

(1943) 07 BOM CK 0011
In the Bombay High Court

Kedarnath Himatsingka

APPELLANT

Vs

Prabhabati Saheba

RESPONDENT

Date of Decision : 08-07-1943

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 40 Rule 1(d)

Citation : (1945) 47 BOMLR 561

Hon'ble Judges : Porter, J;Madhavan Nair, J;MacMillan, J;George Rankin, J;George Clauson, J

Bench : Full Bench

Final Decision : Allowed

Judgement

Madhavan Nair, J.—These are consolidated appeals from two separate but identical orders of the High Court of Judicature at Patna dated January 23, 1939, and January 26, 1939, respectively in Civil Revision No. 563 of 1938, and Miscellaneous Appeal No. 89 of 1932, which affirmed the order of the Subordinate Judge of Dumka dated August 15, 1938.

2. The appellant before the Board is the Receiver appointed by a consent order of the High Court dated December 23, 1932, in Consolidated Miscellaneous Appeals Nos. 89-93 of 1932, of a Ghatwali tenure known as the Hendwe Estate held by respondent No. 10, the proprietress of the said estate under the Banaili Raj, represented by respondents Nos. 1 to 9.

3. Shortly stated, the main question for determination is whether the appellant has a prior right to reimburse himself from the collections of the estate in respect of certain loans advanced or raised by him to and for the estate at the express orders of the Subordinate Court and the High Court on various occasions, before paying certain decretal amounts and dues to the Banaili Raj. These amounts became due subsequent to the decrees which had been passed by the Subordinate Judge of Bhagalpur, which were then under appeal to the High Court in A. Section Nos. 19-23 of 1931.

5. The Courts in India have answered the question against the appellant.

6. The relationship between the Banaili Raj and the Hendwe Estate is that of landlord and tenant with this difference, that the holders of the Hendwe Estate hold it on Government Ghatwali tenure, and as such, the estate is not liable to be sold in execution of a decree for rent, though deliberate and persistent default on the part of the Ghatwal to pay rent may constitute misconduct in relation to his office, for which he is liable to dismissal by Government see *Rani Sonobati Kumari v. Raja Kirtya nmd Singh* ILR (1934) Pat. 70. Respondent No. 10 is the life-holder of the Hendwe Estate, holding it under the Banaili Raj at an annual rent of about Rs. 12,000. As the rent was in arrear, the Banaili Raj instituted four suits against respondent No. 10 in the Court of the Subordinate Judge of Bhagalpur and also a suit for declaration that the estate is liable to sale for default in payment of rent. On September 19, 1930, the suits were decreed. The arrears of rent decreed amounted to about Rs. 1,16,000 besides interest and costs. Respondent No. 10 filed appeals Nos. 19 to 23 of 1931 in the High Court of Patna against the said decrees. Meanwhile, the Raj took out execution of the decrees, whereupon respondent No. 10 preferred miscellaneous appeals Nos. 89 to 93 of 1932 in the High Court, which were all consolidated.

7. On December 23, 1932, a consent order Was passed by the High Court on a compromise petition, to which the respondents were parties, whereby the appellant was appointed Receiver of the Hendwe Estate with all the powers under Order XL, Rule I(d), of the Civil Procedure Code. Paras 2, 4, 5 and 11 of the Order, which are important in connection with this appeal, are as follows:

Para 2.?The Receiver undertakes to this Hon"ble Court to pay to the decree holders a sum of Rs. 50,000 on or before the 30th of June, 1933, and a further sum of Rs. 40,000 on or before the 30th of June, 193/1, and the balance of decrial amounts in execution on or before the 30th of June, 1935, provided that the judgment debtor shall be living at the dates mentioned and the receiver shall not have been discharged for any reasons whatsoever.

Para 4.?For the purposes aforesaid the Receiver is authorised to raise loans of Rs. 50,000 and Rs. 40,000 and Rs. 40,000 as and when required at interest not exceeding 12 per cent. and Attorney charges at 2 per cent. besides actual out of pocket expenses. If the judgment debtor can arrange loans on better terms, the Receiver will take loans so arranged.

Para 5.?The Receiver do continue as such Receiver until the sums advanced by him or raised by him as loans as aforesaid or under any other order or orders of the Court are paid.

Para 11.?The amounts advanced by the Receiver or raised by him as loans will be a first charge on the estate and on the realisation.

8. Pursuant to the above order, the appellant raised or advanced the sum of about Rs. 1,20,000 for payment to the decree-holders.

9. In accordance with various orders made by the Subordinate Judge of Dumka the appellant raised and advanced further loans of about Rs. 1,32,478.

10. On February 14, 1934, the High Court made an order authorising the appellant "to raise such loans as may be required for meeting the expense of the litigation" by which was meant the appeals then pending in the High Court. The Court provided that the loans will be raised subject to the rights of the Banaili Raj?.

