

*Privy Council Appeal No. 134 of 1919.*  
*Bengal Appeals Nos. 4 and 5 of 1918.*

Mati Lal Das - - - - - *Appellant*

v.

The Eastern Mortgage and Agency Company, Limited, and others - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN  
BENGAL.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 20TH JULY, 1920.

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*Present at the Hearing :*

LORD BUCKMASTER.

LORD ATKINSON.

SIR JOHN EDGE.

MR. AMEER ALI.

[*Delivered by* SIR JOHN EDGE.]

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These are consolidated appeals from decrees of the High Court at Calcutta which modified decrees of the Subordinate Judge of Dacca, which were made in two suits which were tried together. Each suit was a suit for sale on a mortgage of immovable property and they were brought by The Eastern Mortgage and Agency Company, Limited, through the liquidator of the Company. The Company is a respondent to these appeals. The rights and interests of the Company in the decrees under appeal have been assigned to Kedar Nath Sanyal, Rai Janaki Nath Roy Bahadur, Rai Sita Nath Roy Bahadur and Satish Ranjan Das, who were added as plaintiffs and are respondents. The other respondent was Harry Loftus Weatherall, now dead, who is represented by Mrs. Weatherall, he was a *pro forma* defendant. These appeals were brought by Srimati Shyampearī Dasya and Mati Lal Das, who were defendants. Shyampearī is now dead, and is represented by the appellant Mati Lal Das.

In one of the suits the mortgage sued upon was made on the

22nd September, 1890, by Mohini Mohan Das, in favour of the Company, for Rs. 250,000, and in the other suit the mortgage sued upon was made on the 7th November, 1890, by Priya Moyi Dasya in favour of the Company for Rs. 120,000. The mortgages were by registered deeds. The mortgages were not of the same property. It was expressly stated in each mortgage that it should be read and construed as an English mortgage as defined in the Transfer of Property Act, 1882.

Mohini, the mortgagor in the one case, was the brother-in-law of Priya Moyi, the mortgagor in the other case, who was the widow of Mohini's brother Lal Mohan Das. The Hindu family to which Mohini and Lal Mohan belonged was governed by the law of the Daya Bhaga. Their father, to whom in his lifetime the mortgaged properties had belonged, was Madhu Sadan Das, who was a wealthy banker of Dacca. He died in April, 1865, having had by his wife Srimati Shyampeari the following five sons : Mohini Mohan, the mortgagor of the 22nd September, 1890, who died childless on the 28th December, 1896, and his mother Shyampeari inherited his estate for her life ; Radhika Mohan, who died in or before 1890 leaving a widow (this litigation is not concerned with his estate) ; Lal Mohan, who died childless on the 18th December, 1885, leaving his widow Priya Moyi, the mortgagor of the 7th November, 1890, who inherited his estate for her life ; Khetra Mohan, who died in 1902, leaving his son Mati Lal, appellant here, him surviving ; and Sashi Mohan, who died unmarried in October, 1865, whose estate his mother Shyampeari inherited for her life. Shyampeari after the death of her son Sashi Mohan, in consideration of an annuity agreed to be paid to her by her then four surviving sons, purported to surrender to those four sons the one-fifth share of the property left by her husband, which she had for life by inheritance from her son Sashi Mohan. Shyampeari has died since these suits were instituted, and that surrender is challenged as invalid by the appellant here Mati Lal, who at the time of her death was the reversioner to Sashi Mohan, and it is open to him to question the validity of that surrender and to establish any right which he may have to the one-fifth share which Sashi Mohan had held. Mati Lal is also now the reversioner to Mohini Mohan and to Lal Mohan ; the fact that Mati Lal is a party to these suits will not preclude him from establishing such right to that one-fifth share of Sashi Mohan as he may have as a reversioner entitled to possession.

