

(1957) 09 PAT CK 0001
In the Patna High Court
Case No : A.F.O.D. No. 139 of 1948

Isar Nonia and Others

APPELLANT

Vs

Karinam Pandey and Others

RESPONDENT

Date of Decision : 11-09-1957

Acts Referred:

Evidence Act, 1872 — Section 35, 45, 5
Trusts Act, 1882 — Section 90

Citation : AIR 1958 Patna 353 : (1958) 6 BLJR 64

Hon'ble Judges : K. Dayal, J;G.P. Sinha, J

Bench : Division Bench

Advocate : Tarkeshwari Nath and Radha Raman Sinha, for the Appellant; Kailash Ray, B.K. Sharma, Kamleshwar Prasad and B.K.N. Singh, for the Respondent

Judgement

G.P. Sinha, J.—The paramount question to be considered in this case is whether the provisions of Section 90 of the Trusts Act can be made applicable on the facts and circumstances of this case, and whether the mortgagees, who are represented by defendants 1 to 15, could be directed to make over possession of the lands, which they purchased from a purchaser at court auction sale, to the plaintiffs.

2. The plaintiffs brought the suit, giving rise to this appeal, (1) for a declaration that the rehan bonds have been redeemed and that the plaintiffs are entitled to retain possession of the properties entitled in schedules A and B and to get possession of the properties entered in schedules C and D of the plaint; (2) on the aforesaid declaration, for confirmation of possession of the plaintiffs, together with defendant No. 19, over the properties mentioned in schedules A, B, C and D and in case they be held to be not in possession, a decree for possession may be given; and (3) for a decree for mesne profits as per accounts given in the plaint and also for further mesne profits till the date of recovery of possession.

3. According to the plaintiffs' case, Baldeo Nonia had five sons. The plaintiffs are the four sons and defendant No. 19, Rambeyas Nonia, is the fifth son. Their case

is that, on 1-12-1926, plaintiffs 1 and 2 and defendant No. 19 (who will hereafter be referred to as Rambeyas Nonia) had executed a rehan bond for Rs. 2,230/- in favour of Mahdeo Pandey (since deceased) and Rajnath Pandey (defendant No. 2) in respect of schedule A lands (Exhibit 2) measuring 13 bighas and 14 kathas. On the same date, the very same mortgagors executed another bond in favour of the same mortgagees for Rs. 2,000/- in respect of properties mentioned in schedule B (Exhibit 2(a)) measuring 8 bighas and 7 kathas. The mortgage bonds recited that the mortgagees were to pay the rent. On, 6-6-1928, another rehan bond was executed by plaintiff No. 2 and Rambeyas in favour of one Digamber Ahir in respect of 8 bighas mentioned in schedule E for Rs. 1,600/- (Exhibit E (1)9.

On 10-6-1929, a simple mortgage bond was executed by plaintiff No. 1 and Rambeyas in favour of defendant No. 1 for Rs. 900/- (Exhibit N). On 28-6-1933, another rehan bond by plaintiffs 1, 3 and 4 in favour of Digambar Ahir was executed in respect of 2 bighas 10 kathas for Rs. 2003/4- (Exhibit E). One more mortgage bond was executed by Rambeyas in favour of Mossamat Sarifa in respect of 63 acres for Rs. 136 (Exhibit E (2)) on 13-11-1933. On 22-6-1935, Rambeyas executed a hand-note for Rs. 100/- in favour of the same Digambar Ahir (Exhibit M). On 12-9-1935, the superior landlord, the Maharaja of Dumraon, brought a rent suit No. 751 of 1935, against Rambeyas and the plaintiffs for recovery of arrears of rent amounting to Rs. 189/11/9 for years 1339 and 1340 Fasli.

