

which was due to him on the date on which the contract of service was wilfully broken. I think, therefore, and it seems to me that I am supported in this view by the case of *Queen-Empress v. Indarjit* (1), that an employer of labour is not precluded from availing himself of the provisions of Act No. XIII of 1859 merely because, in the contract of service between himself and his workmen, there is a stipulated penalty capable of enforcement by a civil suit, in the event of breach of the contract on the part of the workmen, which penalty has admittedly not been enforced, nor payment of the same tendered, on the part of the workmen.

The other point taken before me is that the negotiations which took place between Murli Dhar and the defaulting workmen, and also with the rival contractors into whose service the latter had entered, amounted to a novation of the contract of service between Murli Dhar and the applicants, so as to render the latter incapable of enforcement either by way of application under Act No. XIII of 1859 or in any other manner, but I think the simplest answer to this contention is that, on the facts found, there was no complete novation of contract. Murli Dhar offered to be satisfied with a certain payment, far less than the penalty to which he was entitled under his contract, provided a certain condition which he chose to attach to his offer were fulfilled. That condition was never fulfilled, and Murli Dhar's offer consequently lapsed.

For these reasons I think that the decision of the courts below in this matter was correct and I dismiss this application.

Application dismissed.

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

1919
February, 7.

CHIRANJI LAL (PLAINTIFF) v. NARAINI AND OTHERS (DEFENDANTS) *

Indemnity bond—Suit to recover money payable under an indemnity bond—Decree passed against plaintiff, but money not actually paid—Suit maintainable.

It is not necessary that, before a suit on an indemnity bond can be filed, the plaintiff should have already been compelled to make the payment in

*Appeal No. 156 of 1917, under section 10 of the Letters Patent,

(1) (1889) I. L. R., 11 All., 262.

1919

CHIRANJI
LAL
v.
NARAINI.

respect of which he is seeking to be indemnified. It is sufficient that a decree has been passed against him for such payment. *British Union and National Insurance Co. v. Rawson* (1) and *Tota Das v. Babu Ganesh Prasad* (2) (unreported) referred to.

THE facts of this case were as follows :—

The plaintiff had executed a mortgage on the 4th of November, 1902, in favour of Musammat Maharani. On her death Kanhaia Ram claimed to be entitled to the property left by her and, therefore, to the money due upon the mortgage. The plaintiff paid him Rs. 500 in discharge of the mortgage and obtained from him on the 3rd of February, 1911, an indemnity bond in which Kanhaia Ram agreed to indemnify the plaintiff if any other heir of Musammat Maharani claimed the money and the plaintiff had to pay it. Certain other persons, alleging themselves to be heirs of Musammat Maharani and entitled to one-half of the mortgage-money, sued on the mortgage of the 4th of November, 1902, impleading both the plaintiff and Kanhaia Ram, and got a decree against the plaintiff on the 24th of April, 1915, for one-half of the amount due on the mortgage, which then amounted to Rs. 590. The plaintiff then brought the present suit to enforce the indemnity bond. Up to that time he had not paid anything on the decree of the 24th of April, 1915. Both the courts below decreed the suit, but with a proviso that the decree could not be executed unless and until the plaintiff was obliged to discharge the decree of the 24th of April, 1915. On second appeal by the defendants, a single Judge of the Court reversed the decrees of the courts below and dismissed the suit as being premature. The plaintiff appealed under section 10 of the Letters Patent.

Babu *Piari Lal Banerji*, for the appellant :—

The mere fact that the plaintiff had not, prior to instituting his suit, paid the money due under the decree of the 24th of April, 1915, is not a bar to the maintainability of the suit. The indemnifier can be obliged and required to pay to the indemnified the amount necessary to enable the latter to meet the liability provided against by the indemnity bond. A decree has been passed against the plaintiff, and Kanhaia Ram is a party to it; and the decree declares that the plaintiff is liable to pay a sum

(1) (1916) 2 Ch. D., 476. (2) (1910) Civil Revision No. 79 of 1909, decided on January 31st, 1910, (unreported).

of Rs. 590 on account of the mortgage of 1902. The plaintiff is therefore entitled to call upon Kanhaia Ram or his legal representatives, to pay him that sum by way of indemnity. Reference was made to *In re Law Guarantee Trust, and Accident Society* (1) *British Union and National Insurance Co. v. Rawson* (2) and *Tota Das v. Babu Ganesh Prasad* (3) (unreported). Further, since the filing of this Letters Patent Appeal, the plaintiff has paid up the decree of the 24th of April, 1915.

Dr. S. M. Sulaiman (for Munshi Panna Lal), for the respondents :—

Under his deed of the 3rd of February, 1911, Kanhaia Ram agreed to pay the plaintiff only such sums as the plaintiff might actually have to pay to any other rightful heir of Musammam Maharani. The plaintiff had not yet paid any such amount, so no cause of action had accrued to him for bringing the suit, and the suit was premature. The question as to how much Kanhaia Ram had received from the plaintiff should be gone into. The receipt for Rs. 500 is not, by itself, conclusive as to the amount actually paid.

Babu Piari Lal Banerji, was not heard in reply.

