Privy Council Appeal No. 92 *of* 1922.

Seth Kanhaya Lal, since deceased (now represented by Seth Hanuman Parshad and another) - - - - *Appellants*

v.

The National Bank of India, Limited, Delhi - - - - *Respondents*

FROM

THE CHIEF COURT OF THE PUNJAB.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD APRIL, 1923.

Present at the Hearing :

VISCOUNT FINLAY.
LORD DUNEDIN.
LORD ATKINSON.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* LORD DUNEDIN.]

The present action is to recover a sum of Rs. 83,005 with interest, being a sum paid, as alleged, under coercion and as such recoverable under Section 72 of the Contract Act. In order to make the matter intelligible it is necessary to give the history of the various transactions which have given rise to the claim.

A limited company called The Delhi Mills Cotton Company was established before 1891 and carried on business. In January, 1891, it issued debentures to the extent of two lacs of rupees in favour of a Mr. Anderson and others. The debentures were secured by a mortgage of immovable property of the company. Later in the same year the company arranged for a cash credit with the respondents—the National Bank of India—to the extent of two lacs. By a supplementary agreement of the 6th March, 1900, this was increased to three lacs. In security of the sums

to be advanced under the cash credit, the company gave the bank a lien on all manufactured goods and on all raw materials hereafter belonging to the company. The company came to owe the bank large sums, and on the 30th June, 1900, the respondents put in force their lien and sold off the manufactured goods and stock of raw material of the company. After realisation of the effects sold, the company still owed Rs. 78,000 odd. The company being in need of money to continue business applied to the appellant, and on the 21st August, 1900, entered into an agreement with him. In terms of this agreement the appellant advanced to the company three separate sums of Rs. 225,000 each, the first sums to be applied in paying off the debentures issued in favour of Mr. Anderson and others; the other sums were to be used for the payment of debts and the provision of working capital. By the agreement, the company further agreed to give a mortgage on its whole immovable property and also to give a lien for its stock and raw material in the same manner as it had given lien to the respondents. By another term of the agreement the appellant was made managing agent of the company and given full and exclusive power as to the management of its business with certain provisions as to his remuneration. The appellant advanced the money, entered upon the management, and continued the business. He paid up the earlier debentures and a new mortgage was granted in favour of certain persons—Lachhman Das and Rukma Nand—who were to act as trustees for the debentures which were now held by the appellant. The provisions of this mortgage were the same as the provisions in the original mortgage to Mr. Anderson and others; and allowed the mortgagees, if any attachment was put in force against the company's immovable property, to enter into possession and effect a sale. On the 20th December, 1900, the respondents raised an action against the company for the sum of Rs. 79,000 odd still due to them. This action was unsuccessful before the first Judge, but on appeal judgment was given as craved, and on the 21st April, 1902, it was declared that the bank had a lien on raw material and manufactured goods. On the 16th May, 1902, an application was made for attachment of all the property—both movable and immovable—of the company. On the same day an order for an attachment was made, but the order only referred to attachment of the movable property. Certain of the goods of the company were, on the 18th May, attached in virtue of this order. An objection was taken on the 19th May, and the attachment was set aside on the same day. A Mr. Clarence Kirkpatrick, who had obtained a power of attorney from Lachhman Das and Rukma Nand, entered into possession of the immovable property in virtue of the mortgage. Notwithstanding the order of the 19th May, the respondents brought up the matter again and asked that the movables attached should be sold. On the 31st May, the District Judge refused to give any such order in respect of his previous order of the 19th May. Appeal was taken against this,

and on the 20th June the Chief Court set aside the orders of the 19th and the 31st May, and an interlocutory order was pronounced against the company dealing with the articles attached and a warning issued against the trustees (who had entered into possession of the premises) from interfering with the articles attached. On the 25th June, Mr. Clarence Kirkpatrick, after all due advertisement, exposed the mills for sale and they were, on that date, bought by the appellant for Rs. 502,000. After deducting the expenses and paying the sum due to the appellant as debenture holder and as mortgagee there remained a sum of Rs. 10,000 odd which was sent by cheque to the company. This cheque was attached by the respondents and paid to them.