On 7-11-1935, the suit was decreed; and, in Execution Case No. 1915 of 1935, the holding was sold at court auction on 4-1-1936. The entire khata No. 14 measuring 23.07 acres was sold for Rs. 236/- and was purchased by one Mahesh Nonia, husband of defendant No. 16, and delivery of possession was given on 31-5-1936. This Mahesh Nonia was the wife's brother of Rambeyas. Thereafter, on 9-6-1936, this Mahesh Nonia, the auction purchaser, executed a sale deed in favour of Ramekbal Pandey, defendant No. 12, one of the mortgagee defendants, in respect of a portion of khata No. 14, namely, portions of plots 200, 38 and 113, the total area being 16 bighas. The sale deed is exhibit D, which mentions the consideration money as Rs. 500/-

The plaintiffs' case further is that, on the 15th Jeth, 1353 Fasli, corresponding to 1946, Rambeyas and the plaintiff No. 1 paid the mortgage money as per rehan bonds exhibits 2 and 2 (a) to defendant No. 1, one of the mortgagees, who, on receiving payment, made an endorsement on the back of exhibit 2(a). The endorsement is exhibit 1.

It is said that the plaintiff No. 1 and Rambeyas thought that endorsements were being made on both the bonds, but later on it appeared that defendant No. 1 had made endorsement only on one of those bonds which had been stitched together, and the bonds were made over to the plaintiff No. 1 and Rambeyas. Having redeemed the rehan bonds, it is said, the plaintiffs went to plough the lands on the 12th Asarh 1353 Fasli, but there was interference by the defendant-

mortgagees, and they had to leave the field, and hence the suit on 29-7-1946.

4. It is also mentioned in the plaint that the defendants in collusion and concert with one another, had purchased the property, namely, the entire holding belonging to the plaintiffs and Rambeyas, without the knowledge and information of the plaintiffs and the purchase was made in the name of Mahesh Nonia, and that, according to the plan and contract amongst the defendants, the sale deed in favour of defendant No. 12 was executed in respect of 16 bighas, mentioned in schedule C of the plaint, and defendant No. 19, Rambeyas, kept the remaining property for himself in the farzi name of his brother-in-law. It is also stated that Rambeyas, the defendant No. 19, is a sattadar of the Canal Department, and he, in collusion and concert with the other defendants, got certain fraudulent entries made in the canal papers of which the plaintiffs had not till then full knowledge.

The plaint further states that the rent was due from defendants 1 to 15, the mortgagees, and they had deliberately allowed the rent to fall in arrears in collusion and concert with the other defendants and got the property sold at court auction and purchased the same in the farzi name of the husband of defendant No. 16, namely, Mahesh Nonia, in collusion and concert with, Rambeyas, and, in that view of the matter, the interest of the mortgagor-plaintiffs and Rambeyas was not in any way affected by the said sale. The plaintiffs and Rambeyas were, therefore, entitled to redeem and having redeemed, as already stated, they are entitled to the property namely, the lands purchased by the mortgagees mentioned in exhibit C.

5. The defence is that the mortgagees had paid the rent to Rambeyas, one of the mortgagors, who was the karta of the family of the mortgagors, and there was no default in payment of rent by the mortgagees that the mortgagees were not made parties to the rent suit, and they had no information about the proceedings in the rent suit or in the execution; that after the delivery of possession, the defendants learnt about the decree for rent and the sale, and, thereafter, the mortgagee defendants approached the plaintiffs and Rambeyas and thereupon a settlement was arrived at by which the mortgagees were to get a sale deed in respect of 16 bighas from Mahesh Nonia the auction-purchaser; and that out of the consideration money of Rs. 500/- Rs. 200/- was paid in cash to Mahesh Nonia and the balance of Rs. 300/- was paid to a creditor of Mahesh Nonia, as directed by the terms of the sale deed.

6. Rambeyas, defendant No. 19, did not appear in the suit, nor has he been examined as a witness.

7. The court below has held that there is no reliable material on record from which it could be held that Rambeyas, defendant No. 19, was on bad terms with the plaintiffs, rather the evidence is to the effect that they were always on good terms, that, in spite of the fact that the plaintiffs and Rambeyas were parties to the rent suit and the summonses and the processes in the execution having been served upon them, they took no steps to get the sale set aside, that the rent of

the lands" in mortgage with the mortgagee defendants was paid to Rambeyas that there was no default on the part of the mortgagees, and that, as the plaintiffs and Rambeyas were suffering from chronic indebtedness, they devised a plan of suffering a rent decree to be passed and the holding to be sold, and thus wiping out the mortgage debts not only of the mortgagee-defendants but of all other persons as well, as already indicated while mentioning the facts of the case.

