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[498] ORIGINAL CIVIL.

Before Mr. Justice Farran.

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MANOEL JOAO DIAS (*Plaintiff*) v. THE HONGKONG AND SHANGHAI
BANKING CORPORATION AND Z. R. DE SA (*Defendants.*)*
[17th April, 1890.]

Loan—Deposit with Bank—Receipt given for loan—Statement in receipt that loan was repayable on production of receipt—Production of receipt a condition precedent to payment.

The plaintiff deposited the sum of Rs. 2,454-7-7, with the defendants' Bank in Bombay as a loan for a year, to bear interest at the rate of four and a half per cent. He was given a receipt for the said sum, which stated that the money was "repayable here on production of this receipt."

Held, that the receipt contained the terms of the contract of loan between the plaintiff and the defendants and that the production of the receipt was a condition precedent to the repayment of the money.

THE plaintiff brought this suit against the Hongkong and Shanghai Bank to recover a sum of Rs. 2,454-7-7 deposited by him with the said Bank on the 23rd January, 1888, for one year, to bear four and a half per cent. interest.

The plaintiff stated that in 1880 the plaintiff had deposited the sum of Rs. 2,000 with the said Bank, and on each subsequent year had renewed the deposit, including the interest that had accrued. The last renewal was made on the 23rd January, 1888, on which day the plaintiff, as already stated, deposited the said sum of Rs. 2,454-7-7 for one year, to bear interest at four and a half per cent. The receipt for the renewed deposit was sent by the Bank to the plaintiff, who was then at Goa, where his father-in-law, the second defendant, resided, and where the plaintiff's papers and valuables were at that time kept.

Before leaving Goa the plaintiff missed the said deposit receipt, and he, therefore, on the 21st December, 1888, wrote to the Bank, informing them of the loss of the receipt, and warning them against paying the money to the wrong person.

In January, 1889, the plaintiff demanded payment of the deposit, with the interest accrued thereon. The Bank declined to pay, unless the receipt was produced, and the Agent informed the plaintiff that the second defendant had produced the missing [499] receipt, and had demanded payment of the money. On the 25th January, 1889, the plaintiff again demanded the money from the Bank, and was again informed that the money would be paid on production of the receipt duly endorsed. On the following day the plaintiff's solicitors wrote as follows to the Bank:—

"You are well aware that our client cannot produce the fixed deposit receipt, and that it has been in the possession of one Zacarias Raimundo de Sa. At present he is not in a position to say how the said Zacarias came into possession of it until he goes to Goa and institutes enquiry into the matter.

"Our client has made a certain contract, and for the due fulfilment of it he desires the Bank to pay his money back, and he, therefore,

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enquired whether the Bank would object to pay him on his giving an indemnity.

"Our client is aware that on production of the deposit receipt the Bank would pay. He being unable at present to produce the receipt, is willing to give an indemnity to the Bank, if you would pay the money without deposit receipt."

On the 28th January the Bank replied that they were unable to comply with the plaintiff's request, and that the deposit could not be paid, except on production of the receipt.

Nothing more was done in the matter for some time. On the 2nd May 1889 the plaintiff's attorneys wrote to the Bank as follows:—

"Referring to previous correspondence our client, Mr. Manoel Joao Dias, had with you in regard to his fixed deposit, we are now instructed to inform you that our client went over to Goa, and claimed from his father-in-law, Zacarias Raimundo de Sa, the deposit receipt which he has clandestinely obtained possession of, but he declines to part with it, intending to extort some money from our client. Our client even challenged de Sa to establish his right to retain possession of the deposit receipt, but all without effect.

"Under these circumstances our client is compelled once more to apply to you for repayment of his money without production of the receipt, which we need hardly remind you is not transferable. Our client has already offered, and is willing even now to offer the Bank an indemnity against any claim that may be made by de Sa.

"You will admit that even if de Sa claimed the money, the Bank would not be entitled to pay him without our client's discharge, and the payment to our client cannot in any way prejudice the Bank, notwithstanding the fictitious claim set up by de Sa.

"We are instructed finally to state that if, notwithstanding what has been stated above, the Bank will refuse to comply with our client's request, our client will be reluctantly compelled to proceed at law against the Bank, holding the Bank responsible for the consequences."

[500] In reply to the above letter the Bank wrote on the 7th May, 1889:—

"If good and substantial securities are furnished, we will notify de Sa, and pay the amount within, say, two months from date of notice."