Mohini Mohan had acquired the 4 annas share in the property which was left by his father, which his brother Khetra Mohan had held, and then held that 4 annas share and his own 4 annas share, making, subject to any right of the heirs of Sashi, the 8 annas share which he mortgaged to the Company on the 22nd September, 1890, that is, all his immovable properties excepting those which are situate within the town of Dacca. The property which Priya Moyi mortgaged to the Company on the 7th November, 1890, was the 4 annas share in the property which had come to her for her life on the death of her husband Lal Mohan. Priya Moyi died in 1902. The suits were instituted in 1912.

Their Lordships will first consider the substantial questions argued on this appeal which relate to the mortgage granted by Mohini to the Company. By the mortgage of the 22nd September, 1890, granted by Mohini to the Company the Company was to apply the mortgage money of Rs. 250,000 in the first place in payment of all legal costs, charges and expenses, including stamp duty and registration fees, of and incidental to the mortgage and in the next place in payment and satisfaction of a decree held by other previous mortgagees and the balance to Mohini, and Mohini covenanted with the Company as to the payment by him to the Company of principal and interest as follows:—

“ 3. Will on the 1st day of Baisakh next pay unto the Mortgagees at Calcutta the sum of Rupees two hundred and fifty thousand with interest for the same after the rate of nine-and-a-half per cent. per annum computed from the date of these presents and if the said sum of Rupees two hundred and fifty thousand shall not be paid on the said first day of Baisakh next then will pay to them interest thereon after the rate aforesaid by equal half-yearly payments on the 1st day of Baisakh and the 1st day of Kartick in every year until the same sum shall be fully paid.

“ Provided always and it is agreed and declared that if and whenever a half-year's interest for the principal sum for the time being due after the rate of seven and a half per cent. per annum shall be paid on or before the half-yearly day hereinbefore appointed for payment of interest the Mortgagees shall accept the same in lieu of and in satisfaction for the interest after the rate of nine and a half per cent. per annum payable for that half-year under the covenant in that behalf hereinbefore contained but this proviso is without prejudice to the right of the Mortgagees to require payment of interest after the higher rate for any half-year in which interest at the lower rate shall not be paid on or before the due date for the payment thereof.”

By that mortgage of the 22nd September, 1890, it was declared and agreed as follows:—

“ VII. And it is declared and agreed and the Mortgagor doth hereby in manner aforesaid covenant with the Mortgagees that so long as any money shall remain on the security of these presents and until the Mortgagees shall enter into and take possession of the mortgaged premises.

“ (1) Such mortgaged premises shall be managed entirely (and without any interference whatever by the Mortgagors) by Messrs. Harry Loftus Weatherall and George Loftus Garth so long as they shall fulfil the terms and conditions of these presents or in the event of the death resignation or dismissal of either of them by the survivor of them or failing such survivor by another duly qualified manager to be nominated by the Mortgagees. Provided always that any manager afterwards so appointed by the Mortgagees shall be obliged if so required by the Mortgagors to give proper security for the due performance of his duties and the proper management of the estate.

“ (2) The managers or manager shall have the fullest possible powers for the proper management and improvement of the said mortgaged premises (including power to appoint and dismiss all servants and to make settlements with raiyats and farmers and to give leases and to institute and conduct and defend suits and other legal proceedings) and for the realisation of the rents and profits thereof and they or he shall not be liable to dismissal except for misconduct or neglect of duty or of the terms of these presents (so far as they are to be or can be carried out by them or him) proved to the satisfaction of the Mortgagees.

Provided always that no manager shall have power to reduce the rental of any village or villages below the present rental in order to obtain a selami or premium for so doing without the joint concurrence in writing of the Mortgagees and the Mortgagors. And provided also that the Mortgagors shall not in any event enter into any engagements or execute any documents for the sale mortgage permanent lease or other alienation of any part of the mortgaged properties without the written concurrence of the Mortgagees it being the intention of the parties and being of the essence of the negotiations for the grant of the said loan that the Mortgagors shall in no way interfere in the management of the said mortgaged premises.