The proceedings as to the attachment came up for final disposal on the 4th August, when the District Judge was directed to proceed on the basis of the attachment of the 18th May. Inasmuch, however, as the attachment was admittedly only of movable property, the respondents on the 15th August put in a further application for attachment of the premises. Following up this the mills themselves were attached on the 20th August. On the 27th August the appellant, who, in virtue of the sale, had become the owner of the mills, put in a petition for removal of the attachment on the ground that it was his own property which was being attached for a debt of the company. To remove the attachment he paid the debt under protest. The next day he raised the present suit to recover the money so paid under coercion in terms of Section 72 of the Contract Act. There was originally added a claim for damages. The suit has had a most unfortunate history and been protracted for a very long period, different claims having been already twice before the Board. What happened may be best stated in the words of Lord Moulton in the judgment of the Board upon the second appeal :—

> "In his plaint the plaintiff states that he was the sole proprietor of such mills and of their contents. On thus being ousted from his property he took the course of paying under protest the sum claimed. Having thus freed his property from the attachment, he at once brought the present action claiming a return of the money so paid and damages for the alleged illegal acts of the defendants.
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> In reply to the above plaint, the respondent bank filed certain preliminary pleas relating to the claim for the return of the money paid under protest of which it is only necessary to cite the first, which was that 'the suit as framed will not lie.' It is admitted that the plea is in substance identical with the more usual form of plea, viz., that the plaint discloses no cause of action.
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> The District Judge no doubt with the laudable intention of shortening the proceedings and thereby lessening the costs, heard an argument on these preliminary pleas before requiring anything further to be done by the defendants, and on the 18th November, 1902, he gave judgment to the effect that so far as the recovery of the money was concerned, the plaint disclosed no cause of action. He therefore dismissed with costs the claim for the recovery of the money and directed that the action should proceed on the question of damages for illegal attachment. The plaintiff, having,

in vain, applied for the drawing up of an order embodying this decision, decided not to proceed with that part of the case which related to damages and consequently did not appear on the further hearing, whereupon the District Judge dismissed the whole case for default under Section 102 of the Civil Procedure Act. The plaintiff appealed to the Chief Court against this decision, and that Court dismissed the appeal on the ground that no appeal lay against an order dismissing a suit under Section 102. From this decision the plaintiff appealed to His Majesty in Council, and their Lordships held that the order of the 18th November, 1902, was a final decision on the case as to the recovery of the money paid and that therefore it was not competent to the Judge to dismiss that part of the case under the powers of Section 102. They therefore remitted the case to the Chief Court in order that the appeal to that Court, so far as it related to the recovery of the money paid, might be heard and decided on its merits."

Their Lordships go on to find that the payment under the circumstances described was a payment under coercion and remitted the case that the defences, other than that rested on the words of the statute, might be disposed of.

The Subordinate Judge gave judgment in favour of the appellant, but on appeal that judgment was reversed and the suit dismissed, and it is from that judgment that the present appeal lies. The judgment of the Appeal Court proceeded on one ground alone—namely, that on consideration of the whole circumstances it was not equitable that the money should be paid back. That view was supported before their Lordships by a very lengthy and careful argument examining all the English decisions, from *Moses* v. *McFarlane*, 2, Bur., 1005, downwards, as to what defences were available to the action for money had and received. In their Lordships' opinion all these authorities are beside the question. The right here sought to be enforced is a statutory right expressed in terms of Section 72 of the Contract Act, and this Board has already held that the circumstances gave rise to that statutory right. To append a consideration (as the Court of Appeal has done) of the relation of parties *inter se*—apart from the actual circumstances which enforced the payment—is simply to allow counter-claim under another name, and a counter-claim in the Punjab is not admissible.

