
(1968) 09 CAL CK 0012

In the Calcutta High Court

Case No : A.F.O.O. No. 8 of 1968 (Suit No. 277 of 1964)

Dhirendra Nath Sen and Others

APPELLANT

Vs

Smt. Santasila Debi and Others

RESPONDENT

Date of Decision : 05-09-1968

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 24 Rule 3, Order 34 Rule 14, Order 34 Rule 15, 34, 51

Citation : AIR 1969 Cal 406 : (1968) 1 CALLT 102 : (1969) 2 ILR (Cal) 525

Hon'ble Judges : D.N. Sinha, C.J;B.C. Mitra, J

Bench : Division Bench

Advocate : Basu, for the Appellant; Chatterjee, for the Respondent

Final Decision : Dismissed

Judgement

Sinha, C.J.—This is an appeal against the judgment and order of Masud J. dated 14-9-1967. The facts are briefly as follows: By an order dated November 29, 1954 certain disputes were referred to sole arbitration of the late Dr. Radhabinod Pal. On May 27, 1955, the arbitrator made his award. Judgment on award was passed on May 22, 1956. The award related to the adjudication of certain disputes between members of the same family. The relevant clause in the said award is Clause (10) which runs as follows:

"10 (a) That 1. Sri Dhirendra Nath Sen

2. Sri Priya Nath Sen

3. Sri Anadi Nath Sen

4. Sri Jitendra Nath Sen

5. Sri Satyendra Nath Sen

6. Sri Fanindra Nath Sen

7. Sri Rabindra Nath Sen shall each pay severally to Smt. Santasila Debi the sum

of Rs. 5000 (five thousand) each (in all Rs. 35000 thirty five thousand) in full satisfaction of her claim to the dividends from the New India Glass Works (Calcutta) Ltd., upto the close of the year 1945-46 as also in full discharge of her claim in respect thereof from the joint family.

(b) That each of the seven brothers named above shall pay to Sm. Santasila Devi the amount thus declared payable by him in five equal quarterly instalments of Rs. 1000 each the first of such instalments falling due on the 1st September 1955. In case of default in the payment of any of these instalments interest on the defaulted amount at the rate of 6 per cent per annum shall be payable from the date of default.

(c) That the above payments shall remain charged on the respective allotments of the seven brothers contained in paragraphs 2, 4 (a) and 6 of this award, these charges having priority over the charges created in paragraph 16 below in favour of Sm. Sovabati Sen."

2 Thus, five equal quarterly instalments were payable on 1st September, 1955, 1st December 1955, 1st March 1956, 1st June 1956 and 1st September 1956. On the 1st September, 1955 Shri D. Sen, Solicitor for the parties Nos. 2, 4, 5 and 7 mentioned above, wrote to Messrs. T. Banerjee and Co., Solicitor for the respondent No. 1, enclosing a sum of Rupees 4000 in cash being the amount of the first instalment payable by the four parties abovenamed in terms of the said award. On the same day, Messrs. T. Banerjee and Co. refused to accept the said tender of Rs. 4000 on the ground that their client, respondent No. 1, had challenged the award by an application in Court which was pending and their instructions did not permit them to accept it. Similarly, on 2nd September 1955 Shri D. Sen, solicitor for the parties Nos. 1 and 6 wrote a letter to Messrs. T. Banerjee and Co., solicitor for respondent No. 1, enclosing a sum of Rs. 2002 being a payment of first instalment together with Rs. 2 as interest. By a letter dated 2nd September 1955 Messrs. T. Banerjee and Co. refused to accept the said sum on the same ground, namely the pendency of an application. On May 22nd, 1956 the application made by the respondent No. 1 was dismissed and judgment on award was passed. On May 28th. 1956 Shri D. Sen on behalf of the parties Nos. 1, 2, 4, 5 and 7 wrote a letter to Messrs. T. Banerjee and Co. enclosing a sum of Rs. 18000 in cash, stating that it was on payment of the amount payable to their client in terms of the said award and decree. On May 28th, 1956 Messrs. T. Banerjee and Co stated that they would not accept the money without their client's instructions. On May 31st 1956 Shri D. Sen again wrote to Messrs. T. Banerjee and Co. requesting them for information as to whether they had received instructions to accept the money. No reply was sent to this letter. What had happened in the meantime was that an appeal had been preferred by respondent No. 1 against the decree passed on the said award dated 22-5-1956. On January 29, 1957 the appeal was dismissed. On February 18th, 1957 Shri D. Sen as solicitor for Shri S.N. Sen wrote a letter to Messrs. T. Banerjee and Co. enclosing a sum of Rs. 5000 in cash stating to be the amount