The plaintiff thereupon submitted the names of certain persons willing to be his sureties, and on the 18th May, 1889, the Bank wrote as follows:—

"We have selected Dr. Pinto and Mr. B. X. Furtado from the list of sureties submitted, and on receipt of a letter of indemnity duly executed we shall notify de Sa."

On the 1st June 1889, the plaintiff's attorneys sent a draft indemnity bond to the Bank for approval, requesting its speedy return.

On the 20th June, 1889, they wrote again to the Bank requesting that the draft might be returned approved.

In reply to this last letter the Bank wrote as follows to the plaintiff's attorneys:—

"Bombay, 21st June 1889.

"Dear Sirs,—In reply to your favour of yesterday's letter we beg to say, on further consideration of the matter in question, we do not feel

disposed to pay under guarantee the deposit we hold in the name of Mr. M. J. Dias, but can only part with the amount on production of the receipt. 1890
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“ Considering that the deposit receipt has not been lost, but is in the possession of Mr. de Sa, it is, we think, for the depositor rather to take action against Mr. de Sa for the recovery of the receipt, than to call upon us to pay the deposit under guarantee. Besides, it would, in our opinion, be establishing a very bad precedent, if we adopted the course that is proposed to us. ORIGINAL
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“ We return your draft guarantee.

“ Yours faithfully,
(Signed) _____
Assistant Agent.”

The plaintiff then filed this suit to recover from the Bank the said sum of Rs. 2,454-7-7., with interest at four and a half per cent. per annum from the 23rd January, 1888, for one year, and further interest at nine per cent. from that day as interest or damages. He also claimed from the Bank Rs. 500 as damages for breach of the agreement to pay the money on getting an indemnity. He also claimed damages from the second defendant measured by the loss he had sustained by reason of the non-payment [501] of the said deposit on the 23rd January, 1889, viz., nine per cent. on the money then due till payment, and also the expense and loss in respect of preparing the indemnity bond.

The Hongkong and Shanghai Bank paid the money claimed by plaintiff into Court and filed a written statement, in which they admitted that the plaintiff had deposited the loan with them, as stated in the plaint, on the 23rd January, 1888, and stated that the Bank had “ agreed to re-pay the said sum and interest thereon on production of the receipt.” The written statement contained also the following paragraphs :—

“ 2. On the 21st December, 1888, the plaintiff sent a letter to these defendants, informing them that the said receipt was missing, and on the same day these defendants received a letter from the solicitor for the second defendant informing them that the said receipt had been deposited by the plaintiff with him as security for the repayment of Rs. 1,500, and requesting these defendants not to pay the amount thereof to the plaintiff, except on production of the said receipt.

“ 3. These defendants admit that the correspondence, copies whereof are annexed to the plaint, passed between themselves and the plaintiff and his solicitors, and these defendants crave leave to refer to the same. These defendants submit that they were justified in declining to pay the amount of the said receipt, and the interest due thereon, except on the production of the said receipt.”

“ 5. These defendants bring into Court the said principal sum and interest thereon up to the 23rd January, 1889, and are willing that the same would be paid to either the plaintiff or the second defendant as this Honourable Court may direct.

“ 6. These defendants submit that they are not liable to pay any interest on the said sum after the said 23rd January, 1889.”

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The following is the letter received by the Bank from the attorney of the second defendant, referred to in the second paragraph of the written statement:—

"Bombay, 21st December, 1888.

"THE AGENT,

"Honkong and Shanghai Banking Corporation.

"Sir,—I am informed by my client Zacarias Raimundo de Sa that one Mr. M. J. Dias deposited in your Bank Rs. 2,454-7-7 for a fixed period of twelve months ending on the 23rd proximo, bearing interest at the rate of four and a half per cent. per annum, and duly obtained a receipt for the same from the said Bank under your signature.

"That since the aforesaid deposit was made, my client lent and advanced Rs. 1,500 to the said M. J. Dias on his depositing with him the aforesaid receipt as security for the repayment thereof with interest.

[502] "I have therefore to request you, on my client's behalf, not to pay to the said M. J. Dias the said sum of Rs. 2,454-7-7 on the 28th proximo until the said deposit receipt given by the Bank as aforesaid and now in my client's possession is produced by him.

"Yours truly,

"(Signed) MULJI BHAVANIDAS BARBHAYA."

The Bank replied as follows:—

"Bombay, 21st December, 1888.

"MULJI BHAVANIDAS BARBHAYA, Esq.,
 Solicitor.

"Dear Sir,—We have received your favour of date *re* the fixed deposit of Mr. M. J. Dias for Rs. 2,454-7-7, due 23rd January, 1889.