While this disposes of the ground on which the Appellate Court reversed the judgment of the Subordinate Judge it does not dispose of all the grounds of defence. The respondents assert that the mills did not belong to the appellant, and if that were so then necessarily the appellant could not complain of the attachment. As regards the sale itself there is no ground of challenge. Mr. Kirkpatrick was duly authorised by the deed under which he acted, due notice was given of the sale, and no fault is found with the procedure at the sale itself. The respondents attack the sale on other grounds. First, they say that it is not possible in India to put a clause into a mortgage deed allowing of sale except through the medium of the Court, and second, they say as the appellant was the debenture holder in whose interests the sale was brought on, he was incapable of purchasing. As to the first point,

there is no positive enactment prohibiting such a stipulation being annexed to a mortgage, for Section 59 of the Transfer of Property Act does not apply, the Act not having been extended, at least at the time of these transactions, to the Punjab. Their Lordships' attention was, however, directed to the cases of *Bhuwanee*, 7 Sudder Dewanny Adawlut, page 354, and *Keshavra Krishna*, 8 Bombay, H.C. (A.C.J.), page 142. Their Lordships do not question these authorities, but they consider they have no application to the case of a limited company issuing debentures and securing the debentures by a mortgage in favour of trustees with the power of sale. The whole reasoning which led to the judgments cited was the necessity of protecting persons who from their circumstances needed protection entering into transactions of loan, and the class of mortgages there dealt with did not include mortgages in the English form. To say that a limited company—a creature of statute—requires protection or that the trustees for the debenture holders are the persons who might take advantage of the scanty knowledge of the mortgaging company—the kind of argument which led to the decision in those cases and which was applicable in terms to transactions between the persons aforesaid—is really to consider the situation in a light almost absurd.

As regards the second point, there are numberless authorities to the effect that when anyone is in a fiduciary position he cannot sell to himself. Thus an ordinary trustee cannot buy trust property nor can an official appointed to conduct a sale for creditors be himself the purchaser. See *York Buildings Company* v. *McKenzie*, 3, Pat., 378. But no such position arose here. Mr. Kirkpatrick, who was the seller, sold not on behalf of the debenture holder alone but on behalf of the company. It was his duty and interest to secure as high a price as possible so that the balance—after meeting secured debts—should go to the company. Such a balance was in fact received. The fact, therefore, that the buyer was himself a holder of the debentures became irrelevant. There was no merging of the two positions which is what is prohibited—namely, that the interest of the seller to get the highest price, and of the buyer to get the lowest price, is centred in the same person. This point accordingly fails. The only remaining point was this—the respondents urged that the conveyance in favour of the appellant was bad because the registration was not in order in respect that the registration does not bear that a proper power of attorney was possessed by the person asking for the registration and in respect that it does not afford proper evidence of the execution by Lachhman Das—one of the signatories to the deed of transfer.

These points were admittedly not taken before the Courts below and their Lordships would be slow to admit their validity in such circumstances. But further they think they are unsustainable on their merits. The deed was presented by Mr. Kirkpatrick and the endorsement of the deed as registered bears that he held a special power of attorney authorising him to

appear. It must therefore be presumed that the power of attorney was a proper power under the terms of Section 33 of the Registration Act.

Then as regards the execution of Lachhman Das—a witness was examined who deponed to the fact. Now, by Section 34, the duty of enquiring as to execution is put upon the registering officer, and by Section 35 it is provided that if he is satisfied as to various particulars he shall register the documents. Here again, the presumption from registration of *omnia presumuntur rite et solenniter acta* would apply; but the matter is finally set at rest by Section 87, which provides that "nothing done in good faith pursuant to the Act by any registering officer shall be deemed invalid merely by reason of any defect in his appointment or procedure."

Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed, the decree of the Chief Court set aside with costs and the decree of the Subordinate Court restored.

The respondents will pay the costs of the appeal.

In the Privy Council.

SETH KANHAYA LAL, SINCE DECEASED (NOW REPRESENTED BY SETH HANUMAN PARSHAD AND ANOTHER)

v.

THE NATIONAL BANK OF INDIA, LIMITED, DELHI.

DELIVERED BY LORD DUNEDIN.

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