reduction of the Company's overdraft at the Bank.

It was, however, argued on behalf of the defendant firm that even if no consideration passed from the defendant firm to the Company at the date of the mortgage, viz., 31st August, 1922, payment of the 5 lakhs was in fact made in April, 1923, and the defendant firm's mortgage of the 31st August, 1922, then became effective.

The argument addressed to their Lordships on behalf of the plaintiffs on this part of the case was that the transaction contemplated by the mortgage of the 31st August, 1922, was never carried out, and that the arrangement made between the Bank and the defendant firm in April, 1923, was an entirely fresh transaction.

Their Lordships are of opinion that the evidence, both oral and documentary, shows that the transaction as originally intended between the Company and the defendant firm was not carried out, for the reasons already mentioned.

In April, 1923, when the final arrangement was made between the Bank and the defendant firm, the Company was obviously insolvent, a resolution for winding up the Company had been passed at the end of March, an application to the High Court at Calcutta had been made on the 9th of April, and, as already stated, the Bank had begun to realise part of the stocks of the Company, on the Company's failure to comply with the notice to maintain the specified margin, and the amount owing from the Company to the Bank was not 5 lakhs, but more than 6 lakhs. The position in April, 1923, was entirely different from that which existed in August, 1922.

In this state of affairs the Bank and the defendant firm entered into the arrangement of April, 1923.

The Company was not consulted about the arrangement, and was no party thereto. Their Lordships are unable to see that the Company, then insolvent and about to be wound up, obtained any advantage from the arrangement which the Bank and the defendant firm made in April, 1923. Such arrangement, it seems to their Lordships, was made solely for the purpose of protecting as far as possible the interests of the two parties to the arrangement, viz., the Bank and the defendant firm. By the arrangement the Bank, on the one hand, succeeded in getting the whole of the Company's debt paid off by the defendant firm; on the other hand, the defendant firm used the said sum of 5 lakhs as part of the purchase price specified in the assignment and thereby obtained a charge over the stock and movables of the Company, which they did not possess before, in addition to getting the assignment of the Bank's mortgage on the refinery. The debt of the Company was not extinguished: it was merely assigned to the defendant firm. This arrangement was different in material respects from the transaction contemplated in August, 1922, and their Lordships are of opinion that if it had been intended by the defendant firm that the arrangement of April, 1923, should be in effect a carrying out of the transaction of August 31st, 1922, it would clearly have been necessary to make the Company a party to the arrangement, by reason of the radical alteration in the terms.

For these reasons their Lordships are of opinion that the arrangement made on the 31st August, 1922, between the Company and the defendant firm, of which the defendant firm's mortgage was part, was never carried out, and that the arrangement made between the Bank and the defendant firm in April, 1923, was a transaction of an entirely different nature and on different terms, to which the Company were not parties, and from which the Company obtained no benefit.

They are, therefore, of opinion that there was no consideration in respect of the mortgage in favour of the defendant firm dated the 31st of August, 1922.

The result is that their Lordships are unable to agree with that part of the decree of the Chief Court, dated the 29th of November, 1926, which directed that the plaintiffs' claim should be subject to the prior incumbrance in favour of the defendant firm under the mortgage of the 31st of August, 1922.

There is, however, a further matter to be considered. The learned counsel for the plaintiffs argued that, although the defendant firm by means of the assignment became entitled to the security held by the Bank, which included a mortgage over the refinery, the plaintiffs' mortgage, which was on both the refinery and the distillery, had priority over the Bank's mortgage, even though the two mortgages were executed on the same day, viz., 10th August, 1922, and the terms of the plaintiffs' mortgage expressly stated that the plaintiffs' mortgage should be treated as a second mortgage against the sugar mills, *i.e.*, the refinery. The basis of the learned counsel's argument was that whereas the plaintiffs' mortgage was registered in pursuance of the Indian Companies Act of 1913 on the 21st November, 1922, the Bank's mortgage was not registered until the 22nd December 1922, and that the order of the High Court of Calcutta of the 6th December, 1922, by which the time for registering the Bank's mortgage was extended, provided that the order should be without prejudice to the rights of any mortgagee accrued in the meantime.

It was argued that by registering their mortgage on the 21st of November, 1922, the plaintiffs acquired a right which they did not possess before, and consequently that such right could not be prejudiced by the subsequent order of the High Court or by the registration of the Bank's mortgage in pursuance of the said order.

The order of the High Court was made under Section 120 of the Indian Companies Act. The reference to Section 109 in the order is an obvious mistake.

Section 109 is as follows :—

“ Every mortgage or charge created after the commencement of this Act by a company and being either . . . (c) a mortgage or charge on any immovable property, wherever situate, or any interest therein: shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the mortgage or charge, together with the instrument (if any) by which the mortgage or charge is created or evidenced, or a copy thereof verified in the prescribed manner, are filed with the registrar for registration in manner required by this Act within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a mortgage or charge becomes void under this section the money secured thereby shall immediately become payable.”

Section 120 is as follows :—

“ The Court, on being satisfied that the omission to register a mortgage or charge within the time required by Section 109, or that the omission or

misstatement of any particular with respect to any such mortgage or charge, was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any person interested, and on such terms and conditions as seem to the Court just and expedient, order that the time for registration be extended, or, as the case may be, that the omission or misstatement be rectified, and may make such order as to the costs of the application as it thinks fit."

