

Privy Council Appeal No. 100 of 1928.

Oudh Appeal No. 8 of 1927.

Sir Hukumchand Kasliwal, Kt., and another - - - *Appellants*

v.

Radha Kishen Moti Lal Chamaria (a firm) and others - - - *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 Sir Hukumchand Kasliwal, who was one of the plaintiffs in the suit, and Deokissen Bhattar, who was brought on the record on the death of his father, Harkissondas Bhattar, the other plaintiff in the suit, against a decree of the Chief Court of Oudh, dated the 29th November, 1926, which varied a decree, dated the 30th April, 1925, of the Subordinate Judge of Unao.

The suit was brought against four defendants, viz. : (1) The Pioneer Mills Ltd. ; (2) The Tata Industrial Bank Ltd. ; (3) Bilas Roy Hurdut Roy, a firm which is now represented by the respondents Lala Ram Narain, Lala Radha Kissen, Lala Ganga Prasad and Lala Hari Prasad and (4) the firm of Radha Kissen Moti Lal Chamaria.

The suit was brought on the 10th February, 1923, in the Court of the Subordinate Judge of Unao.

By an order of the 4th June, 1923, the High Court of Calcutta directed the Pioneer Mills Ltd. (hereinafter called the company)

to be wound up, and by a subsequent order the High Court granted sanction for the continuance of the suit at Unao against the liquidators of the company. All the assets of the company were sold by public auction and the sale proceeds amounting to Rs. 9,85,000 are now held by the liquidators.

The plaintiffs, by their plaint, prayed as follows :—

“ (1) For a declaration that the defendant Company's factory at Unao, together with the land, plants, machineries, implements, structures and buildings and its stock-in-trade at Unao stood charged with the repayment of the amount which might be found due to the plaintiffs for the advances made to the defendant Company as aforesaid.

“ (2) For a declaration that the plaintiffs' claim herein was entitled to priority over the alleged claims of the defendants, the Tata Industrial Bank, Radha Kissen Moti Lal Chamaria and Bilas Roy Hurdut Roy.

“ (3) That in default of payment the said mortgaged properties or a sufficient part thereof be sold by and under the direction of the Honourable Court, and the sale proceeds, after deducting thereout the costs of such sale, be first applied towards the payment of the amounts of the plaintiffs' claim, and the balance, if any, be held subject to the further order of the Honourable Court.

“ (4) For the costs of the suit.”

The plaint was later amended and the following prayer added :—

“ From the amount of sale proceeds amounting to Rs. 9,85,000 in the hands of the High Court of Calcutta the money due to the plaintiffs may be awarded.”

The plaintiffs and the defendants, other than the company, are creditors of the company, and the questions which arise in the present appeal are (1) whether the plaintiffs have a charge on the immovable properties of the company or the proceeds of sale thereof by reason of the terms of an agreement dated the 14th February, 1920, hereinafter mentioned, and are secured creditors of the Company and (2) if so, whether the plaintiffs are entitled to a priority over the secured debts of the above-mentioned defendants.

Many issues were raised at the trial, to which it is not necessary to refer, inasmuch as no question now arises in respect thereof. The learned Subordinate Judge decided that the agreement of the 14th February, 1920, did not create a charge on the immovable property of the company, and that in any event no charge could be enforced owing to lack of registration. For these and other reasons set out in his judgment the learned Judge dismissed the suit with costs.

The plaintiffs appealed to the Chief Court of Oudh. The learned Judges of the Chief Court made the following decree :—

“ It is ordered and decreed that this appeal be allowed, the decree of the lower Court be set aside, the plaintiffs be declared secured creditors of the Pioneer Mills Ltd., but their claim as such has no priority over the mortgages mentioned below, and the plaintiffs be and they are hereby granted a decree for Rs. 1,50,000 (rupees one lakh and fifty thousand) only with 8 per cent. per annum interest on Rs. 1,00,000 from 16th

February, 1920, and on Rs. 50,000 from 4th March, 1920, to the date of realization as against the liquidators, subject to the mortgages :—

(1) of the 31st August, 1922, in favour of Radhakishen, Motilal Chamaria, and

(2) of the 10th August, 1922, in favour of Bilas Rai Hardat Rai ;

and as it will serve no useful purpose, this decree is not declared subject to the mortgage of the 10th August, 1922, in favour of the Tata Industrial Bank Ltd., being of no practical consequence now in view of the fact appearing in First Civil Appeal No. 73 of 1925 that that mortgage has come to be merged in, or at any rate no claim can be made on its basis independently of the mortgage of 31st August, 1922, in favour of Radhakishen Motilal Chamaria to which this decree has been made subject."