payable to the respondent No. 1 in terms of the said award and decree. On the same day Messrs. T. Banerjee and Co. wrote to Shri D. Sen that they were writing for their client's instructions and the money was held in suspense. On March 8th 1957 Shri D. Sen gave a reminder that 17 days had passed but no receipt had been sent. On March 13, 1957 Messrs. T. Banerjee and Co. returned Rs. 5000 stating that they had been instructed not to accept the amount tendered, but without indicating any reasons for the same. The respondent No. 1 preferred an appeal to the Supreme Court and on April 26th 1963 the said appeal was dismissed by the Supreme Court. On June 14, 1963 Shri D. Sen on behalf of his client Shri J.N. Sen wrote a letter to Messrs. T. Banerjee and Co. enclosing a sum of Rs. 5000 stating it to be the amount payable by his client to the respondent No. 1 in terms of the said award and decree. This tender was not accepted. Thereafter nothing seems to have happened for about four years until on February 13, 1967 Messrs. T. Banerjee and Co. wrote a letter to the parties Nos. 1, 4, 5, 6 and 7 abovenamed demanding payment of Rs. 35,000 together with all accrued interest unto the date of payment and threatening that, in default steps for execution of the award and decree will be taken. On March 3rd, 1967 Shri D. Sen wrote to Messrs. T. Banerjee and Co. that his client had tendered the proper amounts in time, but the same were not accepted and that they were ready and willing to pay the principal sum but no interest. The letter contained the following other statement:

"Please send the draft Release, which your client shall have to execute on receipt of the amount from my client, for my approval so that payment of the amount and execution and registration of the Lease Deed can be simultaneously done."

On March 8, 1967 Messrs. T. Banerjee and Co. wrote to Shri D. Sen that tenders made without interest were not valid tenders and were rightfully refused. It was further stated that the award did not provide for execution or registration of any release deed and that his clients were not entitled to defer payment of the amount until the execution or registration of such a deed. It was however, stated that upon the amount being paid with interest the respondent No. 1 was willing to execute the deed at the cost and expense of the judgment-debtors. Cost was also demanded for preparation of a deed of release. By a letter dated March 11, 1967 Shri D. Sen on behalf of his client rejected these contentions stating that no interest was payable, and that the payment and execution and registration of the release must be simultaneous. It was further stated that his clients were not agreeable to pay the cost for preparation of the release, but were agreeable to bear the cost of stamp and registration. This view was not accepted by the decree-holder and on May 19, 1967 an application was made for execution. A copy of the tabular statement appears at pages 1 to 7 of the paper book. It was stated therein that the decree, so far as Shri P.N. Sen and A.N. Sen concerned had been satisfied and this should be recorded. It was further prayed that a receiver should be appointed to take charge and sell the undivided one-third share of Shri D.N. Sen in premises No. 7, Rawdon Street, Calcutta, the undivided one-third share of Shri J.N. Sen in premises No. 7/1, Short Street, Calcutta, the

undivided one-third share of Shri S.N. Sen in premises No. 7, Rawdon Street, Calcutta, the undivided one-third share of Shri F.N. Sen in premises No. 7/1, Short Street, Calcutta and the undivided one-third share of Shri R. N. Sen in premises No. 7/1, Short Street, Calcutta. This application was resisted by the judgment-debtors and the matter came up before Masud, J. who by his judgment dated September 14, 1967 ordered as follows: (1) It was held that the tenders dated 1st September 1955 and the 2nd September 1955 were valid and therefore, the respondent No. 1 was not entitled to claim any interest on Rs. 5000 from 27th May 1955 to 1st of September 1955, but they are liable to pay interest from 2nd September until payment. As against Shri S.N. Sen interest on a sum of Rs. 5000 between 18th February 1957 and 13th March 1957 was disallowed, as the money was held in suspense account and not returned. (2) The official receiver was appointed receiver as prayed for by the respondent No. 1 and the judgment debtors were all made liable to pay the cost of the said official receiver. There was, however, no costs awarded regarding the application. It is against this judgment and order that this appeal is directed. It is better to make it clear here that the appellants before us are Shri D.N. Sen, Shri S.N. Sen, Shri R. N. Sen and Shri F.N. Sen. We are not concerned with others against whom the decree has been adjusted. In the Court below, a number of points were urged on behalf of the appellants, but before us only three points have been urged. The first point is that the application for execution was misconceived because the charge declared in the decree could only be enforced by a suit. The second point is that the appointment of receiver in execution was a method of equitable execution which could only be resorted to, if there was any legal impediment to the ordinary mode of execution. As there was no such impediment in this case, the application for appointment of receiver was misconceived and should not have been allowed. The third point is that in the facts and circumstances of this case, no interest was payable, as the decree-holder failed and neglected to accept lawful tenders and, therefore, the order of the learned Judge directing payment of any interest was not sustainable. I shall now proceed to consider the first point, namely as to whether in the circumstances of the case it was necessary to file a suit. The way that Mr. Basu appearing on behalf of the appellants has framed his case, is briefly as follows: He argues that as a matter of law, where a charge is declared in a decree, if the decree itself states that the charge could be realised by a sale in execution, then only such a procedure could be adopted. Otherwise, the charge can only be enforced by way of a suit. Mr. Chatterji on behalf of the respondents has argued that this is not a correct proposition of law. According to him, it is only where a charge is declared prior to the passing of the decree that it is necessary for its enforcement that a suit should be filed. Whatever was the position before the introduction of Order 34, Rule 14 of the Civil P. C. (Act 5 of 1908). after its introduction, a charge declared by the decree itself can be enforced in execution and it is not necessary to file a suit to enforce such a charge and it is immaterial whether there is a provision in the decree itself to that effect or not. For this purpose, both sides have cited a series of decisions of the Calcutta High Court as

well as other High Courts and the Supreme Court and in my opinion it would be useful if I deal with the cases, as far as possible, chronologically. But before I do so, it would be useful to set out the relevant provision of Order 34 Rule 14, which runs as follow:--

"Where a mortgagee had obtained a decree for payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such a suit notwithstanding anything contained in Order 11, Rule 2." Order 34, Rule 15 provides that the aforesaid provision should, so far as may be apply to a charge within the meaning of Section 100 of the Transfer of Property Act 1882. The relevant part of Section 100 runs as follows:--

"Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property....."

