

*PER CURIAM*:—In this case we do not interfere, as the sentence has expired, but we would point out to the lower appellate Court that it had no power to maintain the whole sentence when it reversed the conviction on one of the charges, such a maintenance being an enhancement of the sentence (see Criminal Ruling No. 41 of 1892).

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## APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice Candy.

ANANDRAO BABAJI BARVE (ORIGINAL PLAINTIFF), APPELLANT, v.  
DURGABAI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.\*

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June 26.

*Transfer of Property Act (IV of 1882), Sec. 135—Assignment of mortgage by mortgagee—Suit by assignee—Payment into Court by defendants (representatives of mortgagor) of price paid to the assignor (mortgagee) without admitting the mortgage or assignment—Interest—Payment in grain—Damdapat.*

In a suit by the assignee of a mortgage to recover the amount due on it, the defendants (who were representatives of the mortgagor) without admitting the mortgage, or that anything was due under it, paid into Court the amount which the plaintiff had paid for the assignment with interest and expenses, but said that they did not admit the assignment to the plaintiff or the assignor's right to the mortgage, but that they were willing that the amount should be paid to the plaintiff if he proved that he was the person entitled to recover the mortgage-debt.

*Held*, that the plaintiff was entitled to recover the whole amount legally due on the mortgage, and that section 135 of the Transfer of Property Act (IV of 1882) did not apply. Payment into Court under such circumstances was only a conditional tender and such a conditional tender is not a payment under the section.

*Held*, also, that the rule of *damdapat* applied to the mortgage, the advance having been in cash, although the interest was to be paid in grain.

SECOND appeal from the decision of J. Fitzmaurice, District Judge of Thána, varying the decree of Ráo Sáheb G. V. Saraiya, Subordinate Judge of Bassein.

Suit by the plaintiff as assignee of a mortgage. The mortgage had been executed on the 12th January, 1880, by Balkrishna N. Vartak and Narayan Balkrishna Vartak to one Parashram Sadashiv, whose grandson Balkrishna assigned it to the plaintiff. The deed provided (*inter alia*) that twenty maunds of paddy

\* Second Appeal, No. 624 of 1896.

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should be delivered annually to the mortgagee as interest on the sum lent. The plaintiff alleged that no part of the debt had been paid, and now sued the defendants, who were the heirs of the mortgagors, to recover Rs. 250 as principal and Rs. 490 as interest.

The defendants did not admit the mortgage or the assignment, or that anything was due. They pleaded that they had no notice of the assignment as required by sections 131—133 of the Transfer of Property Act (IV of 1882), and they alleged that the only consideration paid by the plaintiff for the assignment was Rs. 200. They accordingly paid that sum into Court together with Rs. 3-6-0 as interest and Rs. 3-10-0 as expenses, in all Rs. 207, which they submitted was what the plaintiff was entitled to in case he should prove his right under the mortgage, having regard to section 135 of the Transfer of Property Act (IV of 1882).

The Subordinate Judge passed a decree for the plaintiff for Rs. 670, holding that the plaintiff was entitled to the full amount of the mortgage-debt and not merely to the sum which he had paid for the assignment. He also held that the rule of *dandupat* was not applicable to the case, as the interest was to be paid in grain and not in cash.

On appeal, the Judge varied the decree and awarded only Rs. 207 to the plaintiff, holding that section 135 applied and that payment of that sum into Court was sufficient under the section.

The plaintiff preferred a second appeal.

*N. G. Chandavarkar* for appellant:—The plaintiff is entitled to the whole mortgage-debt which he purchased. Section 135 does not apply to this case. That section applies only when an unconditional payment is made. Here the payment made by the defendants was not unconditional. It was not made to the buyer, but into Court, and the defendants contested the assignment and the plaintiff's right under the mortgage—*Vishnu v. Dagalw*<sup>(1)</sup>; *Khoshdeb v. Satar Mondol*<sup>(2)</sup>; *Grish Chandra v. Kashiscart*<sup>(3)</sup>.

(1) I. L. R., 19 Bom., 290.

(2) I. L. R., 15 Cal., 436.

(3) I. L. R., 13 Cal., 145.

*Ganesh K. Deshmukha* for respondents:—The payment into Court was sufficient, and section 135 applies. The payment was not conditional. The plaintiff, of course, had to show his right to recover the money. The execution of the mortgage was not contested. The defendants merely pleaded ignorance of the transaction. They had to protect themselves from liability to the mortgagee's heirs. The payment into Court was sufficient—*Debendra Nath v. Pulin Behary*<sup>(1)</sup>.