The learned Judges held that the said agreement created a charge in favour of the plaintiffs as regards the movable assets of the Company in the event of delivery. No question in this appeal arises in connection with that decision.

The matters in issue, as already stated, are confined to the allegations that the plaintiffs have a charge over the immovable properties of the Company, and the proceeds of sale of such properties, and that they are entitled to priority in respect thereof

As regards the immovable property, it is not clear what was the decision of the learned Judges of the Chief Court, because they delivered two judgments which do not appear to be entirely consistent.

Apparently they held that the plaintiffs had a charge over the immovable property of the Company by operation of law and not "by contract" but decided that the plaintiffs had no priority over the mortgages of the above-mentioned creditor defendants. It is from the said decree that the plaintiffs have appealed.

The material facts relating to the questions arising in their appeal are as follows. The plaintiffs' claim depends upon an agreement dated the 14th February, 1920, made between the Company and the plaintiffs. The plaintiffs were thereby appointed Banians to the Mills and agreed to finance them to the extent of Rs. 1,500,000, receiving interest on the daily balances at 8 per cent. per annum and commission of 2 annas in the maund on certain purchases and manufactured goods.

The agreement further provided :—

"That all stock-in-trade . . . shall be under hypothecation to the Banians and in their charge and control . . . and all deliveries shall be made upon delivery orders from the Company and upon payment to the Banians of the price of the quantity to be delivered upon the delivery orders."

Clause 7 provided :—

"That the Company shall as soon as possible after the execution of these presents execute in favour of the Banians a regular deed of mortgage of the land refinery factory plants machineries implements structures and buildings at Unao for the sum of Rs. five lacs to meet any deficit that may be due to the Banians for the advances made by them after availing of the stock under hypothecation to them as aforesaid."

The plaintiffs in pursuance of the agreement advanced to the Company Rs. 1,00,000 on the 16th February, 1920, and Rs. 50,000 on the 4th March, 1920, and it is these sums together with interest which they now seek to recover.

The claims of the above-mentioned defendants are as follows :—

The Company executed the following mortgages :—

(i) On the 10th August, 1922, in favour of the Tata Industrial Bank to secure loans on a cash credit account up to Rs. 5,00,000.

(ii) On the 10th August, 1922, in favour of Bilas Rai Hurdut Rai for Rs. 4,00,000.

(iii) On the 31st August, 1922, in favour of Radha Kissen Chamaria and Moti Lal Chamaria for Rs. 5,00,000.

The said mortgages in favour of the said three defendants were upon certain immovable properties of the Company and the deed of the 10th of August, 1922, in favour of the Tata Bank included a charge on the stock-in-trade of the company. The property comprised in the said mortgage in favour of the Bank and the debt secured thereby were assigned by the Bank to the firm of Radha Kissen Moti Lal Chamaria, in consequence of an agreement made between the parties thereto in April 1923, which brought into operation a deed of transfer dated the 2nd January, 1923.

The mortgage in favour of the Tata Bank was registered pursuant to the provisions of the Indian Companies Act, 1913, within the time extended by the Court on the 22nd December, 1922. The mortgage in favour of Bilas Rai Hurdut Rai was registered under the said Companies Act within the time extended by order of the Court on the 21st November, 1922, and the mortgage in favour of the firm of Radha Kissen Moti Lal was registered under the Companies Act on the 21st September, 1922.

No deed of mortgage of the immovable property of the Company was ever executed in favour of the plaintiffs and the above-mentioned agreement of the 14th February, 1920, between the plaintiffs and the Company was not registered under the provisions of the Indian Companies Act, 1913, or under section 17 of the Indian Registration Act of 1908.

