

(1912) 08 CAL CK 0044
In the Calcutta High Court

Eastern Mortgage and Agency Co. Ltd.	Vs	APPELLANT
Rakea Khatun and Others		RESPONDENT

Date of Decision : 05-08-1912

Acts Referred:

Bengal Tenancy Act, 1885 — Section 95(2)

Citation : 17 Ind. Cas. 202

Hon'ble Judges : Chapman, J; Cecil Brett, J

Bench : Division Bench

Judgement

1. These two Appeals, Nos. 355 and 356 of 1912, are directed against two orders passed by the Subordinate Judge of Backergunge in two mortgage suits brought by the present appellants, the Eastern Mortgage and Agency Company, Limited, against the defendants-respondents, Rokea Khatun, widow of the late Tajamal Ali Choudhury, and others to recover the principal and interest due on two mortgage bonds executed by Tajamal Ali Choudhury and others on the 18th September 1896 and the 9th September 1897 respectively. The former bond covered a loan of Rs. 8,800 and the latter a loan of Rs. 3,50,000 and contained a proviso that Rs. 1,00,000 should be afterwards lent if the conditions under which original loan was made were complied with. One of the conditions imposed in the mortgage-deeds was that Messrs. Garth and Weatherall were to be appointed managers on behalf of the mortgagors of the mortgaged properties and that they were to pay off the mortgage-debt with interest out of the profits of the mortgaged properties and also to take their own commission. These two gentlemen were duly appointed managers and the additional Rs. 1,00,000 was afterwards advanced. Obstruction to the management is said to have been offered by the mortgagors with the result that the managers were unable to collect the rents from the mortgaged properties or to pay to the mortgagees any portion of the mortgage-debt or of the interest.

2. Meanwhile, in consequence of quarrels between the mortgagors and their co-sharers in the properties covered by the mortgages as well as in other properties

belonging to the family, on the 14th December 1901, Messrs. Garth and Weatherall applied to the Collector of Backergunge asking that steps should be taken to prevent a breach of the peace and to enable them to obtain possession of the properties covered by the mortgages. The Collector sent on the application to the District Judge in whose Court it was numbered as Miscellaneous Case No. 74 of 1901. The result of the proceedings taken on this application in the Court of the District Judge was that on 27th March 1902, he called on the co-owners in the estate to appoint a common manager. They failed to do so and, on the 1st May 1902, the District Judge passed an order u/s 95, Clause 2 of the Bengal Tenancy Act directing that the management of the estate should be taken over by the Court of Wards; and as a temporary arrangement, he appointed, on the 12th August 1902, Abdul Ali Chowdhury as common manager of the estate. On the 23rd December 1902, the Court of Wards declined to take over the management and Abdul Ali Chowdhury was allowed to remain on as common manager. On the 8th May 1903, the District Judge removed Abdul Ali Chowdhury from the managership as his management was not satisfactory and as he was related to some of the co-owners. The Judge, on the application of Messrs. Garth and Weatherall, then appointed Babu Nibaran Charan Dass as common manager but, on the 9th September 1903, another application was made by Messrs. Garth and Weatherall that the estate should be placed under the management of the Court of Wards.

3. On the 16th September 1903, the Court of Wards agreed to take over the management subject to the condition that the Eastern Mortgage and Agency Company, Limited, would remit the sum of Rs. 1,50,000 from their debt subject to the condition that the loan was paid off within a certain time. This was agreed to and the estate was under the management of the Court of Wards from the 17th September 1903 to the 15th May 1912. The Court of Wards on the 15th March 1912 gave notice that they would give up the management on that date.

4. Meanwhile, on the 11th September 1911, no payments having been made up to that date in discharge of the mortgage-debt or the interest, the Eastern Mortgage and Agency Company, Limited, instituted the two suits to recover the whole sum due on the mortgage-bonds with interest to date and also another suit on a promissory-note for money advanced by the Company to pay the Government revenue which had fallen due on the mortgaged properties.

5. After receipt from the Court of Wards of the intimation that it proposed to give up the management on the 15th May 1912, notices were issued by the District Judge to the co-owners of the estate to show cause why a common manager should not be appointed and no cause having been shown, the District Judge, on the 7th May 1912, appointed Babu Debendra Nath Dutt, a Pleader of his Court, as common manager of the Estate.

6. On the 5th June 1912, application was made by the Eastern Mortgage and Agency Company, Limited, to the District Judge to set aside the order appointing the manager on the ground that it had been made without notice to them though

they were Co-proprietors having purchased 87 items of property in the estate but on the same date, the District Judge passed an order refusing the application.

7. On the 28th June 1912, a Rule was obtained from this Court on the mortgagors and other co-owners of the estate to show cause why the order of the District Judge of the 5th June should not be set aside on the ground that it appeared to have been passed without sufficient evidence and without any notice to the petitioners. This Rule is Rule No. 4081 of 1912.

8. On the 5th June 1912, applications were made to the District Judge in both of the suits (Nos. 442 and 444 of 1911) brought on the mortgages, for the appointment of a Receiver pending the disposal of the two suits. These applications were disallowed by the Subordinate Judge in a long order, recorded on the 10th June 1912.