The court below has also held that the processes in the execution and the rent suit were duly served upon the plaintiffs and Rambeyas. It has been found that no money was paid at all by plaintiff No. 1 and Rambeyas to the mortgagee-defendant No. 1 and that the endorsement of payment appearing on one of the mortgage bonds is a forgery and not in the hand of defendant No. 1, as alleged by the plaintiff. The court below further found that Mahesh Nonia was acting in complete concert with the plaintiffs and Rambeyas, and that the plaintiffs lived with their brother, Rambeyas, and are in possession of the properties which remained after the sale deeds executed by Mahesh Nonia. The suit was ultimately dismissed.

8. Mr. Tarkeshwar Nath, learned Counsel appearing on behalf of the appellants, has very ably argued this case with his usual care for details.

9. He has invited the court to consider:

(1) that the provisions of Section 90 of the Trusts Act apply to this case, and the purchase by the mortgagee-defendants should be held to be a purchase in favour of the plaintiffs and defendant No. 19.

(2) that, the mortgagee-defendants did not Pay the rent to the landlord, as stipulated in the mortgage bonds and the receipts Exts. 1(1) and 1 (2) showing payment of rent by the mortgagees to Rambeyas for the years 1337 to 1339 fasli and 1340 to 1342 Fasli, respectively, are not the receipts given by Rambeyas, defendant No. 19, and no reliance should be placed upon the same,

(3) that, upon the evidence, it should be held that the mortgage money was, in fact, paid, as alleged by the plaintiffs, to the mortgagee-defendants, and the endorsement, exhibit 1, should be held to be a genuine endorsement and

(4) that there is no material to show that the plaintiffs were parties to the arrangement by which the defendant-mortgagees purchased 16 bighas of lands from Mahesh Nonia, the auction purchaser.

10. I shall deal with these points now.

(1) Section 90 of the Trusts Act.

11. I should like to quote Section 90 of the Trusts Act, which reads thus:

" "Where a tenant for life, co-owner, mortgagee or other qualified owner of any property, by availing himself of his position as such, gains an advantage" in

derogation of the rights of the other persons interested in the property, or where any such owner, as representing all persons interested in such property, gains any advantage, he must hold, for the benefit of all persons so interested, the advantage so gained, but subject to repayment by such persons of their due share of the expenses properly incurred, and to an indemnity by the same persons against liabilities properly contracted, in gaining such advantage".

The words which appeared to me to be important have been underlined (here in " "). I should like to quote one of the illustrations to the section namely, illustration (c). It is as follows:

""A mortgages land to B, who enters into possession. B allows the Government revenue to fall into arrear with a view to the land being put up for sale and his becoming himself the purchaser of it. The land is accordingly sold to B. Subject to the repayment of the amount due on the mortgage and of his expenses properly incurred as mortgagee B holds the land for the benefit of A".

Here also, the important words have been underlined (here in " "). In order to avail oneself of the provisions of Section 90, it must be shown that the mortgagee, as in this case, by availing himself of his position as mortgagee, has gained certain advantage in derogation of the rights, of other persons, namely, the mortgagors. If there is no material to hold that the mortgagee was in any manner responsible for the auction sale of the holding, then in my opinion, these provisions cannot apply. The earliest case which considered the provisions of this section is *Soho* found in *Nawab Sidhee Nuzir Ali Khan v. Ojoodhyaram Khan*, 10 Moo Ind App 540 (PC) (A). It was held in that case that, as there had been a fraudulent sale under Act 1 of 1845 by A, the mortgagee's representative in possession, that Act did not apply so as to defeat the mortgagor's equity of redemption, and that the sale was to be considered as a private sale, and impressed a trust on the estate which passed under it; and further that, as there was a fraudulent agreement between the mortgagee's representative in possession and the purchaser at the Government sale, both were estopped as against the mortgagor from relying upon the illegality of their contract. The other Privy Council case which might be referred to is that of *Deo Nandan Prashad v. Janki Singh* ILR Cal 573: AIR 1916 PC 227 (B), and I like to quote the following observation made by their Lordships at page 582 (of ILR): (at p. 228 of AIR):

"The learned Judges (High Court) as a further and distinct ground of decision, find that there was fraud, and the language, used by the High Court, read literally might be understood to attribute personal fraud to the minor, Deo Nandan. But, in view of his age, this can hardly have been intended. In any case their Lordships acquit him of any personal misconduct in relation to the default or sale. He was, however, represented by agents, and when the position created by them is regarded as a whole it leads to the conclusion that the Government revenue was intentionally allowed by them to fall into arrear with a view to the property being put up for sale and bought on behalf of the minor. If this be the true view, as their Lordships hold, then, however free from personal blame the

minor may have been, he cannot profit by his agent's deliberate default committed in breach of the terms of the mortgage and cannot be allowed to hold for himself the advantage gained by the default for which his agents were reasonable".