I now proceed to consider the cases. The first case cited is a Full Bench decision of the Calcutta High Court: Asutosh Banerjee v. Lukhimoni Debya ILR (1891) Cal 139 (FB). In that case, one Lukhimoni Debya obtained a consent decree for maintenance. It was to be paid out of the estate of her late husband and was made a charge upon specified properties. The plaintiff applied for execution of the decree and attached certain properties of the judgment-debtor. But the decretal amount could not be realised. She attain made an application to execute the decree. The judgment-debtor objected inter alia on the ground that as regards future maintenance the decree was merely declaratory and could not be enforced without a further suit. The subordinate Judge overruled the objection. The Court noticed certain conflicting judgments and referred the matter to a Full Bench. The Full Bench referred to Section 230, Clause (b) and Section 255 of the CPC of 1882 and held that future maintenance could be realised by execution of the decree and a suit is unnecessary. It will be noticed that this case is under the old CPC which did not contain Order 34, Rule 14. The next case to be considered is a Division Bench judgment of the Calcutta High Court Aubhoyessury Debee v. Gouri Sunkar Pandey ILR (1895) Cal 859. In that case a consent decree had been passed by the High Court for Rs. 1,68,122-15-0 against Rani Aubhoyessury Debee creating a charge on the estate of the judgment-debtor. The decree-holder applied for execution. The judgment-debtor objected to an execution order on the ground that the consent decree created a charge on the estate of the judgment-debtor, and the judgment-creditor was precluded from proceeding to execution but was bound to file a fresh suit u/s 67 of the Transfer of Property Act (IV of 1882). Norris. J. held as follows:--

"The decree gave the plaintiff a charge on the defendant's immovable property and all the provisions of the Transfer of Property Act as to a mortgagee instituting a suit for the sale of the mortgaged property apply to the plaintiff. One

of the provisions of the Act as to a mortgagee instituting a suit is contained in Section 99, which provides that "where a mortgagee in execution of a decree for the satisfaction of any claim whether arising under the mortgage or not attaches the mortgaged property he shall not be entitled to bring such property to sale, otherwise than by instituting a suit u/s 67,it is clear that the plaintiff cannot sell the property without bringing a suit if the decree had said that in future all payments in Calcutta of the said sums, etc., the same shall immediately become due and realisable by execution by the attachment and sale of the properties set forth in the schedule, there might have been some force in the argument."

3. The next case to be considered is a decision of the Bombay High Court, *Ambalal Bapubhai v. Narayan Tatyaba* ILR 43 Bom 631 : (AIR 1919 Bom 56). That case was under the CPC of 1908. By that time Order 34, Rule 14 had come into operation. A decree for money directed the defendant to pay a sum of money to the plaintiff and further declared a first charge and a lien on certain immovable property of the defendant. The plaintiffs applied for sale of the properties charged in execution. Heaton, J. held that the security could be enforced in execution proceeding. Pratt, J., however, differed and held that the decree as to the charge was merely declaratory and a fresh suit was necessary. Owing to the difference in opinion, the case was referred to Shah, J. Shah, J. held that the provisions of Order 34, Rule 14 would only apply where the mortgage was independent of the decree. It can have no application where the charge or the mortgage was created by the decree itself. The next case to be considered is a decision of Sir Ashutosh Mookerjee in a Bench decision of this Court, *Indramani Dasi v. Surendra Nath Mandal*, AIR 1922 Cal 35. In that case, a decree was made by consent of parties to the effect that the plaintiff would be entitled to maintenance at the rate of Rs. 4 per month and that if the amount was not paid from month to month the plaintiff would be entitled to realise the sum from the defendants by execution of the decree. The properties mentioned in the schedule to the plaint were charged for the payment of the allowance settled as maintenance. Mookerjee, J. relied on the Bombay decision mentioned above, and distinguished the case of (1895) ILR 22 Cal 859 (*supra*) and pointed out that the latter case was decided u/s 99 of the Transfer of Property Act which was differently expressed and had been replaced by the provisions of Order 34, Rules 14 and 15 of the Code. It was held that the language of the Rule 14 makes it clear that the Rule does not apply unless the decree falls within the description of a decree for payment of money in satisfaction of a claim arising under a mortgage or charge.

It was held that the charge having been declared by the decree itself could not be said to exist prior to the date of the decree, and therefore, it was not obligatory on a person to take recourse to a suit to enforce the charge. The learned Judge said as follows:

"The language of Rule 14 makes it clear that the Rule does not apply unless the

decree obtained by the holder of the mortgage or charge falls within the description of a decree for payment of money in satisfaction of a claim arising under the mortgage or charge. The mortgage or charge mentioned in this Rule must obviously be a mortgage or charge existing prior to the date of the decree and not one created by the decree. This view has been adopted not only by this Court but also by the High Courts of Bombay, Madras and Patna."