By the terms of Section 120 the Court, when extending the time for registration, has a discretion to impose such terms and conditions as it thinks just and expedient, and the material words of the order in this case are "without prejudice to the rights of any mortgagee accrued in the meantime."

The phraseology of the order is not very precise, but their Lordships assume that "in the meantime" must be taken to mean the period between the date when the Bank's mortgage should have been registered and the date of actual registration. This period would cover the 21st November, 1922, when the plaintiffs' mortgage was registered.

Section 109 provides that a mortgage, such as the Bank's mortgage of the 10th August, 1922, shall so far as any security on the Company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the Company unless the prescribed particulars are filed with the Registrar within 21 days after the date of its creation.

It is to be noted that the section does not avoid the mortgage absolutely, but only so far as any security is given thereby on the Company's property or undertaking.

The effect, therefore, is that if a mortgage is not registered it is valid as an admission of debt, but as against a creditor or the liquidator it could not be said that a valid charge on the Company's property had been created.

But it is provided by Section 120 that the Court may extend the time for registration in a proper case, as was in fact done in this case. What, then, was the effect of the registration of the Bank's mortgage within the extended time?

In their Lordships' opinion, the Court having extended the time for registration, and the mortgage having been registered within that time, the mortgage was constituted a valid charge *ab initio*, i.e., from the date of its execution, viz., the 10th of August, 1922, subject only to such conditions as were imposed by the Court in the order which extended the time.

If that be so, the Bank's mortgage on registration became a valid charge on the refinery as from the 10th August, 1922, and the plaintiffs' mortgage of the 10th August, 1922, which also was registered within the time extended by the High Court, became a valid charge from the 10th August, 1922, on the refinery and the distillery; but on the face of the plaintiffs' mortgage it was only a second charge upon the refinery.

But it was said on behalf of the plaintiffs that a right to enforce their mortgage had accrued to them on the registration of the mortgage on the 21st November, 1922, and by the order of the Court such right was not to be prejudiced. The right which the plaintiffs had to enforce their mortgage against the property of the Company depended not only upon the registration, but also on the terms of the mortgage itself, and the right which they had to enforce in respect of the refinery was a second charge only. The order of the Court of the 21st December, 1922, that it should be without prejudice to the "rights of any mortgagee accrued in the meantime," in their Lordships' opinion, could not have been intended to convert the plaintiffs' second charge upon the refinery into a first charge thereon.

The learned counsel for the plaintiff-appellants, in support of his argument, referred to the decision *in re Monolithic Building Co., in re Tacon v. The Company* [1915], 1 Ch. 643, which decided that Section 93 of the Companies (Consolidation) Act, 1908, avoids an unregistered mortgage as against a subsequent registered incumbrancer, even though he had express notice of the prior mortgage at the time when he took his own security.

The facts of the present case are materially different from the facts of the cited case, especially by reason of the fact that the plaintiffs' mortgage contains an express term that it is a second charge on the refinery. Further, the learned Judges who decided the cited case seem to have dealt with it "in reference to the difference of position between a registered secured creditor and a prior unregistered secured creditor." See judgment of Cozens Hardy, M.R., at page 662, and the effect of the subsequent registration of the prior creditor's security within the time extended by the Court does not seem to have been considered.

Their Lordships are of opinion that there is nothing in the order of the High Court of the 6th December, 1922, which interfered with the priority of the Bank's mortgage upon the refinery over the plaintiff's mortgage therein.

Their Lordships, therefore, are of opinion that the appeal should be allowed on the ground that there was no consideration for the mortgage of the 31st August, 1922, in favour of the defendant firm, but they are further of opinion that the Bank's mortgage of the 10th August, 1922, which was assigned to the defendant firm, has priority over the plaintiffs' mortgage in respect of the property comprised in the mortgage so assigned to the defendant firm.

The decree of the Chief Court therefore must be set aside. The proper direction will be that the plaintiffs' claim be decreed for Rs. 4,18,666-10-0, with 8 per cent. per annum interest from the 15th March, 1923, till realization against the Company and the Liquidators thereof, with a declaration that the aforesaid claim is subject to the prior incumbrance created by the mortgage dated the 10th of August, 1922, in favour of the Tata Industrial Bank, Limited, which was assigned to the defendant firm, Radha

Kishen Moti Lal Chamaria, and inasmuch as their Lordships understand there are other charges affecting the property of the Company, the case will be remitted to the Chief Court in order that the rights of the respective creditors of the Company, secured and unsecured, may be adjusted in the liquidation.

The main question in this litigation was whether there was consideration for the mortgage of the 31st of August, 1922. On that question the plaintiffs succeeded in the Trial Court and failed in the Chief Court.

On appeal to His Majesty in Council the plaintiffs have succeeded on the aforesaid main question, but they have failed on the question of priority of the Bank's mortgage over the plaintiffs' mortgage. Their Lordships therefore are of opinion that the plaintiffs should recover from the defendant firm, Radha Kishen Moti Lal Chamaria, their costs in the Trial Court and in the Chief Court, and two-thirds of their costs of the appeal to His Majesty in Council. The direction of the Chief Court that there should be no order as to costs of the cross-objections filed in that Court will stand.

Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

LALA RAM NARAIN AND OTHERS

vs.

RADHA KISHEN MOTI LAL CHAMARIA
(A FIRM).

DELIVERED BY SIR LANCELOT SANDERSON.

Printed by

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

1929.