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IN THE MATTER OF THE INVENTIONS AND DESIGNS ACT.

For these reasons I must hold that there has been a user of the invention in public by Messrs. Angelo Brothers prior to the date of the application for leave to file a specification, which user does not fall within the exemption provided by section 23 of the Act.

It follows that the invention is not new within the meaning of clause (*b*) of section 20 of the Act. There must therefore be a declaration that the applicant, Mr. E. A. Short, is not entitled to the exclusive privilege of making, selling and using the invention, which is in question in these proceedings, and the rule must be made absolute with costs.

Attorney for the petitioner : Messrs. *Gregory & Jones.*

Attorney for the opposite party : Mr. *Farr.*

Before Mr. Justice Ameer Ali.

DEBENDRA NATH MULLICK *v.* PULIN BEHARY MULLICK. *

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April 16.

Mortgage—Actionable claim—Transfer of Property Act (IV of 1882), section 135, clause (d)—Transfer of a claim for an amount less than its value—Recovery of amount actually paid with interest and incidental expenses.

Where the debtor without denying the claim offers to pay the purchaser the actual price paid by him with interest and expenses of the sale and merely disputes the amount of these items :

Held, that such a case does not come under the exception in clause (*d*) of section 135 of the Transfer of Property Act, and the first paragraph of that section applies.

That it is not necessary to deposit the money in Court in order to gain the benefit of section 135 of the Transfer of Property Act.

THE defendant, Pulin Behary Mullick, executed a mortgage and further charge, dated respectively the 23rd September and the 3rd November 1886, in favour of one Sowdaminey Dossee, who assigned the same to the plaintiff on the 26th January 1891. On hearing of the assignment the mortgagor immediately offered to pay to the assignee the actual price paid by him for the assignment, together with interest and incidental expenses. There was a dispute as to the amount of these items, the price of the assignment according to the plaintiff being Rs. 6,000 and according to the defendant only Rs. 2,750, which latter sum was proved at the hearing to be correct. This offer was refused by the assignee who

* Original Civil Suit No. 319 of 1891.

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brought this suit for the full amount that might be found due on the mortgage and further charge. When the case was called on, the learned Counsel for the defendant offered to pay the amount actually paid by Debendra Nath Mullick with interest and incidental expenses. The plaintiff refused to accept anything less than what was claimed in the suit, and the case proceeded.

Mr. *A. M. Dunne* and Mr. *S. P. Singha* for the plaintiff.

Mr. *R. Mittra* and Mr. *A. Chaudhuri* for the defendant.

The following cases were cited in argument: *Grish Chandra* v. *Kashisauri Debi* and *Brojo Sundari Debi* (1), *Khoshdeb Biswas* v. *Satar Mondol* (2), *Rajendra Narain Bagchi* v. *Watson and Co.* (3), *Muchiram Barik* v. *Ishan Chunder Chuckerbutti* (4), and *Russick Lal Pal* v. *Romanath Sen* (5).

AMEER ALI, J.—[The judgment, so far as it is material for the purposes of this report, was as follows.]

Mr. *Dunne*, on behalf of the plaintiff, contends that though the consideration for the assignment was only Rs. 2,750, yet, inasmuch as the defendant has not brought himself within the provisions of section 135 of the Transfer of Property Act, the plaintiff is entitled to the full amount that may be found due on the mortgage and further charge. His contention in substance is that, unless the defendant pays into Court before the hearing the amount for which the assignment is made, together with all costs and incidental expenses, the defendant is not entitled to the relief under section 135 of the Transfer of Property Act.

[After considering the evidence the learned Judge continued.] Section 135 of the Transfer of Property Act provides as follows:—

"Where an actionable claim is sold, he against whom it is made is wholly discharged by paying to the buyer the price and incidental expenses of the sale, with interest on the price from the day that the buyer paid it."

The section no doubt is badly worded. The words "by paying to the buyer" would also mean "if he pays to the buyer."

(1) I. L. R., 13 Calc., 145. (2) I. L. R., 15 Calc., 436.
(3) I. L. R., 18 Calc., 510. (4) I. L. R., 21 Calc., 568.
(5) I. L. R., 21 Calc., 792.