It must be mentioned here that in the decree it was provided that the money could be realised in execution proceeding. The next case to be considered is a Bench decision of the Bombay High Court. *Gurpadappa Dodappa Hasibi Vs. Karveerappa Kulkarni*, . In that case, the facts were very much like the instant case. A decree was passed on an award made in arbitration proceedings between the parties. Under the decree the plaintiff was awarded Rs. 9000 payable by annual instalment of Rs. 1500, the first instalment being due on 31st July, 1931. The amount was created a charge on certain properties belonging to the judgment-debtor. The decree-holder having applied for enforcing the charge in execution, one of the objections taken was that according to the provision of Order 34, Rule 14 of the Civil P. C. the decree-holder could only do so by a separate suit to enforce the charge. Beaumont, C. J. said: --

"It is contended by Mr. Jahagirdar on behalf of the defendants, that having regard to Order 34, Rule 14, Civil P. C. the plaintiffs must proceed by a separate suit, to enforce the charge upon the land. The rule clearly does not apply in terms because it only applies where a mortgagee obtains a decree for payment of money in satisfaction of a claim remaining under a mortgage, and here there was no mortgage. The decree itself created the charge, and it has been held by this Court in ILR 43 Bom 631 = (AIR 1910 Bom 56) (supra) that Rule 14, Order 34, Civil P. C. does not apply to execution of a decree creating a charge for the first time, there being no prior mortgage."

The next case to be considered is a Bench decision of the Patna High Court. *Mt. Prem Kuer Vs. Ram Lagan Rai and Others*, . In that case, the plaintiff obtained a decree for past and future maintenance against her mother-in-law which was declared a charge on certain properties belonging to her. The appellant had executed her maintenance decree and brought the properties to sale. The exact point namely whether a suit should have been brought was not an issue, but the learned Judges laid down the nature of the charge declared in the decree. It was held that a charge created by a decree of the Court is neither a charge created by act of parties nor by operation of law. Such a charge does not, therefore, fall u/s 100, T. P. Act. The next case to be considered is a Bench decision of the Calcutta High Court, *Manindra Nath Biswas Vs. Radhasyam Biswas*, . In that case, a compromise decree was filed under which a certain sum was payable to the plaintiff in several instalments. Certain properties were charged by way of security and it was provided that the decree-holder will be entitled to realise his dues by execution. P.N. Mookerjee, J. said as follows: --

"The other question raised by Mr. Sarkar and touching more directly the order for

sale of the Immovable properties of the judgment-debtor, is not altogether free from difficulty. In our opinion, however, the answer to this question really depends upon the construction of the solenama decree if the said terms, properly construed, give to the compromise decree the effect of a charge decree, that is, of creating or embodying a charge, enforceable in execution, against the judgment-debtor's Immovable properties, the conclusion would immediately follow that the said Immovable properties can be sold straightway in the present execution case and no attachment also would be necessary and. in that view, the order of sale, as made by the learned Subordinate Judge, must be upheld. This position is incontestable as under a series of uniform decisions, the proposition is well established in this Court that, when a charge is created by the decree and is enforceable in execution under the terms thereof, the statutory impediment, as contained in Order 34, Rules 14 and 15 of the Code, does not apply and no suit is necessary or imperative in that behalf under the law."

4. This decision, however, only throws a partial light on the Question, as in the instant case there is no provision in the decree that the charge is enforceable in execution. The next case to be considered is a single Bench decision of this Court, *Jata Bhusan Chatterjee Vs. Sm. Krishna Bhamini Debi and Another*, . In that case, a decree was passed for maintenance, present and future which was made by the decree a charge on certain properties. The decree-holder applied for enforcing the charge in execution. The objection taken was that the charge could only be enforced by a suit and not in execution. It was held by Guha Roy J. that a charge created by decree would be one by operation of law u/s 100 of the Transfer of Property Act only where the decree embodied a charge which existed in law apart from the decree itself. If a decree embodies a charge which has no existence in law independently of the decree itself this would be outside the definition of Section 100 of the Transfer of Property Act. It was held that the application for execution was a valid one. The next case to be considered is a single Bench judgment of the Madras High Court *Seethalakshmi Ammal v. Srinivasa Naicker*. AIR 1958 Mad 23. It was held by Ramaswami, J. that a charge created by a decree does not fall within Section 100 of the Transfer of Property Act. The next case to be considered is a Full Bench decision of the Andhra High Court, *Sri Rajah Mommadevara Naganna Naidu Bahadur Jamindar Garu (died) and Others Vs. Sri Rao Janardhana Krishna Rangarao Bahadur Jamindar Garu and Others*, . It was held that Section 100 of the Transfer of Property Act was restricted in its operation to two categories of charges, namely those created by act of parties and those created by operation of law. Charges created by decrees of Court are not included. Such charges are not created by operation of law. The learned Judge followed a Full Bench decision of the Allahabad High Court *Mahesh Prasad Vs. Mt. Mundar*, .

5. In my opinion these cases lay down the following principles:--

1. Where an amount is payable under a decree and a charge is declared for securing the payment thereof, then: --

(a) Where the decree provides that the charge may be enforced in execution of the decree, it can be enforced by such execution.