RICHARDS, C. J., and BANERJI, J.:—This appeal arises out of a suit brought on foot of a bond, which has been called, not inappropriately, an indemnity bond. It appears that there was a mortgage executed by the plaintiff in favour of one Musammam Maharani. On her death there were two sets of persons claiming to be entitled to the property held by her. One claimant was a man of the name of Kanhaia Ram. He alleged that he had received payment of the entire mortgage money from the plaintiff, and there was given in evidence a receipt he executed for the full amount and the bond which is the basis of the present suit. In that bond Kanhaia Ram covenanted that if anyone else put forward a claim to the money secured by the deed of mortgage and if he failed to prove his power to give a discharge and if the plaintiff should be obliged to pay any one else, then he would indemnify the plaintiff against such payment. Certain property was hypothecated to secure this covenant. In course of time a

(1) (1915) 1 Ch. D., 340.

(2) (1916) 2 Ch. D., 476.

(3) (1910) Civil Revision No. 79 of 1909, decided on January 31st, 1910, (unreported).

1919

CHIRANJI
LAL
v.
NARAINI.

1919

CHIRANJI
LAL
v.
NARAINI.

rival claimant brought a suit against the plaintiff and Kanhaia Ram based on the original mortgage, alleging that the then plaintiffs were entitled to half the property in possession of which Musammat Maharani had been and that the receipt and discharge by Kanhaia Ram was only effectual to the extent of half of the mortgage debt. This suit was successful and a decree for sale of the mortgaged property was made, and, as already stated, the plaintiff and Kanhaia Ram were defendants to that suit. The court of first instance decreed the plaintiff's claim, but put a *proviso* to the decree that it could not be executed unless and until the plaintiff was obliged to discharge the decree which had been made against him. The court of first appeal confirmed this decree. A learned Judge of this Court set aside the decrees of the courts below and dismissed the plaintiff's suit as premature. It seems to us that the view taken by the learned Judge of this Court was not correct. It is true that at the time the suit was brought the decree had not actually been discharged; but it was a mortgage-decree against the plaintiff's property, and it seems to us that it was highly technical to hold that the suit was therefore premature. Furthermore, the *proviso* which the courts below had put upon the decree prevented the possibility of any injustice being done to the respondent. On behalf of the appellant the case of the *British Union and National Insurance Co. v. Rawson* (1) has been cited as an authority that the suit could not be dismissed as being premature. We think also the case of *Tota Das v. Babu Ganesh Prasad* (2) is an authority in the plaintiff's favour. Dr. *Su'aiman*, on behalf of the respondent, has tried to support the decision of the learned Judge of this Court upon the ground that the plaintiff may not have paid the full amount stated in the receipt to Kanhaia Ram. It appears that there was a finding in the previous litigation in which the plaintiff and Kanhaia Ram were co-defendants, that the plaintiff had not paid the full amount due upon the mortgage. As pointed out by the lower appellate court, this decision was certainly not necessary for the purposes of that suit, and furthermore, the plaintiff and Kanhaia Ram were arrayed on the same side. Admittedly,

(1) (1910) 2 Ch. D., 476.

(2) (1910) Civil Revision No. 79 of 1909, decided on January 31st, 1910, (unreported).

there was some consideration for the bond sued upon in the present suit, and the terms of the bond were that if a claim should be put forward and the discharge which Kanhaia Ram was purporting to give should prove not sufficient, then Kanhaia Ram would indemnify the plaintiff from any further money he had to pay. We have already held that under the circumstances of the present case the granting of a mortgage-decree against the plaintiff was equivalent to payment. We may mention here that the appellant has produced before us a certified copy of the certificate recording payment of the amount of the mortgage-decree. We allow the appeal, set aside the decree of the learned Judge of this Court and restore the decree of the lower appellate court. The appellant will have his costs of both hearings in this Court.

1919

 CHITRANJEE
 LAL
 v.
 NARAINI.

Appeal allowed.

Before Mr. Justice Piggott and Mr. Justice Walsh.

KADMA PASIN (JUDGMENT-DEBTOR) v. MUHAMMAD ALI (DECREE-HOLDER)*
Civil Procedure Code (1908), order XXXIV, rule 14—Usufructuary mortgage comprising (1) a fixed rate holding and (2) a right to receive offerings at a temple—Subsequent agreement between mortgagor and mortgagee for payment by former of a fixed sum instead of the offerings—Decree for arrears—Execution of decree—“Claim arising under the mortgage.”

 1919
 February, 7.

The property comprised in a usufructuary mortgage consisted of (1) a fixed rate holding and (2) of the right to receive certain offerings at a temple. Inasmuch, however, as the mortgagee was a Muhammadan, a subsequent agreement was entered into between the parties whereby the mortgagor bound herself to pay annually a fixed sum of money in lieu of the offerings, and also, in case of default, to pay interest thereon. Default having been made, the mortgagee sued on this agreement and obtained a decree for money against the mortgagor. In execution of this decree he attached the mortgaged property and sought to have it sold. Upon objection by the mortgagor, judgment-debtor, held that the mortgagee could not bring the mortgaged property to sale in execution of the decree, as the claim under the subsequent agreement was one arising under the original contract of mortgage within the meaning of order XXXIV, rule 14, of the Code of Civil Procedure. *Haribans Rai v. Sri Niwas Naik* (1) distinguished.

* Second Appeal No. 498 of 1918 from a decree of F. D. Simpson, District Judge of Allahabad, dated the 14th of March, 1918, reversing a decree of H. G. Smith, Subordinate Judge of Mirzapur, dated the 30th of January, 1917.