

**(1931) 06 CAL CK 0032**  
**In the Calcutta High Court**

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|-----------------------------------------------|------------|
| Kshitish Chandra Acharjya Choudhry and Others | APPELLANT  |
| Vs                                            |            |
| Raja Janakinath Roy and Others                | RESPONDENT |

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**Date of Decision :** 10-06-1931

**Acts Referred:**

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

**Citation :** AIR 1932 Cal 194 : 137 Ind. Cas. 127

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**Judgement**

1. This is an appeal by certain defendants judgment-debtors from an order of the Additional Subordinate Judge of 24-Pargannas passed on 9th August 1930, appointing one Babu Sudhindra Nath Mukerji, receiver in respect of the properties of the defendants judgment-debtors which had been mortgaged to the respondents.

2. The properties are extensive and are situated in several districts, namely, 24 Porgannas, Mymensingh, Rangpur Rajshahi and Noakhali.

3. The respondents instituted a suit on the mortgages on 10th March 1926, their dues having come up to over Rs. 3,00,000 of which the amount of interest itself in arrears amounted to over Rs. 1,00,000. They applied for the appointment of a receiver in respect of the mortgaged properties, alleging that there was apprehension that the security would be lost by reason of nonpayment of Government revenue, that the value of the securities was being diminished as interest was accumulating so that the mortgaged properties would not be sufficient to satisfy their dues; and that the mortgagors had been declared disqualified proprietor and their estate had been taken over by the Court of Wards. The Subordinate Judge on the 4th March 1929 passed an order holding that a receiver should be appointed. The appellants appealed from this order but the appeal eventually failed as no person had yet been appointed as such receiver. In the meantime a preliminary decree as well as a final decree were passed in the suit. After the appeal had ended as aforesaid the respondents, on 23rd July 1930, applied for the appointment of a receiver in accordance with the order passed on 4th March 1929. The Subordinate Judge thereupon made the

order which forms the subject-matter of this appeal.

4. Now, it is quite clear that upon the circumstances such as they were at the date of the respondents' application for the appointment of a receiver there was a proper case for such appointment and the order of 4th March 1929 was one to which no objection could reasonably or successfully be taken. It is also true that in actions for foreclosure or for sale if there is reason to suspect that the security is or would become insufficient or if the interest is in arrear the Court may appoint a receiver to safeguard the interest of the mortgagee. It is also correct to say that the right that the mortgagee has in this respect is not affected by the mere fact that a decree for sale has been passed. But the order which is complained of in this appeal is open to the objection that it has merely completed the appointment contemplated by the order of 4th March 1929 and has not taken into account the events that have since happened and the position of affairs such as it was at the time when it has been passed, namely, 23rd July 1930. A decision of this Court has been cited before us namely the case of Manindra Chandra Ray Chaudhury and Another Vs. Suniti Bala Debi and Others, as authority for the contention that the appointment should be regarded as in the suit and that the events that have happened need not be considered, because in that case which was the case of an English mortgage this Court while appointing a receiver after decree observed:

The right of the mortgagee to ask for a receiver is not affected by the fact that a decree for sale has been passed because the suit cannot be said to have terminated till the property is sold or the mortgage money paid.

5. In one sense no doubt the suit in the present case has not come to an end, but whether the appointment is regarded as made in the suit or in execution what the Court has to see is whether the appointment appears to the Court to be just and convenient within the meaning of Order 40, Rule 1 of the Code. It is obvious that when the question arises, after a mortgage decree for sale whether a receiver should be appointed in respect of the property to be sold, in order to see whether it would be just and convenient to make the appointment, one must consider what impediment, here is or may be for the sale to be held. In a recent case in which a receiver was appointed in a suit for rent in which after a decree for a substantial amount had been passed the Court below while granting the decree-holder's application for sale of the defaulting tenure, also appointed a receiver at his instance holding that by the introduction of Section 51 in the new Code the decree-holder may as of right and as of course apply for execution by appointment of a receiver, this Court has pointed out that:

the remedy by the appointment of a receiver is by way of equitable execution and is available in cases in which equitable and special consideration intervene: Hemendra Nath Roy Chowdhury and Another Vs. Prokash Chandra Ghosh and Others, .

6. The order complained of in this case is one which proceeded entirely upon

what was alleged in the respondents' petition dated 9th December 1926. It has not taken note of the fact that before it was passed not only had the preliminary and the final decrees for sale been made but that properties lying in the districts of the 24 Pargannas, Rajshahi and Noakhali had been sold and application for sale of other properties some of which lie in the districts of Mymensingh and Rangpur were pending. It has been pointed out to us that the judgment-debtors had applied for setting aside the sale that has taken place and has been adopting obstructive tactics for warding off the sale of the properties that yet remain unsold. Whether these materials would justify an order for appointment of a receiver and if so in respect of which properties has never been considered by the Court below and we are not prepared to support the order complained of by taking into account matters never considered by that Court.

7. The result is that the order appealed from cannot, in our opinion, stand and it is accordingly set aside and the appeal is allowed but without any order for costs.

8. It will be quite open to the decree-holder to apply afresh for the appointment of a receiver at the present stage of the proceedings, and if such an application is made the judgment-debtors will have an opportunity of showing cause thereto and upon consideration of matters as they would then exist the Court will consider whether an order in the decree-holder's favour would be just and convenient to both the parties.