(b) if the charge is declared by act of parties or by operation of law, apart from the decree, then the provisions of Order 34. Rules 14 and 15 of the Civil P. C. read with Section 100 of the Transfer of Property Act apply and the charge can only be enforced by a suit, but where the charge is declared by the decree itself, then neither Order 34. Rules 14 and 15 of the Civil P. C. nor Section 100 of the Transfer of Property Act applies and the charge can be enforced in execution of the decree. It is immaterial whether the decree is a consent decree or not.

2. A charge created under the decree is not a charge created by act of parties or by operation of law.

3. If upon a construction of the decree, it appears that the charge is only declaratory then it can only be enforced in a suit. The mere fact that the charge is created for further maintenance does not make it declaratory. Where the decree itself creates a charge and the words used in the decree are not inconsistent with the intention of the Code to have the judgment-creditor's dues satisfied by sale of the charge properties in execution proceedings, this can be done in execution and it is not necessary to file a suit for that purpose. There is, however, nothing to bar a suit.

6 Before we apply the principles to the facts of the instant case, it will be necessary to cite a few more cases relied on by Mr. Basu appearing on behalf of the appellants. The first case cited is a Bench decision of the Calcutta High Court *Gobinda Chandra Pal v. Kailas Chandra Pal* ILR 45 Cal 530 = (AIR 1918 Cal 705). In that case, the facts were as follows: On 18th April, 1899 the respondent executed a mortgage bond in favour of the predecessor of the appellants, and on the same day executed a security in his favour. The security bond covered 37 properties which were included in the mortgage bond. In due course decrees were obtained on both bonds. The decree made in the suit on the security bond was a decree against the judgment-debtor personally with a declaration in the decree that the decree-holders are entitled to a lien over the properties. An attempt was made to enforce the charge in execution but this failed. Beachcroft, J. said as follows:

"The next argument addressed to us was that Rules 14 and 15 of Order 34 did not, apply to this case, as the decree-holder's charge was not one within the meaning of Section 100 of the Transfer of Property Act, in that it had not been created either by operation of law or by act of parties, but by judicial order, viz., the decree in the suit. The fallacy in this argument is that the charge is not created by the decree. The decree only declares the existence of the charge; it was in fact created by the act of the parties. And the same answer applies to the argument based on the opening words of Order 34, Rule 14 read with Rule 15, namely, that the decree-holder was not a charge-holder at the time that he obtained his decree. In fact he was, though his rights had not previous to the

decree obtained judicial recognition "

7. The distinction is obvious and applying the tests mentioned above it was rightly decided that a suit was necessary to enforce a charge created by act of parties prior to the decree. The next case cited is a Bench decision of this High Court Kashi Chandra Chakravarti Vs. Priyanath Bakshi and Others, . In that case, the suit was filed on a mortgage bond and a decree was passed in terms of a petition of compromise to the effect

"that the plaintiff would be entitled to realise the whole amount by taking out execution; the properties mortgaged shall remain a charge under the mortgage....."

It was held that the decree was not a money decree, but a mortgage decree which could be executed against the mortgaged properties without a fresh suit and that Order 34. Rule 14 was not applicable to the case. Again, this is in consonance with the tests mentioned above and I do not see how it supports the appellants' case. The next case is a Bench decision of the Calcutta High Court, Hemlata Debi v. Bhowani Charan Roy (1934) 39 CWN 725. In that case, a suit for maintenance, a compromise decree was passed in which there was monthly allowance to be paid which was made 3 charge on the estate. It could be realised by execution. It was held that notwithstanding this condition, a separate suit would lie. In my opinion this case also does not help the appellants. The question to decide is not whether a separate suit lies at all, but whether that is the only remedy, which would displace an application for execution. Lastly, Mr. Basu has cited a Division Bench judgment of the Allahabad High Court *Posti Mal Vs. Firm Radha Kishan-Lal Chand*, . In that case, a suit was filed upon a promissory note. There was a compromise by which the defendant agreed to pay a certain sum of money in specified instalments and hypothecated certain properties for the due payment of the money. A decree was passed on the footing of the compromise and embodied all its terms. Default was made in payment of the first and all subsequent instalments. Thereupon, the decree-holder applied for execution of his decree by sale of the property hypothecated under the compromise. The defendant judgment-debtor objected inter alia on the ground that the hypothecated property could not be sold in execution of the decree passed on the compromise and that unless the decree-holder instituted a suit under Order 34, Rule 4 of the Code of Civil Procedure, he was not entitled to have the hypothecated property sold. This contention was upheld on two grounds. The first ground was that the hypothecated part of it was merely declaratory and as there were no words to signify that the decree-holder would have the hypothecated property sold in execution, the decree-holder must institute a suit under Order 34, Rule 4. The second ground was that inasmuch as the hypothecation was by a compromise which was anterior to the decree, therefore, Order 34, Rule 14 would apply. With respect, we are unable to agree with this judgment. It is contrary to all the prevailing authorities on the subject. The compromise was made in a suit and the learned Judges held that-

"It is perfectly clear that the compromise in which the liability under the promissory note became merged, created a mortgage or charge"

If this is so it could not be said to be a claim arising under a mortgage created prior to the decree and created at a point of time anterior to it.