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But however read, it is difficult to suppose that the Legislature meant by those words an actual payment to the buyer. Actual payment implies the consensus of two minds, the offer of payment or tender on one side and the acceptance of the payment on the other. Logically, there can be no payment unless these two facts combine. The Legislature could hardly have had in contemplation the case of an actual payment, for where the person against whom a claim was made offered to pay and the buyer agreed to receive and did receive the price, there was an end of the question. Rationally construed, therefore, the words "by paying" must mean "by paying or offering to pay." In the case of *Grish Chandra* v. *Kashisauri Debi* (1) Mr. Justice Mitter put the same construction on the section. Any other view would, to my mind, reduce the law to absurdity. There is nothing throughout the section about payment into Court. "Payment into Court" is a mode of tender or offer. When a sum of money is deposited in Court, it forms a conclusive piece of evidence as to the fact of tender or offer. But there is nothing in the law to suggest that a tender or offer to pay may not be made in any other way. The cases that have been cited, and to which I shall presently refer, furnish no warrant for the suggestion that the only way in which the offer can be made is actually paying into or depositing the money in Court. To impose any such condition would, to my mind, be wholly unwarranted by the words of the section. In order to arrive at the intention of the Legislature, we must, it seems to me, construe the words rationally. And the rational and natural construction appears to my mind to be that, where an actionable claim is sold and the person against whom it is made pays or offers to pay to the buyer the price actually paid by the latter with all incidental expenses, he is discharged from liability for the claim. The offer must be proved in the usual way. If the offer is made by depositing the money in Court it may be proved by a certificate of the Accountant. Beyond the fact that it can be easily and conclusively proved, there seems to me to be no charm in what is called "payment into Court."

Reference was made to clause (*d*) in the proviso to section 135

(1) I. L. R., 13 Calc., 145.

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in support of the contention that payment should have been made into Court before the hearing.

The proviso runs as follows: "Nothing in the former part of this section applies.

"(*a*) Where the sale is made to the co-heir or co-proprietor of the claim sold;

"(*b*) Where it is made to a creditor in payment of what is due to him;

"(*c*) Where it is made to the possessor of a property subject to the actionable claim;

"(*d*) Where the judgment of a competent Court has been delivered affirming the claim, or where the claim has been made clear by evidence and is ready for judgment."

It will be noticed that there is nothing in clause (*d*) about payment into Court before the hearing or at any other time. The argument is only inferential, and rests upon certain words used in the cases decided in this Court under section 135.

The High Court of Calcutta has differed from the other High Courts in the construction of clause (*d*), and I am of course bound to follow the decisions of this Court so far as they enunciate any general principles, irrespective of the special facts of the particular case.

In *Grish Chandra* v *Kashisauri Debi* (1) the learned Judges remarked that "clause (*d*) of that section also points out that, even if the debtor had offered to pay the amount mentioned in the section after the decree in the lower Court, he would not have been discharged, because that clause says that the former part of the section will not apply where the judgment of a competent Court has been delivered confirming the claim."

In *Khoshdeb Biswas* v. *Satar Mondol* (2), which was a reference from the Small Cause Court, there was no argument, as nobody appeared on either side, and the judgment of the Court was as follows:—

"In this case we are of opinion that the plaintiff can recover the whole amount due on the bond, notwithstanding section 135

(1) I. L. R., 13 Calc., 145. (2) I. L. R., 15 Calc., 436.

of the Transfer of Property Act. We agree with the decision of this Court in *Grish Chandra* v. *Kashisauri Debi* (1) that the section does not apply where the money is recovered by suit after a contest as to the liability of the defendant. We think, however, that, if the money paid by the plaintiff for the claim with interest and expenses were paid into Court immediately on the suit being brought, that would be a payment within the meaning of the section, and would release the defendant from further liability."

There is nothing to show that the learned Judges considered "payment into Court" as the only mode by which a tender could be made.