FARRAN, C. J.:—Section 135 of the Transfer of Property Act has given rise to various different rulings in the High Courts. It is a sweeping and rather drastic section. It enables a person against whom an actionable claim exists, whether disputed or not, to free himself from his obligation for its fulfilment by paying to the assignee by purchase of the claim the price and incidental expenses of the sale with interest on the price from the day that the buyer paid it. The time within which an obligation when assigned can be thus got rid of, is not limited by the Act; and hence payment into Court after suit brought to recover the claim has been held to fulfil its conditions if made before the claim is made clear by evidence and is ready for judgment—*Muchiram v. Ishan Chunder*<sup>(2)</sup>; and the definition of an actionable claim is so wide that it has been held to extend even to a registered mortgage claim—*Namdar Chaudhri v. Karam Raji*<sup>(3)</sup>; *Muchiram v. Ishan Chunder*<sup>(2)</sup>; *Russick Lall v. Romanath*<sup>(4)</sup>; *Debendra Nath v. Pulin Behary*<sup>(1)</sup>. The latter case is an authority for saying that an offer or tender of the price and expenses with interest is sufficient though not followed by a payment into Court.

The Madras and Allahabad High Courts have even held that the assignee of an actionable claim is not entitled to recover in any case more than he has paid for the claim with interest and expenses—*Nilakanta v. Krishnasami*<sup>(5)</sup>; *Jani Begam v. Jahangir Khan*<sup>(6)</sup>. These decisions, however, have not found favour with the Judges of the Calcutta High Court; and this Court, following their view, has ruled that the assignee-plaintiff is entitled to

(1) I. L. R., 23 Cal., 713.

(4) I. L. R., 21 Cal., 792.

(2) I. L. R., 21 Cal., 568.

(5) I. L. R., 13 Mad., 225.

(3) I. L. R., 13 All., 315.

(6) I. L. R., 9 All., 476.

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recover the whole amount of the claim assigned to him, unless the defendant actively avails himself of the provisions of section 135 of the Transfer of Property Act. We feel no doubt as to the soundness of that decision.

The question here is, whether what the defendants have done is equivalent to payment. They have (without admitting the mortgage-debt upon which they are sued in their representative capacity, or that anything is due under it) brought into Court the amount which the plaintiff has paid for the assignment of the mortgage, but say that they do not admit that the plaintiff's assignor was the person entitled to the mortgage, or the plaintiff's assignment, and are only willing that the amount should be paid to the plaintiff if he proves to the satisfaction of the Court that he is the person entitled to recover the mortgage-debt. This tender by payment into Court was, in fact, a conditional tender.

In our opinion, a conditional tender such as this does not amount to a payment within the meaning of section 135. Payment into Court, unless the plaintiff can take it out in satisfaction of his claim, is not payment at all. If the plaintiff had not shown that his assignor was the person entitled to the mortgage, his suit would have been dismissed with costs. The payment into Court did not shorten the trial in any respect except that it avoided the necessity of taking the mortgage account. It doubtless may in some instances occur that the obligee of an actionable claim does not know whether the assignee of the obligor of such claim has a good title to recover it or not. In such cases it may be difficult for the obligee to avail himself of the provisions of section 135, but we do not think that such a consideration should lead us to hold, as the District Judge has done, that a conditional tender in the shape of payment into Court, coupled with a condition as to its payment to the plaintiff, is equivalent to payment. The payment into Court in this case did not in the least shorten the trial. Issues were raised and the case was fought upon them, and it was only when the plaintiff obtained a certificate under Act VII of 1889, and proved his case, that a decree was passed in his favour.

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In the absence of a preamble it is difficult to determine what object the Legislature had in view in passing the section—what the mischief was which they sought to remedy. The word “payment” which they have used in the section cannot, as pointed out in *Debendra Nath v. Palin Behary*<sup>(1)</sup>, be read in its usual sense. To so read it would make the Act a dead letter. Under these circumstances one is perforce led to conjecture what the evil was which needed legislation of a somewhat novel and retrograde character to check it. If it was to put an obstacle in the way of assigning even undisputed registered mortgage claims and choses in action of every kind, the Madras rulings are without doubt best calculated to effect that purpose, but it is difficult to suppose that the Legislature had in view a purpose so opposed to modern ideas. If they desired to confer immunity upon debtors from paying the full amount of their debts, the same observation is applicable. If they intended to diminish litigation, the ruling that a strict tender before suit followed by unconditional payment into Court, or unconditional payment into Court where tender before suit is impossible, is necessary in order to bring the obligee within the terms of the section, best effectuates the object of the Legislature. If the suit is to go on notwithstanding the payment, litigation is not avoided. If the Legislature had in view the checking of the common Indian practice of buying up doubtful and disputed claims, the definition of actionable claim in section 130 is too wide and brings within the scope of the provision undisputed as well as disputed and doubtful choses in action.

We reverse the decree of the District Judge and restore that of the Subordinate Judge, but as we think that the rule of *damdupat* is applicable to this mortgage—the advance having been in cash though the interest was to be paid in grain—with the variation that the interest must be limited to the amount of the mortgage-debt, or Rs. 500 in all. There will be the usual decree for sale in default of payment of that sum with interest at 9 per cent. within six months of this date. Costs throughout in proportion.

*Decree reversed.*