

## APPELLATE CIVIL.

1876  
August 21.*(Mr. Justice Turner and Mr. Justice Spankie.)*

MANNA LAL (DEFENDANT) v. THE BANK OF BENGAL (PLAINTIFF).\*

*Act IX of 1872 (Contract Act), ss. 2 (d), 25—Consideration—Agreement without  
Consideration—Void Agreement.*

While certain hundis were running the acceptor gave the holder, the drawer having become bankrupt, a mortgage of certain immoveable property as security for the payment of the hundis in the event of their dishonour when they became due. *Held*, in a suit on the mortgage-deed, the hundis having been dishonoured, that there was no consideration, within the meaning of that term in Act IX of 1872, for the agreement of mortgage, and the same was void under s. 25 of that Act.

This was a suit to recover Rs. 5,000 on a mortgage-deed dated the 21st May, 1874. One Rai Lakshmi Chand, of Benares, drew two hundis, each for Rs. 2,500, the one payable on the 15th June, 1874, the other on the 19th June, 1874, on the defendant's firm at Cawnpore. These hundis were endorsed to the Bank of Bengal and discounted by the agent of that Bank at Benares, and were then forwarded to the agent of the Bank at Cawnpore, and by him presented to the defendant and accepted. On the 18th May, 1874, the agent at Cawnpore was informed that the drawer of the hundis was bankrupt. He immediately applied to the defendant to give security for the amount of the hundis, and on the 21st May, 1874, the defendant executed the deed of mortgage in suit. This deed, after reciting that the defendant was the acceptor of the hundis, that as such he was liable thereon, and that the amount of the hundis was due to the Bank of Bengal from him and payable by him, proceeds as follows: "I, therefore, of my own free-will and pleasure, agreeably to the request of the Bank of Bengal for security for the amount of the hundis due to the Bank of Bengal, Cawnpore branch, do hereby hypothecate and pledge for the said amount a house and six shops situated in the *chawk* in the city of Cawnpore, and a bungalow situated in the Cawnpore Cantonment, and execute this by way of a collateral security-bond. . . . . The hypothecated property shall remain hypothecated and pledged as long as the amount

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\* Special Appeal, No. 566 of 1876, against a decree of the Judge of Cawnpore, dated the 17th March, 1876, modifying a decree of the Subordinate Judge, dated the 2nd August, 1875.

1875

MANNA LAL  
v.  
BANK OF  
BENGAL.

of the hundis is not paid. The said Bank of Bengal is at liberty to realize on account of the hundis the amount thereof from the hypothecated property and from me in any manner it likes." On the 24th June, 1874, the Bank of Bengal instituted a suit against the drawer of the hundis and the defendant in this suit at Benares to recover the sums due on the hundis, which had been dishonoured on maturity. As the defendant neither resided nor carried on business at Benares, application was made to the High Court to sanction the trial, which sanction was refused. The Bank thereupon amended the plaint in that suit and sued the drawer alone, and obtained a decree, which at the time of the present suit was unsatisfied. On the 9th March, 1875, the present suit was instituted.

The defendant pleaded, among other pleas, that the mortgage was obtained from him on the promise that the Bank would exhaust every means to obtain payment of the hundis from the drawer before recourse was had to the acceptor. The agent of the Bank denied that any such promise was made, or that he had any authority to make any promise in the matter. The Court of first instance found that no such promise was made.

On appeal the defendant again urged that the mortgage had been made in consideration of the promise made by the agent of the Bank at Cawnpore, and he further pleaded that, if no such promise was made, there was no consideration for the mortgage, and the contract was void under s. 25, Act IX of 1872. The lower appellate Court found that no promise had been made, and held that, inasmuch as the acceptor of a bill derives benefit reciprocally with the drawer in banking transactions, and that both are liable for the prompt discharge of the bill on its arriving at maturity, any security given meanwhile by either of them is not devoid of consideration, inasmuch as it carries with it the prospect of a deferred demand for the money.

On special appeal to the High Court by the defendant it was again contended that, there being no consideration for the agreement of mortgage, the agreement was void under s. 25, Act IX of 1872.

Mr. *Raikes*, for the appellant.

Mr. *Colvin* and Mr. *Conlan*, for the respondent.

The judgment of the Court, so far as it related to the above contention, was as follows :

But we must admit the validity of the plea that the contract of mortgage is void under the provisions of s. 25 of the Contract Act. We do not quite understand the Judge's argument as to the benefit which the appellant derived from the banking transaction. It does not appear that he had received any portion of the hundis when discounted; but, assuming that he had done so, and admitting that under the circumstances he was liable on the hundis, neither the antecedent benefit, nor the existing liability, nor the anticipated advantage to which the Judge alludes, would constitute a consideration as defined in the Contract Act. To constitute a consideration as defined in that Act there must be an act, abstinence, or promise on the part of the promisee or some other person at the desire of the promisor. On the facts found there was no such act, abstinence, or promise, and therefore there was no consideration for the mortgage, and the contract is void. On this ground we must allow the appeal, and reversing the decrees of the Courts below so far as they decree the claim, we must dismiss the suit with costs.

1876

MANNA LAL  
v.  
BANK OF  
BENGAL.

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BEFORE A FULL BENCH.

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1876

August 21.

(*Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oilfield.*)

JAGESHAR SINGH (PLAINTIFF) v. JAWAHIR SINGH AND OTHERS  
(DEFENDANTS.)\*

*Act IX of 1871, sch. ii, 10.—Pre-emption—Limitation—"Actual Possession."*

*Held* (STUART, C. J., dissenting) that the purchaser of the equity of redemption of immovable property, which is at the time of sale in the usufructuary possession of the mortgagee, takes "actual possession" of the property, within the meaning of that term in art. 10, sch. ii of Act IX of 1871, when the equity of redemption is completely transferred to and vested in him.

*Per* STUART, C. J.—That such a purchaser does not take "actual possession" of the property until he takes visible and tangible possession thereof or enjoys the rents and profits of the same, after redemption of mortgage.

This was a suit to enforce the plaintiff's right of pre-emption of a share in a certain zemindari village and for possession of the same. The right of pre-emption was founded upon a special con-

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\* Special Appeal, No. 1028 of 1875, against a decree of the Subordinate Judge of Gházipur, dated the 21th June, 1875, affirming a decree of the Munsif of Saidpur, dated the 4th December, 1874.