“(3) The managers or manager shall out of the rents and profits of the mortgaged premises as the same shall be received. In the first place pay the Government revenue and all Government and Municipal cesses rates rents for sikmi and putni tenures to superior landlords and all other charges payable in respect of the mortgaged premises and for the time being due or accruing due. In the second place pay to the Mortgagees interest at the times aforesaid on the said sum of Rupees two hundred and fifty thousand up to the first day of Baisakh one thousand two hundred and ninety-nine and thereafter the annual sum of Rupees twenty-six thousand and two hundred and fifty required for the service of the said loan as aforesaid and to be applied as shown in the said second Schedule hereto and in the third place pay all proper costs and charges for management and realisation of rents and auditing and scrutinising by professional auditors chosen by the Mortgagees of the managers' accounts (if such audit and scrutiny shall be thought necessary by the Mortgagees) and shall hold any surplus of the said issues and profits in trust for the Mortgagors.” . . .

It was also by the said mortgage deed of the 22nd September, 1890, agreed and declared that in certain events the Company might

“appoint (upon such salary or remuneration and with such powers of management as they shall think proper) such person as they in their absolute discretion shall think fit to be Receiver of the rents and profits of the mortgaged premises. . . .”

#### The salary or other remuneration

“of the Receiver and the charges and expenses incident to his Receivership shall be paid out of the nett rents and profits next after payment of Government revenue and Government and Municipal cesses rates taxes and charges. Provided always that the power to appoint a Receiver shall not prejudice or affect any of the rights or remedies of the Mortgagees as mortgagees and that the Mortgagees shall not incur any personal liability in respect of or be personally answerable for any loss or misapplication of the rents and profits of the mortgaged premises or any part thereof by reason of any default neglect or misappropriation of any manager or Receiver or any person employed by or under them respectively. Provided also that any Receiver appointed as aforesaid shall be forthwith discharged by the Mortgagees and the mortgaged premises shall be again managed as hereinbefore provided by a manager upon the Mortgagors making good the deficiency or default in consequence of which the Receiver was appointed and upon the Mortgagors paying all the expenses incurred in connection with the appointment and during the employment of the Receiver.”

The loan in respect of which Mohini granted to the Company the mortgage of the 22nd September, 1890, was procured for him by Harry Loftus Weatherall and George Loftus Garth of Dacca,

who will hereafter be referred to as Garth and Weatherall. It was a condition upon which the Company agreed to make the advance that Mohini should appoint Garth and Weatherall as the managers. On the 22nd September, 1890, by a deed made between Mohini of the one part and Harry Loftus Weatherall and George Loftus Garth of the other part, Mohini appointed Garth and Weatherall managers with full powers of the mortgaged property and agreed that neither of them should be dismissed or removed from the office of manager except with the written consent of the Company. That deed contained amongst others the following clauses :

“ 1. That the said Harry Loftus Weatherall and George Loftus Garth shall be allowed a commission of 15 per cent. on the gross collections of the said estate to cover all charges of managements that is to say the salaries of all Naibs Gomashas Muhorirs Mokhtars and other servants and agents employed by them or him and all charges incurred in realising rents and other dues but not costs of litigation other than and except such litigation as may arise out of or be connected with suits for the realisation of rents and other dues of the like nature and shall be entitled to retain as their or his remuneration any balance of the said commission that may remain in their or his hands, after payment of all such charges as aforesaid in addition to the share of the surplus as hereinafter mentioned.