8. That being so, it must be held that none of the cases cited destroy the efficacy of the tests that I have formulated above. Applying the tests to the facts of the instant case, it must be held that the charge created by the judgment on award was realisable in execution and an independent suit was not necessary. The fact that the charge is declared by an award which was made anterior in point of time to the passing of the decree does not alter the situation. An award has no force unless a judgment is passed upon it and in any event a charge created under it cannot be said to have been created either by "act of parties" or by "operation of law".

Therefore, Order 34, Rule 14 does not apply. It is then said that the award had been registered at a point of time prior to the passing of the judgment on award. This is not a point which was raised in the lower Court and it is not very clear on the facts stated before us as to whether the registration was in fact effected prior to the decree. But even if it was so effected, we do not see how it created a charge prior to the decree, either by "act of parties" or by "operation of law". Consequently, it would not come within the provisions of Order 34, Rule 14 read with Rule 15 and Section 100 of the Transfer of Property Act. It is not disputed before us that an award by itself is not enforceable without a judgment passed on the award. To say that a charge existed apart from the judgment on award would be unsustainable. A Court is not bound to pronounce judgment according to the award. For good reasons, the award may be set aside or remitted for reconsideration. It would be impossible to suggest that a valid charge existed even if the award was set aside or remitted for reconsideration. The position would be the same even if it had been registered. In our opinion, in the facts and circumstances of the case, the charge does not exist apart from the decree. In other words, it must be taken to have been created by the decree itself in which the award is merged.

9. We next come to the point as to whether a Receiver in execution could be asked for by way of "equitable execution" when it was not shown that there was any impediment to "legal execution". The argument on behalf of the appellants is based on a Bench decision of this High Court (Raja) Promothanath Malia Vs. H.V. Low and Co., .

In that case the facts were as follows. The plaintiffs obtained a consent decree against the defendant for the sum of Rupees four lakhs with interest, payable by certain instalments. The suit was a money suit, but a consent decree was passed providing that the decretal amount should be secured by a first charge upon the Chalbulpur Colliery situated in the district of Burdwan. The plaintiffs applied to this Court for execution of the decree on a tabular statement and Lord Williams,

J. made an order appointing a receiver to take possession thereof and sell the property. Two objections were taken; the first being that this Court had no jurisdiction, as the colliery was situated in the district of Burdwan and that the learned Judge had no jurisdiction to appoint a receiver because there was no legal or practical difficulty in procuring the sale or execution in the ordinary course, namely by transfer of the decree for execution to the local Court at Burdwan. Rankin, C. J. pointed out that the expression "equitable execution" as used in English law was a misnomer here, because in India the distinction between legal and equitable interest is not observed in the full sense in which it is part of the law of England. Since 1908 at all events provision has been made by the Court for the appointment of receiver as a form of execution (Section 51, Civil P. C.). The learned Chief Justice pointed out that as regards jurisdiction to appoint a receiver of Immovable property situated outside the local jurisdiction of the High Court, it is not excluded because this Court has always made such orders. Reference was made to Mr. Justice Markby in *Jugodumba v. Puddomoney Dossee* (1875) 15 Beng LR 318 (330). But as a "matter of practice, receivers were appointed in execution only by the Court within whose local jurisdiction the property charged was situated. A special case has to be made out for appointment of a receiver in such circumstances by this High Court and the learned Chief Justice was of the opinion that no such special case was made out and there was no proof that it was necessary or even advantageous that this Court should make the appointment of a receiver. The learned Chief Justice, therefore gave the plaintiff a chance by a further affidavit to show good reasons why a receiver should be appointed. It will, therefore, appear that the principle is not correct that in India it is necessary to show, before a receiver could be appointed in execution of a decree, that there is any impediment to what has been termed as "legal execution". u/s 51 of the Code of Civil Procedure, a decree may be executed in many ways one of which was by appointment of a receiver. In appointing a receiver, the Court has only ordered a legal form of execution, which means no more than a form of execution warranted by law. In this case, there is no question of the property being outside jurisdiction. Nothing has been argued before us on the point as to why if the Court had jurisdiction to appoint a receiver, it should not have done so. This point, therefore, fails.

10. Lastly, I come to the merits of the case. The facts have all been set out above and on these facts what we have to consider is the argument that the appellants are not bound to pay any interest because the judgment-debtors having tendered the amount due under the decree, the same was refused and so no interest is payable. It has been mentioned above that under the judgment on award each party had to pay a sum of Rs. 5000 to the respondent No. 1 in five equal instalments, on 1st September 1955, 1st December 1955, 1st March 1956, 1st June 1956 and 1st September 1956. So far as the first instalment is concerned, there was a valid tender on the 1st September, 1955 which was refused on the ground that the respondent No. 1 had challenged the award and the application was pending. This application was disposed of on the 22nd May