11. On April 9, 1934, the High Court made a further order "by consent of parties and in the presence of the Receiver" (appellant) by which he was authorised "to raise loans for the purpose of meeting the expenses of the appeals and the personal expenses of the appellant and the payment of the insurance premia and charges incidental thereto." The order expressly stated that the sanction hereby given is without prejudice to the existing arrangement that the decretal dues of the plaintiff respondents are to be paid in such instalments as have been provided for in the order appointing the Receiver and it is further subject to the condition that the plaintiff's other decree or decrees for rent and cess already obtained and the rent and cesses as they accrue due shall have priority over the charges hereby sanctioned.

12. Pursuant to the last order of the High Court the appellant as Receiver advanced further loans aggregating to about Rs. 66,832.

13. This was the state of affairs when on December 14, 1934, respondent No. 10 filed a petition before the Subordinate Judge of Dumka for the removal of the appellant for mismanagement. On June 12, 1936, the Subordinate Judge made a reference to the High Court recommending his removal.

14. The above reference was discharged by the High Court with costs to the appellant. In the order dated August 26, 1936, Mr. Justice Madan (with whom Mohammad Noor J. agreed) made the following observations :

It should be noted that it has already been ordered that the Receiver is first entitled to recoup himself for the amounts paid by; him in satisfaction of the previous decrees of the Banaili Raj. The subsequent decrees and dues of the Raj are the next claim and then the Receiver is entitled to recoup the balance of the debt.

15. In October, 1937, the appellant submitted to the Court of the Subordinate Judge of Dumka a budget of the expected income and expenses for the Fasli year 1345 (1937-38) in which he provided only Rs. 5,000 for payment to the Banaili Raj. It was urged by the Raj that up to the year 1345 F. a sum of Rs. 1,74,213-10-11 1/2 had become due from the estate, that besides the instalments fixed by the Court in the order appointing the Receiver, he had paid only Rs. 1,500 in three instalments within a period of three years, that their dues should be paid in preference over all other dues, and that substantial payments should be provided in the budget for the decree holders. In reply, the appellant

contended that in view of the order of the High Court by which he was appointed Receiver and which determined the priority of payment "no provision can be made in the budget for any payment of the decree for rent and cess other than those covered by the said appeals, and also of the rent and cess as they accrue due out of the estate realisations because all the loans raised or advanced by the Receiver for the estate except those sanctioned by the Hon'ble High Court by the consent order made on 9-4-34 are first charge on the estate and on the realisations, and the Receiver is entitled first to recoup them."

16. It is not disputed that the appellant has raised considerable sums and paid the decretal amounts for rent which he undertook to pay by the; order of December 23, 1932, and that he has lent to the estate large sums for conducting the appeals and for other expenses. The correctness of the three amounts mentioned above has not been questioned for the purposes of this appeal. Having regard to the specific terms of the order of the High Court dated December 9, 1934 (supra), which stated inter alia that the charges thereby sanctioned shall be "subject to the condition that the plaintiff's (Banaili Raj's) other decree Order 4 decrees for rent and cesses as they accrue shall have priority over the charges hereby sanctioned," the appellant does not claim priority with respect to the sum of Rs. 66,832 raised by him under that order, nor do the respondents dispute that the appellant is entitled to claim priority with respect to the sum of Rs. 1,20,000 which he has paid under the order of the High Court dated December 23, 1932 (supra) in view of para 11 of the order. So, the question for decision in these appeals reduces itself to this, viz., is the appellant entitled to claim a prior right to recoup himself from the collections of the estate the sum of Rs. 1,32,478 advanced or raised by him before paying the subsequent decretal amounts and dues to the Banaili Raj ?

17. The Subordinate Judge held that he was not entitled to claim priority as in his view the priority fixed by the order of December 23, 1932, should be limited to the extent of the loan then sanctioned. He stated that "it could never have been under contemplation that the decree-holders were to postpone all their subsequent dues till the Receiver recouped himself for other loans raised subsequently." In support of his conclusion, he also relied on the opinion expressed by the High Court in its order refusing to discharge the Receiver dated August 26, 1936 (supra). Accordingly, he directed that the appellant should set down equal amounts towards repayment of his first loan and the payment of the subsequent decretal and non-decretal dues of the decree-holders in all subsequent budgets, and in the budget under discussion the sum of Rs. 5,000 payable to the decree-holders should be altered to Rs. 48,547-6-1, the amount of the first new rent decree under execution. With these and certain other minor amendments the budget was passed. These amendments were not discussed before the Board as what was questioned was only the fundamental principle respecting priority on which his budget was framed by the Receiver. The order of the Subordinate Judge was confirmed by the High Court in a short order.

18. The law is well settled that "a Receiver over leasehold is bound in the first place, out of the sub-rents, to discharge the head-rent and outgoings payable to a lessor for which the person whose estate is being dealt with by the Court is liable to the lessor?. The sub-rents should be, in the first place, appropriated to the payment of the head-rent" (see Kerr on Receivers 1935), 10th edn., p. 246). The primary duty of a Receiver over a leasehold is no doubt to discharge the head-rent out of the sub-rents, but it is clear that the parties concerned may by consent order obtained from the Court modify the legal responsibility thus thrown on a Receiver. This position is not disputed. In the present case it is contended by Mr. Rewcastle for the appellant that the order of the High Court by which he was appointed Receiver justifies his claim for priority in respect of the sum in question, and that the Subordinate Judge's construction of the order is erroneous. Their Lordships have to consider whether this argument can be accepted.