Then we come to Patna cases. After referring to the Privy Council case in 10 Moo Ind App 540 (A), his Lordship the Acting Chief Justice, in Gauri Shanker Sahu v. Sheotahal Gir AIR 1936 Pat 434 (C) observed as follows:

"..... .when once the sale in execution of the rent decree took place in the absence of fraud (which has not been established in this case) the right or interest which the tenant had in the property, that is to say his right to redeem was extinguished. If it was extinguished, then the plaintiff, who claims his right to redeem by reason of the purchase in 1929 has no such right. In the absence of any finding of fraud, and in my judgment we cannot infer fraud in this case from the mere fact that the mortgagee failed to pay, the rent sale stands and in my judgment, therefore, the plaintiff had no right to redeem".

Dhavlal, J. agreed with the decision given, though he gave his own reasons, I would like to quote an extract from his observation also:

"It is true that the mortgagee was under an obligation to pay the rent of the holding as it fell due; and it is also true that because the mortgagee defaulted in paying it, therefore the landlord sued for the rent and afterwards proceeded in execution to put the holding up to sale. No collusion however, has been established between the landlord and the mortgagee. The sale was therefore perfectly good and the time for setting aside on any ground whatsoever is long past"

The case of Fekua Mahto and Others Vs. Babu Lal Sahu and Others, , considered the two earlier decisions of the Privy Council, already mentioned, and also the case in AIR 1936 Pat 434 (C), and their Lordships observed as follows :

"The whole decision proceeds upon the basis that mortgagees cannot gain an advantage from their own fraud and, therefore, where mortgagees in such cases have allowed rent to fall into arrear and the property to be sold in execution of rent decrees, such sale will not extinguish the equity of redemption as against the mortgagee if he subsequently acquires the property. In short, their Lordships of the Privy Council held that where fraud, such as I have indicated, exists, the sale must be treated as a private sale and not a public sale. In other words, a sale under a rent decree brought about by the fraud of the mortgagees cannot be held to defeat the rights of the mortgagors as against the mortgagees"".

It was found that, as there was no fraud, the plaintiffs mortgagors failed to show that they had a right to redeem. The case of : (Fekua Mahto and Others Vs. Babu Lal Sahu and Others,)(D), was followed by this court in Ram Tapesar Rai v. Arjun Rai, S. A. No. 2542 of 1946, D/-31-8-1949 (E). In this case, the contract between the parties was that the mortgagee shall pay the proportionate rent of

the holding and the balance was payable by the mortgagor himself. On the rent falling in arrears, suit for rent was brought which ended in a sale of the holding and in that context their Lordships observed as follows :

"Mr, Kailash Rai strenuously argued that when the mortgagee was in possession of the portion of the land it was his bounden duty as trustee to save the property from sale. This argument is not sound, as by the principle embodied in Section 76(c) of the Transfer of Property Act it is the absence of a contract to the contrary that the mortgagee is bound to pay the rental due to the landlord. Here, as already said, the contract to the contrary is that the mortgagee is to pay a proportion of the rental and the balance was payable by the mortgagor himself. We fail to understand how the plaintiff can insist upon the application of the equitable rule that the defendant should be treated as a mortgagee even after the sale when the plaintiff himself was in default and did not carry out the terms of his contract. A person who wants to insist upon equity being done to him must also show equity in his favour.""