“ 2. That the said Harry Loftus Weatherall and George Loftus Garth shall apply the moneys which shall come to their or his hands by virtue of these presents and of the powers and authorities hereby vested in them and him in manner following that is to say In the first place in paying the Government revenue and all Government and Municipal cesses and rates and all rents payable to superior landlords in respect of the said estates and In the next place in paying to the said Company interest at the rate of  $7\frac{1}{2}$  per cent. per annum on the said loan of Rs. 250,000 by equal half-yearly instalments as provided in the indenture of mortgage securing the said loan until the 1st day of Baisakh 1299 B.S. and thereafter the annual sum of Rs. 26,250 required for the service of the said loan, as provided in the said mortgage and as shown in the Schedule hereunder written and In the third place in paying themselves or himself the said commission of 15 per cent. on the gross collections to cover all the said charges for management and their or his own remuneration and that from and after full payment and satisfaction of all such sum or sums of money costs and expenses respectively as aforesaid and any costs or other expenses incurred in litigation not connected with the management of the said estates but necessary for the protection thereof or otherwise properly chargeable to the said estates the said Harry Loftus Weatherall and George Loftus Garth shall from time to time pay a moiety or equal half-part or share of all the clear surplus of the moneys which shall come to their or his hands by virtue of or under these presents to the said Mohini Mohan Das or as he shall from time to time direct the remaining half-share of such surplus money to be retained by the said Harry Loftus Weatherall and George Loftus Garth or the survivor of them as and by way of remuneration to them or him for their or his services in addition to the said 15 per cent. commission hereinbefore mentioned.”

It has been contended in support of the appeal that the terms of the mortgage of the 22nd September, 1890, were unconscionable and unenforceable in equity. There is no doubt that the mortgage is in some respects peculiar in its drafting and that it conferred very wide powers on Garth and Weatherall as

managers, but Mohini Mohan executed the mortgage and there is nothing to suggest that he was misled and did not thoroughly understand the contract which he made, or granted the mortgage under undue influence or from pressure, and their Lordships hold that the mortgage was enforceable.

It has also been contended in support of the appeal that Garth and Weatherall were the agents of the Company as mortgagee and that the mortgagee through Garth and Weatherall was in possession as a mortgagee and should have been made to account as a mortgagee in possession. It was rightly found by both the Courts below that Garth and Weatherall were in possession as the agents and managers of the mortgagor and not of the mortgagee. The Company never was in possession, nor was it liable for any default or any waste or mismanagement or any negligence of Garth and Weatherall as managers. The Company was careful not to act in any way as a mortgagee in possession. The Company had a perfect right before lending its money to insist upon the mortgagor appointing managers in whom the Company had confidence.

The Trial Judge rightly held the nine and a half per cent. interest was not penal interest. The decree of the High Court must be varied in the manner hereafter mentioned.

Their Lordships will now consider the substantial questions which were argued and relate to the mortgage granted by Priya Moyi on the 7th November, 1890.

The mortgage which was granted by Priya Moyi to the Company on the 7th November, 1890, was similar in all material respects to that which Mohini had granted to the Company on the 22nd September, 1890, except that the principal sum secured by her mortgage was Rs. 120,000. It contained a similar agreement that Priya Moyi should appoint Garth and Weatherall as her managers of the property mortgaged, and she appointed them as her managers; they were her managers and were not the managers of the Company, and the Company was in no way responsible for any default, or any waste or mismanagement, or any negligence of Garth and Weatherall. The Company never was in possession of the mortgaged property.

It is, however, necessary to consider the circumstances under which Priya Moyi granted that mortgage. She was a purdannahin lady and she was entitled only to a life interest in the mortgaged property and could not grant a mortgage of it which would be binding on the person who might be the reversioner at the time of her death unless there was legal necessity for her making the grant.

In or about 1882 Lal Mohan borrowed Rs. 79,000 at interest from Rup Lal Das and had granted him a mortgage on his immovable property, and in 1888 Rup Lal Das had on his mortgage obtained a decree for sale. In 1890 Priya Moyi, being unable to obtain a loan from any one, was in urgent need of money to satisfy that decree and Mohini advised her to employ Garth and Weatherall to procure for her a loan from the Eastern Mortgage

and Agency Company which had advanced the money to him in respect of which he had granted the mortgage of the 22nd September, 1890. Garth and Weatherall obtained from the Company a loan of one hundred and twenty thousand rupees for Priya Moyi upon the mortgage now in question. She had to pay Garth and Weatherall a heavy commission for procuring the loan for her, and she had to agree to appoint them as her managers of the mortgaged property, otherwise they would not have procured the loan for her, and it was necessary that a loan should be procured. The Courts below have concurrently found that there was legal necessity for the granting of the mortgage, and with that finding and the reasons for it their Lordships agree.