1956. Within this time, two further instalments became due, on the 1st of December 1955 and on the 1st of March 1956. On the 28th May 1956 a tender was made on behalf of Shri D.N. Sen, Shri P.N. Sen, Shri J.N. Sen, Shri S.N. Sen, Shri F.N. Sen and Shri R. N. Sen of Rs. 18,000 "in cash towards payment of the amount due to your client Sm. Santasila Debi in terms of the said award and the decree". This tender was refused because Messrs. T. Banerjee and Co. did not have their client's instruction. The appeal was dismissed on 29-1-1957. On 18-2-57 a sum of Rs. 5000 was tendered on behalf of Shri S.N. Sen which was not accepted. On 26-4-1963 an appeal to the Supreme Court was dismissed. On 14-6-1963 Rs. 5000 was tendered on behalf of Shri J.N. Sen which was not accepted. Thereafter, nearly four years passed and upon a demand being made on 13-2-1967 the claim as to interest was refused and a fresh term was imposed, namely that the deed of release must be executed. The question is whether under these circumstances the judgment-debtors were excused from payment of interest. Mr. Basu has relied on an English case, *Hunter v. Daniel* (1845) 4 Hare 420. In that case the facts were as follows: Under agreement between the parties certain amounts were to be paid in instalments for the purchase of a certain interest in property. The defendant denied the agreement as being: altogether void. The plaintiff filed a suit for specific performance and the question was whether the failure to pay the instalments was a bar. Vice Chancellor Wigram said as follows:

"A party filing a bill submits to do everything that is required of him; and the practice of the Court is not to require the party to make a formal tender whereas in this case from the facts stated in the bill or from the evidence it appears that the tender would have been a mere form and that the party to whom it was made would have refused to accept the money. The defendants, according to the allegation made in the bill insist that the agreement is altogether void and the plaintiff, therefore, is at liberty to contend that the tender would have been "useless."

11. The next case cited is also an English decision *Ex parte, Sullivan, In re. Sullivan*. (1867) 15 LT 434. In that case, certain amounts were payable in instalments under a certain deed. The defendant objected to the deed as invalid. As regards non-payment of the instalments Lord Justice Turner said:

"Further breaches of these covenants, making as it is said, the deed void, were relied upon in this respect, that there was a non-payment of the second and third instalments: but there was a refusal on the part of Mr. Tarrel to take the first instalment on the 21st October, when it had been tendered. This amounted on his part clearly to a refusal to abide by the deed. Therefore, I think that dispenses with the payment or tender of the other instalments until the creditor had notified a change of intention on his part."

12. In both these cases, it will be observed that the payee had definitely taken the stand that the agreement was invalid or void. Under such circumstances, it was held that until there was a change of attitude it was not necessary to go on

tendering the instalments after the first installment was refused. Those are not the facts in this case. Mr. Basu next relies on a Privy Council judgment *Chelikani Venkatarayanam Garu v. Zamindar of Tuni* 50 Ind App 41 : (AIR 1923 PC 26). That was a suit on a mortgage and one of the points that arose was as to whether the mortgagee could charge interest on the mortgage because at a point of time he so acted as to excuse the actual tender being made. It was held that on the facts stated it could not be held that the mortgagee had released the mortgagor of his obligation to tender the money. There was no conduct on the part of the mortgagee which led to the conclusion that a tender which had been validly made had been rejected. It was further found that the mortgagor did not prove that at all times he had the means of payment. Lord Buckmaster said as follows:

"Their Lordships are unable to construe the letter as equivalent to any such clear release of the mortgagor of his obligation to tender the money as is required in order to justify him in not having presented it for receipt. From that time to this nothing has in fact been tendered. No money has been paid into Court, and no effort on the part of the mortgagor has been made to satisfy his obligations under the deed. Their Lordships, therefore, think that the appellant must fail upon that part of his appeal."

13. Mr. Chatterjee appearing on behalf" of the respondent has cited certain cases which I shall consider now. The first case cited is *Watson and Co. v. Dharendra Chunder* ILR (1877) Cal 6. It was held that the liability as to interest can be avoided if payment was made and if there was any difficulty it should have been deposited with the collectorate. The next case cited is a decision of the Supreme Court *International Contractors Ltd. Vs. Prasanta Kumar Sur.*, . In that case, there was a sale and an agreement for repurchase, on tender of a specified sum before a certain date. The seller offered to repurchase it before that date, but the purchaser denied that there was any agreement to reconvey. It was held that this amounted to a complete repudiation of the contract to convey. It was held that in cases of this kind no question of formal tender would arise. If the purchaser definitely and unequivocally refused to carry out his part of the contract and intimated that the money will be refused, if tendered, then no further tender was necessary and the question whether any money was paid by the seller was irrelevant. The above-mentioned decisions in 50 Ind App 41 (AIR 1923 PC 26) and (1845) 4 Hare 420 were referred to. The next case cited is an English case *Dixon v. Clark* (1848) 136 ER 919. This is a leading case for the proposition that tender of part of an entire demand is inoperative. In other words, a tender can only be considered as a valid tender if the entire amount due upon the date of tender is tendered for payment. The payee is not bound to accept any lesser sum than the amount due. The principle was declared in a Bench decision of the Calcutta High Court, *Behari Lal Biswas Vs. Nasimannessa Bibi*, . In that case, Ashutosh Mokerjee, J. laid down the conditions of a valid tender. It was held that a creditor is not bound to accept less, and there can be no valid tender of part of an entire indivisible debt. If the tender was in full of the

amount due then interest ceases. Where any amount was tendered for principle when interest was due a tender might be refused. The principal and interest constituted one individual and entire claim. It was further held that a tender must be unconditional, or at all events, free from any condition to which the creditor may rightfully object. The next case cited is *Barrat v. Cough Thomas* (1951) 2 All ER 48. It was held that a tender was not valid unless the same has been actually tendered and then set aside and is ready for payment at any time. It was found as a fact that no actual tender was made and no money had been set aside for payment of the mortgage and therefore, the liability to pay interest would not be avoided upto the date of actual payment.