The case in *Nandraj Ojha v. Ramtawakal Ojha*, L. P. A. No. 38 of 1941 (F), decided by Harries, C. J. and Fazl Ali, J. (as he then was) on the 10th March, 1942 was distinguished on the ground that, in that case, there was no such contract and the onus lay upon the defendant-mortgagee to show that, under the mortgage, there was no obligation on him to pay either under the law or under the contract the rent to the landlord. In the present case also, it is mentioned in the mortgage bonds that not the entire rental but a proportionate rental was payable by the mortgagees. We should first refer to the written statement of the defendants (paragraph 11) which says that the holding was of 39 bighas held jointly by the plaintiffs and defendant No. 19, out of which 22 bighas 1 katha were given in rehan by the plaintiffs and defendant No. 19, Rambeyas, to defendants 1 to 15 and 10 bighas 10 kathas were given in rehan to Digambar Ahir.

Thus, the balance of the holding was left With the plaintiffs and defendant No. 19. From exhibit X, entries in the register of Kent Suit No, 751 of 1935, it appears that the entire rental of the holding was Es. 64/12/9 (khata No. 14). From the rehan bond exhibit 2, it is clear that the mortgagees were to pay Rs. 24/3/- as rent, including cess; exhibit 2 (a) mentions that the mortgagees were to pay Rs. 14/12/3, including cess, and exhibit E (1), the rehan bond in favour of Digambar Ahir, shows that the mortgagee was to pay Rs. 14/-, including cess. There is no doubt, therefore, upon these documents that only a portion of the rent was made payable by the different mortgagees to the landlord.

Mr. Tarkeshwar Nath drew attention to the body of the mortgage bonds where it was stipulated that "after payment of rent to the proprietor year after year"" the mortgagees were to appropriate the profits of the lands, and he contended that the entire of the holding was payable by the mortgagees. That cannot possibly be the meaning when that agreement is considered in the context in which it is made, and I have shown that in the different bonds different rentals were

mentioned in proportion to the lands of the khata mortgaged. Thus it is apparent that the mortgagees were to pay merely a part of the rental, Next we come to the case of Ram Rup v. Jang Bahadur ILR Pat 391: AIR 1951 Pat 566 (G), on which reliance has been placed by Mr. Tarkeshwar Nath for the appellants.

That case is entirely different on facts. In that case what happened was that there was a rent decree against the mortgagor plaintiffs who had executed a sudbharna bond in favour of the defendants and had left the consideration money with the mortgagees to satisfy the rent decree. The rent decree was not paid and the properties were sold in execution of the rent decree and purchased by the landlord who, subsequently, settled them with the sudbharnadars. It was held that, according to the well established legal maxim, convenience could not accrue to a party from his own wrong and that the sudbharnadar-mortgagees held the decretal amount in trust for the plaintiffs and, having failed to avert the sale, they could not claim the benefit arising from their own default and resist the right of redemption, on the footing that the old tenancy had been extinguished by the rent sale, and the cases in AIR 1936 Pat 434 (C) and : (Fekua Mahto and Others Vs. Babu Lal Sahu and Others,) (D), were distinguished on facts.

Further reliance was placed on the cases reported as Deo Saran Singh and Others Vs. Barhu Singh and Others, and Bariar Singh Vs. Durga Gir and Others, . In the first case, the mortgagees in possession committed default in payment of the landlord's rent and suffered the mortgaged property to be sold and they bought it themselves in the name of their benamidar. The facts of that case, therefore, are easily distinguishable, and they come within the purview of the provisions of Section 90 of the Trusts Act and the Privy Council cases and the Patna cases already referred to above. In the other case Bariar Singh Vs. Durga Gir and Others, the facts were almost similar to the first case. Here, certain holding was sold for default of payment of rent and other charges by the usufructuary mortgagees.

It was held that a subsequent purchaser from the rehandars, to whom the original rehan bond was handed over and who could, therefore, see who was liable to pay rent for the default of which the holding had been sold but who made no enquiry as to the title of the transferor to the property in suit, could not resist the claim of the mortgagor to redeem the holding. This case was decided by a learned Single Judge of this Court, and the decision was given on facts entirely different from the present one.