19. The priority claimed by the appellant is based on his reading of paragraphs 4, 5 and 11 of the consent order of December 23, 1932. Paragraph 4 authorises him to raise loans for paying off the decretal amounts referred to in para 2 of the order. Then comes para 5 which contains a very important provision. It says that "the Receiver do continue as such Receiver until the sums advanced by him or raised by him as loans as aforesaid or under any other order or orders of Court are paid." The paragraph refers to two classes of loan, viz. (1) sums advanced by the Receiver or raised by him as loans, as aforesaid, i.e., as mentioned in Clauses 2 and 4 of the order which obviously refer to the sum of Rs. 1,20,000, the decretal debt, and (2) sums advanced by him or raised by him as loans under any other order or orders of Courts i.e., order or orders of Courts other than the order which authorised him to raise the sum of Rs. 1,20,000. The reference in the second part of the paragraph is not to any specific loan as in the first part of it, but generally to the loans which the Receiver may raise under any other order or orders of Courts. The paragraph also says that the Receiver is to continue as Receiver till the loans thus raised are paid. The next paragraph to be considered is para 11. This paragraph fixes priority and is the most important provision of the order which governs the decision in the present case. It says that "the amounts advanced by the Receiver or raised by him as loans will be a first charge on the estate and on the realisations." The operation of this paragraph is not restricted to any specific amount or loan, but it refers generally to all amounts advanced or raised by the Receiver as loans. It is argued by Mr. Rewcastle. that read in conjunction with para 5, this paragraph confers on the appellant priority over the Raj's claim for head-rent not only with respect to the sum which he is authorised to raise under para 4 to pay the decretal debt, but also with respect to sums advanced by him or raised by him as loans "under any other order or orders of Court." It is not disputed that the sum in question had been raised by orders of Courts. In their Lordships' view, this argument is sound and must be accepted. Read in the manner in which their Lordships think that paras 5 and 11 should be read, there cannot be any doubt that the appellant is

entitled to claim priority with respect to the sum of Rs. 1,32,478?admittedly raised by orders of Court Their Lordships are unable to find any sufficient ground for restricting the operation of para 11 to the sum of Rs. 1,20,000?as the Subordinate Judge has done?when the words of this paragraph are wide enough to cover the sums advanced by the Receiver or raised by him as loans, referable to the latter part of para 5. By the consent order to which respondents Nos. 1 to 9 were parties, they must be held to have waived with respect to the claim now made by the Receiver the priority which their claim for head-rent would ordinarily have in law, over the collections and other realisations from the Hendwe Estate. Though the subsequent order dated April 9, 1934, cannot be relied on as an aid in construing the prior order of December 23, 1932, it may be noted, as shown by that order, that when the respondents desired that their dues should have priority over certain charges claimed by the Receiver, they took care to obtain a declaration of such priority from the Court. It is to be regretted that the "orders of Court" under which the amounts in question were raised are not before the Board. Though the meaning of paras 5 and 11 of the order of December 23, 1932, read together is clear enough, their Lordships think that those specific orders by virtue of which the amount in question was raised should have been made a part of the record as having a direct bearing on the question. However, their Lordships must decide the case on the materials placed before them.

20. In support of their conclusion the Courts in India have relied on the observation made by Madan J. in his order setting aside the order of the Subordinate Judge recommending the dismissal of the appellant, concurred in by Mohammed Noor J., that the Receiver is entitled to recoup the balance of debt only after meeting the subsequent decrees and dues of the Raj which were stated to be the next claim after the Receiver had recouped himself for the amounts paid by him in satisfaction of the previous decrees obtained by the Raj. This opinion miscalled a "direction" by the Subordinate Judge was but a mere observation made by the learned Judges of the High Court in passing, in a matter not directly connected with any question of priority of payment. The point now under consideration did not arise for decision in that order, the sole question in which was whether the Subordinate Judge's recommendation of the dismissal of the appellant should or should not be accepted. In the circumstances the observation referred to is not helpful in construing the order of December 23, 1932.

21. Their Lordships have not failed to notice that the grant of priority to the claims made by the Receiver would mean a postponement to that extent of the payment of the subsequent dues of the Raj ; but the estate was heavily indebted when the Receiver was appointed to administer it, he has been able to pay considerable amounts due to the Raj, and what is more important, the sum in question was admittedly raised by orders of Courts made presumably with full knowledge of all the relevant circumstances.

22. For the above reasons, their Lordships will humbly advise His Majesty that

the orders of the Courts in India should be set aside ; that it should be declared that the appellant as Receiver is entitled to the same priority with respect to! the loans comprised in the sum of Rs. 1,32,478 mentioned in the judgment, as in respect to those comprised in the sum of Rs. 1,20,000 covered by the undertaking contained in the consent order of December 23, 1932 ; and that the case should be remitted to the Subordinate Judge to pass fresh orders on the budget for the year 1345 F. submitted to him by the Receiver. The appellant will get his costs before the Board. The parties will bear their own costs in the Courts in India.