In *Rajendra Narain Bagchi* v. *Watson and Co.* (2) Prinsep and Banerjee, JJ., held that the first paragraph of section 135 did not apply to a case in which the debtors denied the existence of the debt altogether, and the purchaser of the debt had to obtain judgment affirming the claim before any satisfaction was made or tendered. And towards the conclusion of their judgment they added: "Where the debtor without denying the claim offers to pay the purchaser the price paid by him with interest and expenses of the sale and merely disputes the amounts of these items, there, if the purchaser has to obtain judgment of the Court determining such amounts, it would not be a judgment affirming the claim, and so the case would not come under the exception in clause (*d*) of section 135, and the first paragraph of the section would apply."

That, I may say, is exactly the case here. The debtor does not deny the *claim*; he offers to pay the purchaser the price paid by him with interest and expenses of the sale and merely seeks to have the amounts of those items ascertained. If the principle enunciated in *Rajendra Narain Bagchi* (3) be correct, then the present case does not come under the exception in clause (*d*) of section 135.

The next case in order of date is *Russick Lal Pal* v. *Romanath Sen* (4) decided by Mr. Justice Hill on the 8th

(1) I. L. R., 13 Calc., 145.
(2) I. L. R., 18 Calc., 510.
(3) I. L. R., 18 Calc., 510.
(4) I. L. R., 21 Calc., 792.

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of March 1892. Up to that time only three cases had been decided in this Court under section 135 of the Transfer of Property Act. And Mr. Justice Hill, after giving the words of the Chief Justice in *Khoshdeb Biswas* v. *Satar Mondol* (1), expressed his own view as to the construction of that section in the following terms: "The rule thus laid down must no doubt be applied with a certain degree of elasticity, but the principle appears to be clear enough that, in order to avail himself of the provisions of section 135, the debtor must take his measures at the earliest opportunity."

The facts of that case were of a very peculiar character, and a mere cursory examination would show how utterly different that case was from the present. On the 2nd September 1891, previous to the institution of the suit, a letter of demand was sent from the plaintiff to the defendant for the amount due on the mortgage and costs. On the 19th August 1891 the defendant's attorney replied asking to be informed what was actually due on the assignment, and on the 21st August 1891 the plaintiff's attorney replied sending them a statement of account showing what was due for principal, interest and costs under the mortgage.

Having regard to the correspondence the learned Judge thought it extremely unlikely that the parties had at that stage section 135 in their minds. He was of opinion that a demand had been made for payment of the amount due on the mortgage, and that was followed by an enquiry by the mortgagors as to what was the actual amount due.

According to the finding of Mr. Justice Hill, when the suit was brought, both parties were ignorant of their real position under the assignment.

From the 2nd of September 1891 to February 1892 nothing whatever was done by the defendant in that suit for the purpose of asserting his right under section 135 of the Transfer of Property Act.

In November 1891 a written statement was filed, but no reference was made therein to the first part of the section, so as to enable the plaintiff, at all events shortly after the suit was insti-

(1) I. L. R., 15 Calc., 436.

tuted, to make such enquiries as would enable him to see his true position.

And the learned Judge added that Russick Lal Pal admitted in his evidence that he concerned himself in no way about the matter, and he was ignorant that he was entitled to discharge himself by payment of the sum due on the assignment.

The facts being found as above, the learned Judge concluded as follows :—

"It seems to me it is incumbent on the person who seeks to avail himself of section 135 to take the earliest opportunity of doing so ; and applying this test, I do not think that Russick Lal Pal has used that degree of diligence which the case demands." The learned Judge had evidently in his mind the decision in *Khoshdeb Biswas* (1) before it had been explained by the Full Bench, for the section itself does not require that the debtor should take the earliest opportunity of seeking the relief. The only limitation that is imposed is contained in clause (*d*).

On the 2nd April 1894 a Full Bench of this Court decided the case of *Muchiram Barik* v. *Ishan Chunder Chuckerbutti* (2). In that case Mr. Justice Prinsep and Mr. Justice O'Kinealy agreed with the Allahabad and Madras High Courts, being of opinion that clause (*d*) referred to a state of things existing at the time of the assignment and not at the time of the enforcement of payment of the debt ; in other words, that "it referred to circumstances arising upon the transfer of the actionable claim." The majority of the Judges, however, took a different view. The passages in the judgment of Petheram, C.J., which furnish to my mind the key-note to his decision, are important, as they indicate his general conclusion about the limit of time after which the debtor cannot claim a discharge. The learned Chief Justice says (3) : "The second question is one on which the decisions of the Court are in conflict with those in Madras and Allahabad. The cases to which we have been referred are *Grish Chandra* v. *Kashisauri Debi* (4) in which Mittra and Grant, JJ., decided that as the debtor, the defendant, did not pay or offer the amount he was bound by section 135 to pay, the

(1) I. L. R , 15 Calc., 436.
(2) I. L. R., 21 Calc., 568.
(3) Id. at p. 574.
(4) I. L. R., 13 Calc., 145.