Reliance was also placed on the observations made in Sidhakamal Nayan Ramanuj Das Vs. Bira Naik and Others, . But there too the mortgagee was held responsible for not paying the arrears of rent for which the holding was sold and when it was sold it was purchased by the mortgagee himself. On those facts, it was held that the mortgagor was entitled to a decree for redemption as the case was governed by the provisions of Section 90 of the Trusts Act. The provisions of Section 90 of the Trusts Act were also considered in Jadubans Sahai and Others

Vs. Bahuria Phulpati Kuer and Others, , by Ramaswami, C. J. and Kanhaiya Singh, J., in which it was observed as follows:

"It is evident that, on the facts of this case, this section has no application. It applies only when the mortgagee by availing himself of his position as such gains any advantage. The expression "by availing himself of his position as such" obviously signifies that in discharge of his duties he committed some act in breach of the terms of the mortgage. If the mortgagee made good the trust and did all that was enjoined upon him by the mortgage, then no question of trust comes in. In other words, there must be some causal connection between the facts or commission or omission on the part of the mortgagee and the advantage which he gained."

This case followed the case of Kewal Surihar and Another Vs. Bikan Surihar and Others, . These are all the cases of the Privy Council, of the Supreme Court and of this Court, and, in my opinion, in the absence of any collusion or fraud or employment of any unfair means by the mortgagees, in bringing about the sale of the mortgaged properties question of resulting trust coming into being in favour of the mortgagors does not arise, as I will show now that in the present case there was no default made or any fraud practised or any unfair means used by the mortgagees in bringing about the sale of the holding a part of which had been mortgaged to these defendant-mortgagees. As a matter of fact it will appear that they were never on the scene at all and the materials on record do not connect them with either the default in payment of rent or the institution of the rent suit or with the sale of the holding or with the purchase thereof at the Court auction or at any time.

12. I would now consider the other points together. The first thing that has got to be found out is whether there was ill-feeling between Rambeyas, defendant No. 19, and the plaintiffs at any time, as alleged by the plaintiffs, according to whom there was default in payment of rent, the institution of the rent suit and the sale of the holding with the collusion of this defendant No. 19 with the mortgagees and the landlord. In the plaint it is mentioned that defendant No. 19 is a sattadar of the canal. Then again, in evidence, P.W. 1 confirms the statement in the plaint that defendant No. 19 is a sattadar of the canal and that Isar, plaintiff No. 1, is not the sattadar. P.W. 2 states "Ram Beyas and Isar cultivate their lands together these days. Isar pays rent Separately since the filing of this suit". From the canal Khasra (Exhibit G) it appears that Rambeyas Choudhri is mentioned in the column meant for the name of the cultivator in respect of several plots of village Amuan that had remained with the family as also some of the mortgaged plots for the year 1348-49, that is, long time after the auction sale in execution of the rent decree.

This shows that, in spite of the sale in the rent decree, Rambeyas was recorded in the Canal Department for the year 1348-49 and he was in possession in spite of the sale. Mr. Tarkeshwar Nath submitted that Canal Khasras are no evidence of possession. It is enough to state that canal papers are documents which are

prepared in ordinary course of business, and there is no reason why they should not be admitted into evidence, and they are certainly evidence of possession; but what weight should be attached to such evidence must depend upon the facts of each particular case. In *Anjani Kumar v. Mt. Sanjoga Kuer*, First Appeals Nos. 234 and 237 of 1947, D/- 2-9-1953 (Pat) (M), it was held:

"The papers of the Canal Department also prove the possession of the agnates..... .. Certainly, a certain amount of weight should be attached to these papers, and along with the other evidence on the record they do establish the possession of the agnates over the property in suit ever since the death of Ramtahal."

Their Lordships relied upon the cases of *Inderdeo Singh and Others Vs. Janeshwar Singh and Others*, and *Raja Mohan Bikram Shah @ Ram Raja Vs. Deonarain Mahto and Others*, . I would, therefore, reject the contention of Mr. Nath in regard to the canal papers. According to P. W. 3, who is the priest of the plaintiffs' family, Rambeyas is the karta. Even plaintiff No. 1 himself as P.W. 4 had to concede in his examination-in-chief that "Ram Beyas looks after our cultivation". Again, he says--"I cannot say when the makfool (the mortgage for Rs. 900/-) was paid. My brother told me that it had been paid. My brother must have paid it but I do not know what sum was paid by way of interest." He also says -- "We never divided our fields. I never paid the rent. I have got no rent receipt." All these statements confirm me in the opinion that Rambeyas is the karta of the family and there was no ill-feeling between defendant No. 19 Rambeyas, on the one hand, and the plaintiffs, on the other, and that the plaintiffs' case in the plaint about collusion of defendant No. 19 with the mortgagees is simply a figment of imagination.