The argument presented on behalf of the plaintiffs was to the effect that the plaintiffs have a valid and enforceable contract, that it is specifically enforceable, and that it entitles the plaintiffs in the winding-up of the Company to the same priority as the plaintiffs would have had if a mortgage had been executed at the time of the advance.

It was further urged that as the plaintiffs had a right to specific performance of the agreement and inasmuch as the creditor defendants advanced monies with knowledge of the agreement, they must be held to have taken their securities subject to the agreement.

There are more than one reason why these arguments cannot be accepted and the appeal must fail, but their Lordships are of opinion that it will be sufficient if they draw attention to one matter, which, in their opinion, disposes of the plaintiffs' case.

It is to be noted that the claim in this case is not for specific performance of the agreement of the 14th February, 1920.

The claim, so far as the present appeal is concerned, is for a declaration that the Company's immovable property, which is referred to in paragraph 7 of the agreement, stands charged with the amount of the advances made by the plaintiffs and interest thereon.

Their Lordships are of opinion that the terms of the said agreement of the 14th of February, 1920, which relate to the immovable property of the Company, do not constitute a mortgage or charge upon such property within the meaning of sections 58 and 100 of the Transfer of Property Act, 1882.

So far as the immovable property was concerned, the said agreement merely created a right in the plaintiffs to obtain another document, viz., a regular deed of mortgage of the said immovable property which was to be executed by the company.

In short, the plaintiffs are on the horns of a dilemma. On the one hand, if the said agreement did not create a mortgage or charge upon the immovable property of the company, as already intimated, the plaintiffs' claim to a charge and priority must of necessity fail. On the other hand, if it did create a mortgage or charge upon the immovable property of the company, it would come within the provisions of Section 17 (1) (b) of the Registration Act of 1908, and as it was not registered in pursuance of that section, the provisions of Section 49 of the Registration Act would apply, and the unregistered agreement would not affect the immovable property comprised therein and it could not be received in evidence of any transaction affecting such property.

For these reasons their Lordships are of opinion that the appeal fails.

In the decree of the Chief Court it was stated that the decree in favour of the plaintiffs for Rs. 1,50,000 with interest was subject to the mortgages of

- (1) the 31st August, 1922, in favour of the Radha Kissen Moti Lal Chamaria : and
- (2) the 10th August, 1922, in favour of Bilas Rai Hurdut Rai ;

and that the decree was not declared subject to the mortgage of the 10th August, 1922, in favour of the Tata Industrial Bank, Ltd., as the last-mentioned decree was merged in, or, at any rate, no claim could be made on its basis independently of, the mortgage of the 31st August, 1922, in favour of Radha Kissen Moti Lal, to which that decree had been made subject.

This decree requires alteration, because in Appeal No. 9 of 1928 between *Lala Ram Narain and others v. Radha Kissen*