14. The principles laid down by the authorities may be summarised as follows:--

1. Where a certain sum is payable and interest is payable thereon upon nonpayment, a valid tender of the amount due will stop the further running of interest.

2. Such a tender to be valid must satisfy the following conditions:--

(a) It must be of the entire amount due upon the date of tender. The creditor is not bound to accept any lesser sum than the amount due on the date of tender and there can be no valid tender of a part of an entire indivisible debt. Tender of only the principal amount where interest was due is not a valid tender.

(b) A tender must be unconditional, or at all events, free from any condition to which the creditor may rightfully object.

(c) The tender must be "kept good", that is to say the offer of payment must be a bona fide offer. The money due must be actually tendered and where interest is to be avoided the amount due should be set aside for payment and it must be shown that the tenderer was at all material times ready and willing to make the payment.

3. If an amount is payable by instalments then if a particular instalment was tendered and refused, it will absolve a tenderer from tendering the amounts due on further instalments if-

(a) There is a clear and unequivocal denial of the entire liability.

(b) It must be clear on the facts that the tenderer was justified in coming to the conclusion that the entire liability being denied it will be a useless formality to tender any further instalment until the debtor communicated his intention to change his attitude .

(c) Normally, the refusal to accept one instalment will not dispense with the liability of paying or tendering for payment the amounts due on subsequent instalments, unless the denial is such as would justify the tenderer in coming to the conclusion that the amounts of such subsequent instalments, if tendered, will not be accepted.

4 Where a liability arises under a decree or a provision of law which provides that upon a tender being refused the amount due can be deposited in Court, the fact that a tender has been refused and the amount has not been put in Court may be taken as evidence of the fact that the debtor did not "keep good" the tender, that is to say was not ready and willing to pay the amount at all times.

15. Let us now apply these tests to the facts of the instant case. In our opinion there was a valid tender by all the judgment-debtors on the 1st September 1955 and 2nd September 1955. The tender was rejected on the ground that an application was pending challenging the award. It was a reasonable conclusion for the debtors to arrive at that a tender would not be accepted until the said application was disposed of. This application was disposed of on 22-5-1956, so that upto this date interest would not be payable on the instalments which had accrued due, namely 1st of September 1955, 1st of December 1955 and 1st of March 1956. The tender on 28-5-56 was not valid because it did not include the interest between 22nd May 1956 and 28th May 1956. The demand was that the creditor must accept the amount paid without interest as in full payment of her claim upto the date of tender. This tender was rightly refused and did not stop the running of interest and the fact that it was rejected on the ground that the solicitor for the creditor had no instruction to receive it is irrelevant. This renders all the subsequent tenders of the principal amount only, to be defective tenders. In any event, even the appeal filed having been dismissed on 29-1-1957 a tender on 18-2-1957 or 8-3-1957 of the principal amount only were not valid tenders and did not stop the running of interest. Similarly, a tender on 14-6-1963 of the principal amount only was not a valid tender and did not stop the running of interest. Then letter of Shri D. Sen, solicitor for some of the debtors, in which he stated that "they were even now ready and willing to pay the amount "did not alter the situation, as it was clearly intimated that no interest was payable or will be paid and an additional condition was imposed, namely that the creditors must execute a draft release and register it, which condition was not laid down by the decree which declared the liability. This did not amount to an unconditional tender. A certain amount, however, was retained by Messrs. T. Banerjee and Co. in suspense account pending the receipt of instruction between 18-2-1957 and 13-3-1957. This is only with regard to Rs. 5000 sent on behalf of Shri S.N. Sen. During this period, interest on that amount cannot be charged, because the creditor cannot retain the tender and yet charge interest thereon. The learned Judge in the Court below has come to the same conclusion except that he has directed payment of interest between 2nd September 1955 and 22nd May 1956, which he should not have done. As we have held above, during this time there was a valid tender and an outright rejection on the ground that an application was pending in Court for setting aside the award. The debtors were justified in coming to the conclusion that during this time instalments, if offered, will not be accepted. The tender on 1-9-1955 and 2-9-1955 being valid, interest upto 22-5-1956 cannot be charged. There might of course arise the question as to whether during this time the tender was "kept

good". Mr. Chatterjee appearing on behalf of the respondents has, however, stated to the Court that he was not pressing the claim for interest during this period, but will abide by the judgment of the Court with regard to the liability to pay interest between these dates.

16. The result is that we confirm the judgment of the Court below with the variation that the appellants will not be liable to pay interest on the amount due between 1-9-1955 and 22-5-1956. Subject to this variation the appeal fails and is dismissed with costs.

17. The operation of this order will remain in abeyance for six weeks from this date.

18. The order be drawn up expeditiously.

B.C. Mitra, J.

19. I agree.