

*Privy Council Appeal No. 11 of 1925.*

*Bengal Appeal No. 109 of 1923.*

William Arratoon Lucas - - - - - *Appellant*

*v.*

The Bank of Bengal 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 27TH JULY, 1926.

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*Present at the Hearing :*

LORD CARSON.

MR. AMEER ALI.

SIR JOHN WALLIS.

[*Delivered by* SIR JOHN WALLIS.]

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This is an appeal from the judgment of the High Court of Calcutta reversing the judgment of the Subordinate Judge at Dacca and giving the plaintiffs the Bank of Bengal, a decree against the first defendant Lucas, a jute merchant at Dacca, on two mortgages of the 8th July, 1910 and the 29th June, 1911, executed by the first defendant in favour of Messrs. Vertannes and Bertram, his brokers, who, to put it shortly, had arranged to finance him by getting the Bank to honour his drafts on their guarantee. These mortgages the High Court, reversing the judgment of the Court below, held to have been transferred by the mortgagees, to the plaintiff Bank by virtue of a registered instrument, dated the 4th February, 1914, to which the first defendant was a party.

It is unnecessary to refer to the numerous questions raised in the Courts below, because the only questions argued before their Lordships on this appeal were whether the transfer was good, and if so, whether the first defendant is entitled to go behind the

recitals in the instrument of transfer that Rs. 74,017 1a. 4p. was the amount then due to the Bank by the mortgagor, the first defendant, to his brokers as mortgagees in respect of these transactions, and to have an account taken of what is due on the mortgages, in which case it was further suggested that nothing would be found due on the earlier mortgage.

As regards the first question, the document recites that it had been agreed that the mortgagees "should transfer the full benefit of the securities (created by the deeds of 1910 and 1911) to the Bank to the intent that the Bank shall henceforth hold the same as security for repayment to the Bank on demand of the said sum of Rs. 74,017 1a. 4p. and interest thereon," in consideration of the Bank releasing the mortgagees from all claims in respect of these transactions, and this recital is followed by a conveyance of the mortgaged premises to the Bank, subject to redemption on payment by the mortgagor, the first defendant, "of the said sum of Rs. 74,017 1a. 4p., now payable under the principal indenture and the supplemental indenture" (the mortgages of 1910 and 1911) and all interest at the rate aforesaid."

It is said that this document, which was not attested by two witnesses, as required in the case of mortgages by the Transfer of Property Act, and was stamped as a transfer and not as a mortgage, amounts to a fresh mortgage by the first defendant in favour of the Bank, and cannot operate as a transfer to the Bank of the earlier mortgages, even though it is inoperative as a mortgage under the Transfer of Property Act for want of due attestation. In this view, the instrument, if duly executed as a mortgage, would have amounted to a transfer of the two earlier mortgages by the mortgagees to the Bank, and to the creation as between the mortgagor, the first defendant, and the Bank, of a fresh mortgage in satisfaction of the rights acquired by the Bank under the transfer. In these circumstances it appears to their Lordships, that the fact that this latter arrangement between the Bank and the first defendant failed to take effect for want of due execution of the document as a mortgage, affords no reason for refusing to give effect to it as a validly executed transfer of the earlier mortgages by the mortgagees to the Bank in consideration of their release from the liability they had incurred to the Bank.

Even if the document had been duly executed as a mortgage, it has been contended before their Lordships that it shows a clear intention to keep alive the earlier securities as well, possibly as a protection against any subsequent incumbrances which might have been created prior to the transfer, and that there would be no sufficient reasons for not allowing it to have that effect. This was the view taken by the learned judges of the High Court.

As regards the other points, their Lordships agree with the learned Judges that the first defendant cannot now be allowed to question the amount of his liability to his brokers under the mortgages at the date of the transfer as recited in the instrument

of transfer. The transfer clearly proceeded on the footing that the first defendant and his brokers, the mortgagees, were severally personally liable to the Bank on that date in the sum of Rs. 74,017 1a. 4p., and that the brokers were the secured creditors of the first defendant in respect of this liability which they had incurred on his behalf. In this state of things the intention clearly was that the brokers should be allowed to drop out and that by virtue of the transfer, the Bank should become the secured creditor of the first defendant for the full amount.

For these reasons the appeal fails and must be dismissed with costs, and their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

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WILLIAM ARRATTOON LUCAS

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THE BANK OF BENGAL AND OTHERS.

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DELIVERED BY SIR JOHN WALLIS.

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