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section did not apply, and the plaintiff, the assignee of the debt was entitled to recover the full amount of the debt without reference to what he himself paid for it.....I have never thought the point by any means clear, but after a good deal of consideration I have come to the conclusion that the decisions of this Court are right. The view of the section taken by the Madras and Allahabad Courts is that it creates an absolute bar to an action brought by the assignee for anything beyond the amount paid by him with interest and expenses in the same way in which section 4 of the Limitation Act is a bar, if the money sued for had become due more than three years before the suit, and nothing had happened to prevent the operation of the law of limitation. This Court, on the other hand, has held that the defendant may be discharged from all liability by payment before judgment of the smaller sum, but that, if such payment is not made before the final judgment is given, the assignee is entitled to judgment for the whole debt."

Then he goes on to say (1): "In the case of *Khoshdeb Biswas* v. *Satar Mondol* (2) I expressed the opinion that payment in the suit would entitle the debtor to the benefit of the section, and if I was right in that opinion, I can see no reason why, when in an action by the assignee of a debt, the question is not whether the debt was ever incurred at all, but what was the amount which was paid for it, that question should not be tried in some way which would enable the defendant to deposit the amount when found with interest and expenses in Court under section 376 of the Civil Procedure Code before final judgment was given in the suit, and as in all cases in this country the costs of litigation are in the discretion of the Court, there is no danger of injustice being done by their falling on anyone but the party in the wrong. I think that the claim in this suit is an 'actionable claim' within the meaning of the Transfer of Property Act, but that, as the defendant did not pay the amount paid by the plaintiff for the claim with interest and expenses before judgment, but disputed the claim throughout, the plaintiff is entitled to judgment for the whole of his claim."

Mr. Justice Ghose in page 587 said as follows: "It seems to me, reading the several parts of section 135 together, that the payment contemplated in the first paragraph of that section

(1) I. L. R., 21 Calc., at p., 577. (2) I. L. R., 15 Calc., 436.

is a payment at some time or other *before* judgment 'affirming the claim' and *before* the claim has been made clear by evidence and is ready for judgment, as mentioned in clause (*d*) of the section. I don't think that the Legislature could have intended that, where the defendant contests the truth of the assignee's claim and does not pay or offer to pay before judgment the amount of the consideration that the assignee paid, he, the defendant, may yet get a discharge by paying simply the consideration for the assignment and the costs."

Mr. *Dunne* whilst relying upon the decision in *Muchiram Barik* (1) contended that the language used by the learned Chief Justice and Mr. Justice Ghose was incautious and incorrect. I am of opinion that there is no warrant for that argument. If clause (*d*) does not refer to circumstances arising before the transfer, as has been held by a Full Bench of the Madras High Court, by the Allahabad High Court and by two Judges of this Court, then the only rational and natural construction which can be put on the words of that clause is that contained in the decision of the learned Chief Justice expressed in deliberate and careful language, *viz.*, that when the amount of the purchase-money and the interest and incidental expenses have been ascertained the debtor would be entitled to be discharged from liability upon depositing the same in Court before final judgment is given in the suit.

The decision of the appeal Court in *Russick Lal Pal* (2) (18th April 1894) made no variation in the views expressed in *Muchiram Barik* (1) and enunciated no new principle.

Let us now see what are the facts in the present case. It is proved beyond a shadow of doubt that, "in order to avail himself of the provisions of section 135," to use Mr. Justice Hill's language in *Russick Lal Pal* (2), the debtor took his measures at the earliest opportunity. Immediately he received notice of the assignment he tendered to the plaintiff the amount of the purchase-money not now disputed which he paid for the assignment, together with a sum of Rs. 250 to cover the incidental expenses. No demand was made on him for a larger sum for expenses; it was not suggested that the sum offered for expenses was not sufficient,

(1) I. L. R., 21 Calc., 568. (2) I. L. R., 21 Calc., 792 at 798.