As has been said, Priya Moyi was a purdanashin lady. The Board has always held that the circumstances under which a purdanashin woman agrees to sell or mortgage property in which she is interested must be carefully examined in order to ascertain that she had independent advice and "that the lady had sufficient intelligence to understand the relevant and important matters, that she did understand them as they were explained to her, that nothing was concealed, and that there was no undue influence or misrepresentation" (see *Sunitabala Debi v. Dhara Sundari Debi Chowdhurani and Another*, 46 I.A. 272). In this case unfortunately Priya Moyi and her brother-in-law Mohini died before this suit was instituted. Mohini from his personal experience in his own case and in hers must have known the difficulty of procuring at the time a loan on such security as she had to offer. It was necessary for her to obtain a loan, and her maternal uncle Kunja Behari asked Mohini to procure a loan from the Company for her, and Mohini said that he could induce the Company to advance money on conditions on which he himself had borrowed money from the Company. Priya Moyi then called in her cousin, Debendra Nath Das, who was a banker, a pleader and a zamindar, her own Dewan Bhagwan Ghose, and her uncle Kunja Behari, to advise her, and after consulting them decided to borrow money from the Company on conditions similar to those on which the Company had lent the Rs. 250,000 to Mohini. Debendra Nath Das and Kunja Behari were her near relations and looked after her affairs. When the draft mortgage and the draft appointment of Garth and Weatherall were prepared they were submitted on her behalf to her legal adviser Iswar Chandra, who was one of the leading pleaders at Dacca and a man of high reputation as a lawyer and as an honourable man. The drafts were in English and Iswar Chandra translated them for her and explained them to her, taking about three hours to do it. When the deeds were ready for her signature they were again explained to her by Iswar Chandra, the substance of each deed being given in Bengali, and she executed them. On this latter occasion her uncle Kunja Behari, her brother-in-law Mohini, Khetra Mohan and Ganga Narain, an old servant of hers, were present, Mohini and Khetra as then reversioners gave their consent, stating that the arrangement was necessary. Their Lordships are satisfied that Priya Moyi

thoroughly understood the effect of the two deeds and that she acted under independent advice, and they agree with the concurrent findings of the Courts below.

Their Lordships do not question the soundness of the general rule on which the Board acts when there are concurrent findings of fact by the Courts below, but in this case they have thought it better to form their own independent conclusions on the question as to whether there was legal necessity and on the question as to whether Priya Moyi had independent advice and understood the effect of the two deeds to which they have referred.