13. Then we come to the rent suit already mentioned. It is admitted by P.W. 4, plaintiff No. 1 that "We were served with summons in the rent suit", and it has been found by the Court below that the notice and other processes in the execution were served upon the plaintiffs and defendant No. 19 and this finding was not challenged before us. If that be so, the question arises as to why the plaintiffs and defendant No. 19 took no steps for setting aside the rent decree or the sale. If no rent was due from the plaintiffs and defendant No. 19 and rent was due from the mortgagees, who had made default in payment of the rent, why no step whatsoever was taken in regard to the rent decree or the sale which took place in February, 1936, until the suit is brought in 1946, more than ten years after the sale?

This inaction on the part of the plaintiffs and defendant No. 19, in my opinion, speaks a lot against them, and the mortgagee defendants have proved definitely, in my opinion, that they did pay rent to Rambeyas, the karta of the mortgagors' family, and that is amply proved by the receipts exhibits I (1) and I (2). Exhibit I (1) is a receipt granted by Rambeyas to Mahadeo Pandey and Rajnath Pandey, the original mortgagees, for the years 1337 to 1339 Fasli in respect of 22 bighas 1 katha of lands of khata No. 14, which was the aggregate total of the lands of

the two mortgages. Exhibit I (2) is in respect of the years 1340 to 1342 Fasli for the same area as mentioned in exhibit I (1). These two receipts were scribed by one Dukhit Lal (D.W. 12) and they also bear the thumb impressions of Rambeyas.

I have no doubt that these receipts are genuine, and there is no reason to disbelieve the evidence of D.W. 12. This witness has given his evidence in a very straightforward manner, and I have felt impressed by his evidence as a true evidence, and I do not accept the comment of the learned Judge in the Court below that he should be regarded as an interested witness. I think it is wrong as a general proposition to discard a witness merely because he is interested. The evidence must be discarded or accepted on the merits of that evidence and not merely because a man is interested. It is true the Court will need extra caution in evaluating the evidence of an interested person. Looked at from this standard, in my opinion, the evidence of D.W. W Dukhit Lal must be accepted. It was submitted by Mr. Nath that there is no attestation of the thumb marks of Rambeyas on these two documents.

These two documents bear the thumb marks and there is a note in regard to these thumb marks that they are of Ram Beyas Npnia. I have compared this writing with the writing of the body of the receipts, and I have no doubt in holding that both the writings are in the hand of the same person, namely, Dukhit Lal. I would unhesitatingly accept these receipts, exhibits I(1) and I (2), as genuine documents, and they show definitely that the mortgagee-defendants did pay rent of the lands in their possession to Rambeyas, the karta of the mortgagors' family, and these receipts cover the period for which the rent suit was brought, namely, 1339 and 1340 Fasli. The mortgagees therefore were not in default.

14. Then I come to the alleged payment of the mortgage money by the mortgagors to the mortgagee-defendant No. 1, Kariman Pandey. Apart from the oral evidence, which I am not at all prepared to believe, the plaintiffs have relied upon endorsement of payment alleged to have been made by Kariman Pandey himself on, the back of one of the mortgage bonds. (After discussion of oral evidence the judgment proceeds :) This is all the oral evidence in support of the payment. They do not inspire any confidence in my mind in regard to the payment of the rehan money to defendant No. 1. I then come to the endorsement itself. It is exhibit 1 to be found on the back of exhibit 2 (a). The case of the mortgagee defendants is that this signature of Kariman is a forgery and not made by Kariman,

Both parties, however, have examined their experts, and these experts support the case of the party calling them. The Court is not bound by the expert opinion which is merely an evidence in the case and that should be considered along with the other evidence and circumstances appearing in a particular case. In my judgment, the plaintiffs and defendant No. 19 had full knowledge of the rent suit which had been brought about not because of any default of payment of rent by the defendant mortgagees, and they were also aware of the execution

proceedings. Having known all these facts in regard to the rent suit and the execution proceedings, they took no steps for setting aside the sale or the rent decree. In that context, the question is whether it is at all probable that the plaintiffs and defendant No. 19 would pay the mortgage money on mortgages which had disappeared as a result of the rent sale.

