

(1866) 09 CAL CK 0014

Calcutta High Court

Case No: Special Appeal No. 153 of 1866

Kisto Lall Ghose

APPELLANT

Vs

Abdoor Ruhman

RESPONDENT

Date of Decision: Sept. 12, 1866

Judgement

Sir Barnes Peacock, Kt., C.J.

The question submitted for the opinion of a Full Bench is whether the payment into Court by a person alleged to be the mortgagor of certain property was or was not a sufficient tender to prevent foreclosure. The money was paid into Court without any actual restriction being placed on its being paid over to the alleged mortgagee, but the payment was made with, a notice in words to the following effect:--

I have shown the mortgage to be false and fraudulent, and to set aside the kabala and to get back the money, I shall hereafter institute a regular suit.

It appears to me that both Regulations I of 1798 and XVII of 1806 contemplate cases in which the relationship of mortgagor and mortgagee is undisputed, and that s. 7 of the latter Regulation was not intended to apply to a case in which an alleged mortgagor makes under protest a tender of money claimed upon a mortgage which he disputes upon the ground that the deed is false and fraudulent, with notice that he intends to institute a suit to set aside the deed, and to recover back the money tendered or paid into Court, if accepted by the person claiming as mortgagee. But whatever might be our own view of this case, if it were res integra it appears to me that we are bound by the ruling of the Privy Council in the case of Prannath Roy Chowdry vs. Rookea Begum, . In that case two reasons were given why the payment into Court was not sufficient. Lord Kingsdown, in delivering judgment, says at page 358:-- "The remaining objection relates to the payment into Court in the nature of a tender which was made by the defendant Ramrutton Roy. Ramrutton Roy directed the money to be paid out to the appellant, but at the same time in his petition to the Court he disputed the validity of the appellant's title to foreclose, and expressed an intention, amounting to a notice, to sue the appellant to recover back the very

money which he was tendering. The meaning of the direction that the money be paid into Court clearly is that the mortgagor may have adequate and lasting evidence of that which is put in place of a tender, and the mortgagee the security and advantage of a deposit in acknowledgment of the title, The mortgagee would have little inducement to take the money, waiving his lien by its acceptance if litigation on the very same subject were to recommence upon the acceptance of the money; and though mere words in the form of a protest which may accompany a tender will not defeat it where they can reasonably be regarded as idle words, their Lordships think that the proceedings of *Ramrutton Hoy* with respect to the mortgagee's title to foreclose forbids such an interpretation of his language and his act." It is true that His Lordship went on to say that, independently of the objection to the payment, another and a graver reason (which he afterwards explained) existed for holding it not to be such a payment as the Regulations contemplated. But it is clear that the foreclosure was upheld for both the reasons given by the Lords of the Judicial Committee. It was urged that as two reasons were given, and one of them was said to be graver than the other, the graver one must be treated as the ground of the judgment, and the weaker one as an obiter dictum. When two reasons are given for a decision we cannot say that one is obiter any more than the other. They were both directly to the point, and were the reasons upon which the judgment was given.

2. The case will go back to the Division Bench which referred it, with this expression of our opinion.