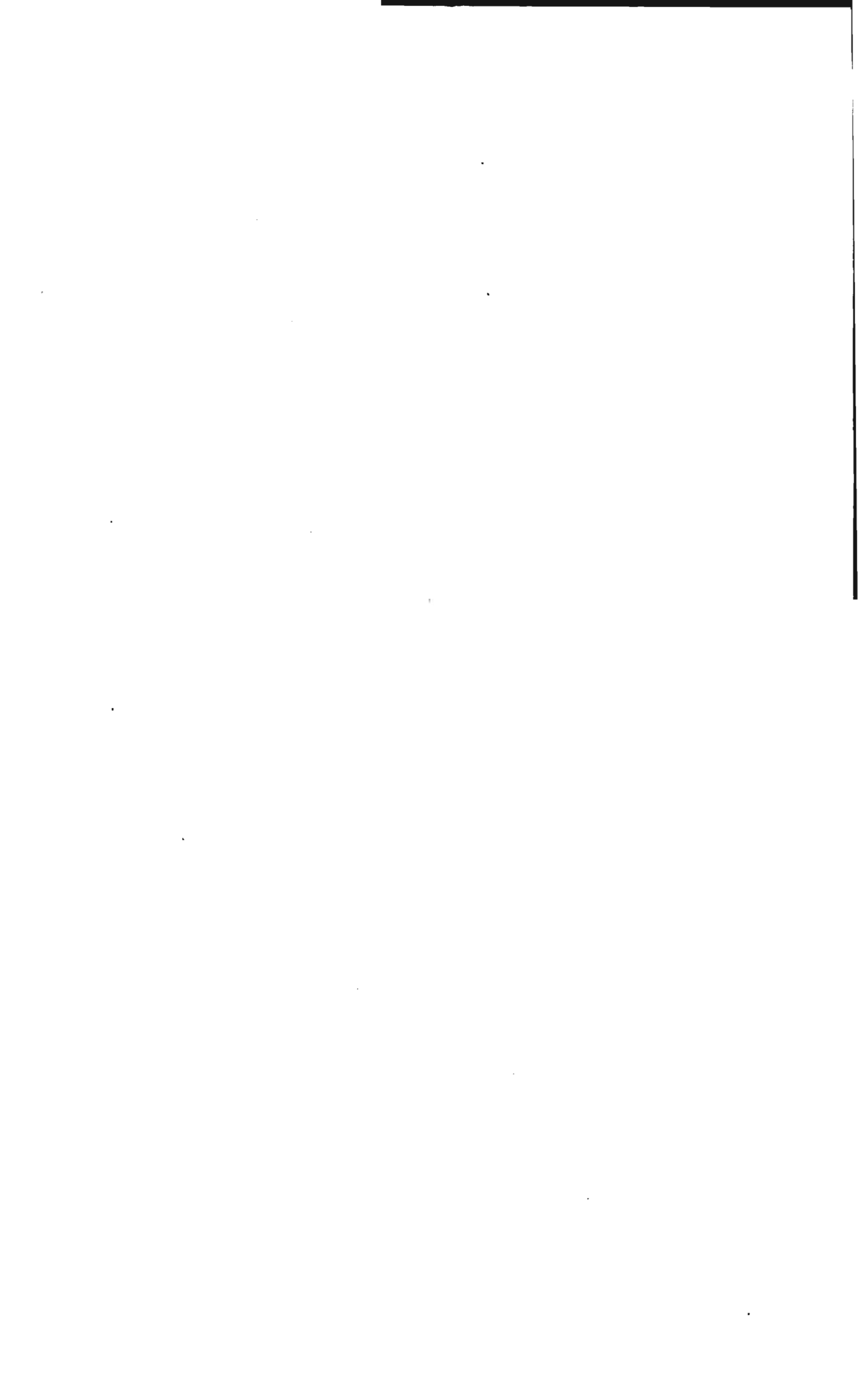
The mortgage of the 7th November, 1890, was enforceable. Garth and Weatherall were appointed managers by Priya Mohi and not by the Company, their possession was not a possession by the Company, and the Company never was in possession and is not responsible for any defaults or negligence of Garth and Weatherall. It has not been found that the Company did anything which would deprive it as a mortgagee of the right to enforce the mortgage of the 7th November, 1890. Priya Moyi may or may not have been well advised to execute the subsequent deeds in favour of Garth and Weatherall, but it has not been shown that the Company was responsible for them or did anything to affect its rights as mortgagee under the mortgage of the 7th November, 1890.

The High Court wrongly construed in this suit as it did in the suit on the mortgage of the 22nd September, 1890, the agreement as to interest. The decree of the High Court in this suit must be varied in manner hereafter mentioned.

Their Lordships will humbly advise His Majesty that the decrees of the High Court under appeal should be varied by decreeing that when an instalment of interest was not paid on or before the due date of payment of that instalment, the rate of interest for that instalment should be calculated at nine and a half per centum and that the necessary corrections in the amounts for which the mortgaged properties may be sold in each case should be made and the time for payment should be extended in each suit for six months from the date of the variations of the decrees by the High Court, and that in other respects the decrees should be affirmed and the appeals dismissed. There will be no costs of the appeals.

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**In the Privy Council.**

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MATI LAL DAS

vs.

THE EASTERN MORTGAGE AND AGENCY  
COMPANY, LIMITED, AND OTHERS.

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DELIVERED BY SIR JOHN EDGE.

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