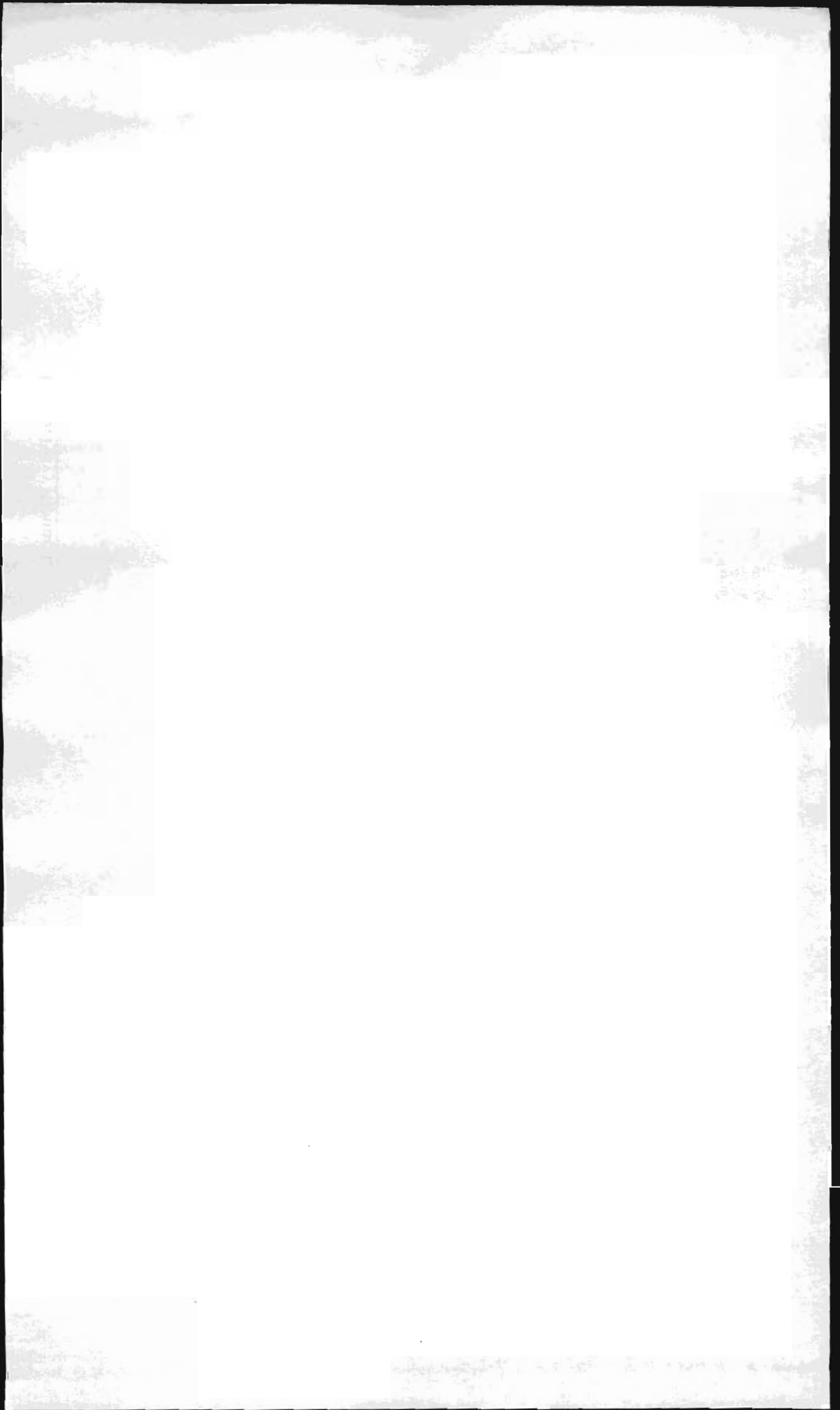
Moti Lal Chamaria, their Lordships have decided that there was no consideration for the mortgage of the 31st August, 1922, in favour of Radha Kissen Moti Lal Chamaria, and that consequently it was not a valid mortgage upon the company's immovable property.

Their Lordships, however, held in that appeal that the firm of Radha Kissen Moti Lal were the transferees of the mortgage in favour of the Tata Bank, of the property comprised therein, and of the debt secured thereby. Consequently it should be declared that the plaintiffs have no charge upon the immovable property of the company and that their claim under the decree for Rs. 1,50,000 and interest is subject to the two mortgages, viz. : (1) the mortgage of the 10th August, 1922, in favour of Bilas Rai Hurdut Rai, and (2) the mortgage of the same date in favour of the Tata Bank, of which the firm of Radha Kissen Moti Lal Chamaria are the transferees.

The case, therefore, will be remitted to the Chief Court in order that the claims of the creditors of the Company, secured and unsecured, may be dealt with in the Liquidation.

The plaintiffs must pay to the respondents who appeared their costs of this appeal.

Their Lordships will humbly advise His Majesty accordingly.



In the Privy Council.

SIR HUKUMCHAND KASLIWAL. KT., AND
ANOTHER

v.

RADHA KISHEN MOTI LAL CHAMARIA (A FIRM)
AND OTHERS.

DELIVERED BY SIR LANCELOT SANDERSON.

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