"Please note that the deposit is not transferable, and we cannot recognize your client's claims in the matter.

"Yours faithfully,

"(Signed) P. E. CAMERON,
 Agent."

At the hearing a copy of the deposit receipt granted to the plaintiff was put in evidence. It was as follows:—

"No. 24/52. Deposit Receipt. Due 23rd January, 1889.
 Honkong and Shanghai Banking Corporation.

Rs. 2,454-7-7. Bombay, 23rd January, 1888.

Not trans-
 ferable.

Received from M. J. Dias, Esquire, Rupees two thousand four hundred and fifty-four, annas seven, and pies seven only, to be placed on deposit for twelve months bearing interest at the rate of four and a half per cent. per annum repayable here on production of this receipt.

For Honkong and Shanghai Banking Corporation,
 —Agent."

—Accountant.

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Interest on this receipt will cease at due date, unless renewed."

There was no appearance for the second defendant.

Jardine, for plaintiff.—The plaintiff is entitled to be paid the money which the Bank has paid into Court, and the Bank should pay the plaintiff's costs of this suit. The Bank ought to have paid the plaintiff in January when he made his demand, and ought not to have made it necessary for him to sue. He lent them money for a year. At the end of that time they were bound to repay him. The absence of the receipt did not justify them in refusing to repay the loan. The receipt is not [503] transferable. The plaintiff gave notice that it was missing, and that he could not produce it. But the non-production of the receipt does not entitle the Bank to keep the plaintiff's money. It is still his. The receipt is merely evidence of the loan. The money has not been assigned. It is not alleged by the Bank that the title to it has been transferred. The offer of an indemnity ought to have been accepted by the Bank. An indemnity would have secured them from loss. The plaintiff is therefore entitled (a) to the money paid into Court by the Bank; (b) to the expenses of preparing the indemnity bond; (c) to damages for retention of his money; (d) to the costs of this suit.

Macpherson, for the Bank.—At the time of making the loan the plaintiff made a contract with the Bank. One of the terms of that contract was that the loan should be repayable on production of the deposit receipt. Its production is made a condition precedent to payment. This document is not a negotiable instrument, but it may be deposited as a pledge. The pledge might establish a charge upon it, and the plaintiff might be ordered to endorse it. The receipt is not lost or destroyed. It is in existence. The Bank might accept an indemnity if it were lost or destroyed, but not when it can be produced. This suit ought to be decided as an interpleader suit. Counsel referred to the Civil Procedure Code (XIV of 1882), s. 470, and Act XXVI of 1881, s. 81.

JUDGMENT.

FARRAN, J.—The plaintiff in this case deposited with the Hongkong and Shanghai Bank, as a loan for a year, a sum of Rs. 2,000 so long ago as the year 1880. This deposit loan, including the accumulated interest, has been renewed in each subsequent year, and a fresh receipt has been granted each year by the Bank to the plaintiff.

The last renewal of the loan was on the 23rd January, 1888. The amount deposited had then reached the sum of Rs. 2,454-7-7, and this money was on that day lent to the Bank for one year, to bear interest at the rate of four and a half per cent. per annum.

For this loan the Bank gave to the plaintiff a deposit receipt in the usual form. That document stated that the Bank had received from the plaintiff the sum of Rs. 2,454-7-7 "to be [504] placed in deposit for twelve months bearing interest at the rate of four and a half per cent. per annum repayable here on production of this receipt." At the foot of this receipt it was stated that "interest on this receipt will cease at due date, unless renewed," and across it are printed the words "not transferable."

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The loan for which a receipt in that form was given became repayable to the plaintiff in January, 1889, and accordingly a demand for payment was then made by him. The Bank replied that they would be glad to pay the amount on production of the receipt duly endorsed. The plaintiff, however, could not produce it. It appeared that the receipt had in some way got into the hands of the plaintiff's father-in-law, the second defendant, at Goa, with whom he had a dispute, and who refused to hand over the document to him.

On the 21st December, 1888, the second defendant through his attorney wrote to the Bank, stating that the receipt had been deposited with him by the plaintiff as security for a certain advance, and requesting them not to pay the plaintiff until the receipt was produced by him. To that letter the Bank replied that the deposit receipt was not transferable, and that they could not recognize the second defendant in the matter.