The answer to this question must be in the negative. As a matter of fact, I think the plaintiffs' family was heavily indebted and most of the debts were covered by mortgage bonds, either simple or usufructuary. They must have thought that it was impossible for them to pay up the debts and the quickest and easiest course that must have suggested to them was to bring about anyhow a rent suit and a rent decree and then have the holding sold up. They did succeed in this and bought the property in the name of Mahesh Nonia, wife's brother of Rambeyas, defendant No. 19. In this background, in my opinion, it is impossible to hold that the plaintiffs and defendant No. 19 would think of making payment of the rehan moneys in the year 1946, about ten years after the rent sale. Apart from this, the endorsement appears to me to be a very laboured writing.

There are admitted writings of Kariman. The photostat copy is exhibit 5 of the signature of Kariman on the written statement, exhibit 3. In the endorsement in question, the expression "Ba kalam khas" is fully written out. In Exhibit 5, however, "Ba kalam khas" appears at several places, and at each place "Ba kalam khas" is not fully written, but merely "Ba" ?ck? of "Ba Kalam" and "Khas" ? [kkl ? of "Khas" are mentioned. I, therefore, take this mode of writing "Ba kalam khas" by Kariman as the usual way in which he used to write "Ba kalam khas". "Ba kalam khas" in the endorsement, therefore, is unusual. The last letter of "Ba kalam khas", "Sa" ? l ? is written in an entirely different manner from the letter "Sa" ? l ? occurring at different places in the endorsement. At those places, the letter "Sa" ? l ? appears to have been written by a person who is not fully conversant of, or adept in, writing. But this last letter "Sa" ? l ? in the endorsement appears to my mind to be written by a person fully adept in writing.

In this view of the matter, in opinion, the endorsement must be held as not genuine, and I would attach no importance to that endorsement and would hold that the plaintiffs have entirely failed to prove the alleged payment of the mortgage moneys. If that be true, then the plaintiffs had no cause of action for the suit, as revealed in the plaint, as against defendants 1 to 15, the mortgagees. I further hold that the defendants' case to the effect that the plaintiffs and defendant No. 19 were themselves party to the arrangement by which the defendant mortgagees came to purchase 16 bighas of land from Mahesh Nonia, the so-called auction purchaser, for a sum of Rs. 500/- has been established, and I accept the evidence of the defendants in regard to this matter which is in consonance with the probabilities of the case.

It was submitted by Mr. Nath that defendant No. 1 has not produced his account books to show that either he paid the rent as per receipts exhibits I (1) and I (2) or he paid the consideration money of Rs. 500/- to Mahesh Nonia. In my

judgment, the account books were not at all necessary to be produced by defendant No. 1 for the reason that these two payments of rent and of consideration are amply borne out by the respective documents. If the plaintiffs wanted to rely upon the account books of defendant No. 1, they should have asked for the production of the said account books. It was submitted that the fact that defendant No. 1 possessed account books came to the knowledge of the plaintiffs during the examination of defendant No. 1 in the witness-box.

Even so, if the plaintiffs had so liked, they could have called upon the defendants to produce those account books. That not having been done, no adverse inference can be drawn from the non-production of the account books by defendant No. 1. I have no manner of doubt, therefore, that the plaintiffs' case has been rightly disbelieved by the Court below, and I would confirm the decree of that Court so far as the defendant-mortgagees are concerned.

15. The Court below, however, had found that the plaintiffs and their brother, defendant No. 19, were in possession of the properties which had remained after the sale deeds executed in favour of the mortgagees, namely, defendants 1 to 15, and Digambar Ahir, and it is rightly submitted by Mr. Tarkeshwar Nath, on behalf of the appellants, that, at least so far as those lands are concerned there should have been a decree in their favour against defendant No. 16, the widow of Mahesh Nonia, and other defendants who are the heirs and legal representatives of Mahesh Nonia since deceased. In my opinion, the submission is justified and the plaintiffs' claim in regard thereto must be allowed, and the suit decreed in respect of the lands of schedule D which remained undisposed of by the auction-purchaser, Mahesh Nonia, and which have been found by the Court below to be in possession of the plaintiffs and defendant No. 19, Rambeyas Nonia.

16. I would, therefore, dismiss this appeal, with the slight modification mentioned above, with costs.

Dayal, J.

17. I agree.