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nor was anything said about brokerage. When the defendant and his attorney made the tender they were told that the plaintiff had paid Rs. 6,000 upon his assignment, which is now found to be false. In his written statement the defendant repeated the offer, and the moment the case was called on his Counsel offered in distinct terms to pay to the plaintiff the amount of his purchase-money, together with all incidental expenses and interest. Until the conclusion of Doyal Chunder Dey's evidence the plaintiff strenuously denied the statement of the defendant that he had paid only Rs. 2,750. From the very outset the defendant has claimed relief under section 135, he has never disputed the *claim* or the assignment; what he has disputed is the amount alleged by the plaintiff to have been paid for the assignment, and he has sought for an ascertainment of the amount of the purchase money and the incidental expenses, &c. Even if he had disputed the "claim," I could not pronounce final judgment in the suit, until it had been ascertained before the Registrar whether full consideration had been paid on the further charge.

But, as I said before, the defendant has never disputed "the claim." Immediately after notice of assignment he tendered the purchase-money, together with a sum of Rs. 250, which he appears to have been advised, was sufficient to cover the incidental expenses. He was never told that the latter amount was insufficient, or that there was anything else to pay. In my opinion, if there is an obligation on the part of the debtor, there is also an obligation on the part of the purchaser. If he has to pay the incidental expenses he must get his information as to the amount from the purchaser.

It surely cannot be contended that when a tender is made of the exact amount of the purchase-money, together with a sum for expenses, and the tender is refused, not on the ground that the sum for incidental expenses is insufficient, but on the ground that the purchase was for a larger amount which is found to be untrue, the debtor cannot avail himself of the provisions of the first paragraph of section 135, even though he offers to pay the expenses actually incurred.

In the present case at the very outset before the case on behalf of the plaintiff was opened, Mr. Mittra for the defendant offered to pay, not only the purchase-money, but all incidental expenses. I think, having regard to the facts of the case and the principles to

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which I have referred in the several cases cited, the defendant is entitled to the benefit of the provisions of the first paragraph of section 135 of the Transfer of Property Act.

On the 10th of April the defendant obtained an order (without prejudice to the plaintiff's right to question the validity of the payment, giving him leave to pay into Court Rs. 3,500 in this suit. That amount has been deposited as appears from the certificate of the Accountant-General. I therefore direct an enquiry before the Registrar as to the expenses of and incidental to the assignment.

Final judgment reserved until after report.

Attorney for the plaintiff: Babu *N. C. Bose.*

Attorney for the defendant Pulin Behary Mullick: Mr. *G. C. Farr.*

F. K. D.

FULL BENCH.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Macpherson, Mr. Justice Trevelyan, Mr. Justice Ghose and Mr. Justice Rampini.

UPADHYA THAKUR AND OTHERS (PETITIONERS) *v.* PERSIDH SINGH AND OTHERS (OPPOSITE PARTIES.) * 1896 *April* 27.

Bengal Tenancy Act (VIII of 1885), section 104, clause 2 and section 108, clause 2—Proceedings under— Memorandum of appeal to Special Judge —Court Fees Act (VII of 1870), Schedule II, Art. 17, vi, Art. 1, clause b, part 2, sections 12, 17—Civil Procedure Code (1882), section 622—High Court's power of interference with order of Special Judge—Rules under Bengal Tenancy Act, Chap. VI, No. 25—Power of Local Government to make the rule.

A number of tenants were joined as defendants in a proceeding for settlement of rents under section 104, clause 2 of the Bengal Tenancy Act, and an appeal preferred by the landlords under section 108, clause 2, from the Revenue Officer's decision, making all or nearly all the tenants respondents. The appeal was dismissed by the Special Judge, on the ground that as many Court

* Full Bench Reference in Rule No. 1565 of 1895, against an order of Mr. Mackie, Special Judge and District Judge of Tirhut, dated the 10th April 1895, dismissing an appeal from the decision of the Settlement Officer of Mozufferpur, dated 11th June 1894.