When the plaintiff made his demand for payment in January, 1889, the Bank, as I have already stated, refused to pay, except on production of the receipt. The plaintiff then offered to give an indemnity, an offer which the Bank was apparently at first disposed to accept, and a draft deed of indemnity was actually prepared. On the 21st June, 1889, however, they wrote stating that on further consideration they had decided not to re-pay the plaintiff the amount of his loan, unless and until the deposit receipt was produced by him. The plaintiff then filed this suit, and the defendants when filing their written statement paid into Court the sum deposited with them by the plaintiff, and stated that they were willing that it should be paid to the plaintiff or to the second defendant as this Court should direct.

The question which has been argued before me is whether the Bank was bound to pay the plaintiff, although he did not produce the deposit receipt. In considering this matter it is to be [505] observed that the receipt is admittedly in existence, so that the question of a lost or destroyed document does not arise. The document is apparently at present in the possession of the second defendant, who alleges that it has been deposited with him as security. The words "not transferable," which are printed across it, mean, I think, that the document is not negotiable, and that the money to which it relates would not pass merely by the delivery or the endorsement of this receipt; but I think that if the plaintiff had transferred for value the money in the Bank secured by the receipt, and had produced proper evidence of such transfer, the Bank on production of the receipt by the transferee would be bound to pay the money over to him.

The receipt states that the money is "repayable here on production of this receipt." The document appears to me not merely to be an acknowledgment of the receipt of the money, but also to contain the terms of the contract on which the Bank consented to receive the loan from the plaintiff and to pay interest upon it to him (1). If that is so, then how are these words to be construed? What other meaning is it possible to give them than this, viz., that the production of the receipt is to be a condition precedent to the re-payment of the money? If that is not their meaning, then they have no meaning at all. It by no means

(1) See on this point *Atkinson v. Bradford Third Equitable Benefit Building Society*, 38 W. R. (English) 630; decided June 11th, 1890.

follows, however, that if the plaintiff cannot produce the receipt, he cannot recover his money. This he may possibly do by taking the proper steps in this Court, but the question I am discussing is whether the Bank was justified in refusing to pay him when he demanded his money from him in January, 1889, and that question I must decide in the affirmative and in favour of the Bank.

It must be remembered that the plaintiff here cannot allege that it is impossible for him to obtain this receipt. There is nothing to prevent him from suing the second defendant for it, and thus putting himself in a position to demand repayment from the Bank, according to the terms of the contract contained in that document.

[506] The money has been brought into Court by the Bank, and I shall order that it be paid to the plaintiff and that he shall have his costs of this suit paid by the second defendant. The plaintiff must pay the costs of the Bank, but he may add these costs to the costs to be recovered from the second defendant. I should not have made this order as to costs, but I understand that the Bank has expressed its willingness to pay to the plaintiff the interest on his loan up to the 11th April, 1890, at four and a half per cent. Under these circumstances I think the Bank is entitled to the costs of this suit. The Bank must, however, pay to the plaintiff the costs of preparing the deed of indemnity, *viz.*, Rs. 50.

Attorneys for plaintiff: Messrs. *Nanu and Hormasji.*

Attorneys for first defendant: Messrs. *Conroy and Brown.*

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APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

CHINTAMAN RAMCHANDRA AND ANOTHER (*Original Plaintiffs*),
Appellants v. DAREPPA AND ANOTHER (Original Defendants
2 and 3), Respondents. [27th January, 1890.]*

Mortgage - Mortgagee in possession not paying assessment during famine - Defendant paid arrears of assessment because registered as occupant and obtained conveyance from mortgagor - Mortgagee lying by - Estoppel - Foreclosure, suit for, by the mortgagee.

The plaintiffs, as mortgagees under a mortgagee deed executed to them by the father of the first defendant, had actual possession of the land in question from 1872 to 1877, during which time they cultivated it, and paid the assessment upon it. In the years 1877 and 1878 they ceased to cultivate it, and paid no assessment. In 1879 the first defendant (his father the mortgagor having died) sold the land to the second defendant, who then paid the arrears of assessment upon it to the Mamlatdar, and took possession. The plaintiffs took no steps to prevent his taking possession, or cultivating the land.

In 1886 the plaintiffs brought this suit for foreclosure. They alleged that they had been dispossessed by the second defendant in 1879, and they claimed mesne profits for the years 1883, 1884 and 1885. The Court of first instance directed the defendant to redeem the mortgage within six months, in default whereof it [507] granted foreclosure to the plaintiffs. On appeal the District Judge reversed that decree, holding that the plaintiffs were estopped by their conduct from recovering the land from the second defendant, who had purchased it in good faith and for value. On appeal to the High Court,

* Second Appeal No. 630 of 1888.