9. Appeals from Orders Nos. 355 and 356 of 1912 are against these two orders.

10. At the request of the parties, the hearing of these two appeals and of the Rule No. 4081 of 1912 has been expedited and all these will be disposed of in this judgment.

11. Dealing first with the two appeals, we are of opinion that the grounds given by the Subordinate Judge in his order of the 10th June 1912 are not sound and cannot be maintained. It appears from the statements of the learned Counsel for the appellants that the original mortgage-debt of Rs. 4,50,000 has trebled and has now risen to over Rs. 12,00,000. Meanwhile no-interest whatever appears to have been paid to the mortgagees and on the contrary the mortgagees appear to have been compelled to advance money to pay the Government revenue on the mortgaged properties in order to save them from sale for arrears, and to recover the sums so advanced they have been compelled to bring another suit on the promissory-note.

12. Though the appointment of a Receiver pendente lite is a matter entirely within the discretion of the Court, it must, in the exercise of that discretion, be guided by the circumstances of each particular case; and it has been laid down as a general rule that the appointment of a Receiver will be made as a matter of course on the application of a mortgagee, if the interest payable under the security is in arrear (see Coote's Law of Mortgages, page 946, and the leading cases referred to therein).

13. Dis-agreeing, therefore, with the Subordinate Judge we hold that in the case of the applications with regard to which these two appeals have been brought, the mortgagees are entitled to have a Receiver of the properties covered by the mortgage appointed pending the disposal of the two suits.

14. We understand that the Subordinate Judge, who recorded the judgment in which the order was passed disallowing the application, has retired. It is, therefore, not necessary for us to express at any length our opinion on the language and substance of his judgment. We need only observe that the learned

Pleader for the respondent has not attempted to support the grounds on which the Subordinate Judge has based his order and, in our opinion, they are altogether insufficient, and many of the suggestions made in his judgment appear to have no foundation in any facts.

15. We, therefore, decree both the appeals and set aside the order passed by the Subordinate Judge refusing the applications made by the mortgagees.

16. As to the selection of a Receiver; the parties before us have differed in opinion. Dealing with this question, we have to observe that as a general rule, the right to propose a person for the appointment of a Receiver belongs to the party interested in obtaining the appointment, and effect will be given to his nomination. Also if the Court appoints a Receiver at the instance of a mortgagee, the mortgagee not having, without the assistance of the Court, power to appoint a Receiver, then the Court exercises its discretion as to who shall be appointed Receiver, and appoints the Receiver whom it thinks best to appoint for the interest of the mortgagee and of the mortgagor, a person whom having regard to the interests of both, the Court considers the best person--(Coote, Law of Mortgage, page 958).

17. Before us, both parties are agreed that it is desirable that the gentleman appointed as Receiver should be one fully acquainted with and experienced in the management of Estates, and that the selection of a member of the Bar who has no such experience or knowledge should not be approved. They are also agreed that in the interest of both parties, it is much to be desired that the offices of common manager and Receiver should be united in one individual.

18. The learned Counsel for the appellant has suggested on behalf of his clients that Mr. Thomas Cunliffe Tweadie, who has considerable experience and knowledge of zemindari management, should be selected as Receiver of the properties covered by the mortgages, and from the testimonials which have been filed we agree that that gentleman would be a suitable selection.

19. On behalf of the mortgagors exception to his appointment is taken on the ground that Mr. Tweadie is managing other Estates on behalf of the mortgagees. This, however, does not appear to us to constitute any valid objection to his being appointed as Receiver in the present suits. Certainly, he would be the person best suited for the appointment in the interest of the mortgagees and in these suits the interests of both parties are in fact identical, namely, to secure a careful and firm management of the property and a proper collection and appropriation of the profits.

20. In our opinion, therefore, the application of the mortgagees should be granted and Mr. Tweadie should be appointed Receiver of the properties covered by the mortgage-bonds pending the disposal of the suits.

21. We have now to deal with the Rule No. 4081 of 1912, which is directed against the order of the District Judge appointing Babu Debendra Nath Dutt as

common manager. Neither party have expressed any opinion against the character and probity of this gentleman but both are agreed that it is desirable in the interests of the Estate that a gentleman, having greater knowledge and experience of the management of Estates than he has, should be appointed as common manager. In these circumstances, we think that the Rule should be made absolute and the order of the District Judge appointing him as common manager should be set aside. We have received from the learned Pleader who represents the respondents in Appeal No. 356 of 1912, a list containing the names of four gentlemen who are suggested for the appointment of common manager. They are M. Najimuddin Ahmed, Babus Benoy Bhusan Gupta, Upendra Nath Sen, Basanta Kumar Guha.

22. The learned Counsel for the appellants has not offered any objection to the second-named. It must, however, be left to the District Judge to make his own selection from these gentlemen and Mr. Tweadie; and in doing so, we think he should endeavour to make such an appointment as will be best for the interests of the Estate and of both parties.

23. The appellants are entitled to their costs in these two appeals. We fix the hearing-fees at three gold mohurs in each. Each party will bear their own costs in the Rule.

24. Let the accords be sent down to the lower Court without delay.