

**(1926) 01 CAL CK 0053**  
**In the Calcutta High Court**

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| Manindra Chandra Ray Chaudhury and Another | APPELLANT  |
| Vs                                         |            |
| Suniti Bala Debi and Others                | RESPONDENT |

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**Date of Decision :** 26-01-1926

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1(s)

**Citation :** AIR 1926 Cal 1006 : 95 Ind. Cas. 632

**Hon'ble Judges :** Panton, J;B. B. Ghose, J

**Bench :** Division Bench

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## Judgement

1. This appeal which arises out of one stage of a certain case has a long history behind it. It is only-necessary to state certain relevant facts in order to appreciate the question which has been raised before us. One Suniti Bala Debi, the respondent before us, executed a mortgage in favour of her step mother named Dhara Sundari and Sarajini on the 5th March 1907. Dhara Sundari brought a suit for her share of the mortgage-money on the 25th March 1909. That suit was defended by the mortgagor Suniti Bala on various grounds. The Subordinate Judge passed a decree in favour of Dhara Sundari. On "appeal by Suniti Bala this Court set aside the decree while maintaining the finding of the Trial Court with regard to the validity of the mortgage. This Court remanded the case for amendment of the plaint and after amendment for making a proper decree on the mortgage for the entire mortgage-money. Suniti Bala preferred an appeal to the Privy Council and the decision of the High Court was affirmed by the Judicial Committee. The case is reported as Sunitabala Debi v. Dhara Sundari Debi Ghowdhurani 53 Ind. Cas. 131 : 46 I. A. 272 : 37 M. L. J. 483 : 17 A. L. J. 997 : (1919) : M. W. N. 821 : 22 Bom L. R. 1 : 24 C. W. N. 297 : 11 L. W. 227 : 47 C. 175 : 2 U. P. L. R. 2, The decision of the Privy Council was passed on the 30th May 1919. During the pendency of the appeal before the Privy Council an application was made on behalf of the plaintiff on the 27th April 1916, before the Subordinate Judge for the appointment of a Receiver of the mortgaged properties. The Subordinate Judge made an order for the appointment of a Receiver on the 22nd September 1916 and an appeal was preferred against that

decision to this Court which was dismissed on the 15th December 1916. The Receiver took possession of the mortgaged properties in January 1917 and has been in possession till the 31st December 1925. The appellants before us got an assignment of the interest of Dhara Sundari in the mortgage on the 15th December 1920 and they were added as plaintiffs: henceforth in this judgment they will be described as plaintiffs in the suit. In the meantime, the other mortgagee Surajini had assigned her interest in the mortgage bond to one Heramba in April 1912 who was added originally as a co-defendant. He made an application subsequently to be transferred to the category of plaintiffs and joined as a co-plaintiff. This was objected to by Suniti Bala and the application of Heramba was dismissed on the 5th August 1921. This order of the Subordinate Judge was set aside on revision by this Court in 1923 and Heramba was joined as a co-plaintiff in the mortgage suit. It appears that subsequently Heramba compromised his claim with the mortgagor and it was settled that Heramba was to receive a fixed sum of money in lieu of the debt according to the mortgage-bond. After the decision of the Privy Council, the plaint was amended as directed by the Appellate Court and a preliminary decree on the mortgage was passed on the 21th March 1924 by the Subordinate Judge. He, however, disallowed certain claims of the mortgagees for compound interest. There was an appeal as against that part of the decree by the mortgagees and the decree of the Subordinate Judge "was modified allowing the appeal of the mortgagees, by this Court on the 25th March 1925. Under that decree, the date of the payment of the mortgage-money was fixed on the 25th September 1926. Just after the preliminary decree on the mortgage, the Subordinate Judge made an order discharging the Receiver appointed in 1916 by his order dated the 26th March 1924. The plaintiffs appealed against that order to this Court and the order was set aside by a Divisional Bench of this Court by its order dated the 30th April 1925. I shall come back to this decision, because a good deal of the controversy in this appeal depends upon the effect of this decision. On the 22nd May, 1925, the mortgagor obtained leave to appeal to the Privy Council as against the preliminary decree on the mortgage made by this Court on the 25th March 1923. This leave was rejected by this Court on the 26th November 1925 for noncompliance of certain orders made by this Court. Then, the mortgagor presented an application for review of that order of the 26th November which was rejected on the 30th November 1925. Plaintiffs then made an application for final decree on the 12th November 1925 and their case is that they could not make the application immediately after the expiry of the date fixed by this Court for payment of the mortgage money because of the pendency of the proceedings relating to leave to appeal to the Privy Council. The hearing of this application for final decree was fixed by the Subordinate Judge on the 9th January 1926, the reason for fixing that date apparently was that the record of the case was in this Court. On the 30th November 1925, the day on which her application for review of the order in the Privy Council Department was rejected the mortgagor made an application before the Subordinate Judge for discharge of the Receiver, having based her application on the judgment of the High Court in connection with the Receiver

matter dated the 30th April 1925. Upon that, the mortgagees presented two applications in one of which they opposed the discharge of the Receiver and in the alternative they prayed for the appointment of a fresh Receiver. The Subordinate Judge by his judgment dated the 4th January 1926, granted the application of the mortgagor discharging the Receiver and, rejected the application of the mortgagees for the fresh appointment of a Receiver. The final decree in the mortgage suit was made on the 13th January 1916. It appears that before the mortgage suit was instituted in 1909, the mortgagees were paid Rs. 900 odd, out of the interest payable under the mortgage. From 1909 till the appointment of the Receiver in 1916 no interest was paid on the mortgage. Under the final decree at present, the share of the mortgage-money to which the mortgagees, the appellants, are entitled, has come up to something like Rs. 2,50,000. The amount that was due to the other mortgagee Heramba Nath Banerjee amounted to something about Rs. 1,60,000. During the management of the Receiver he had in his hands an amount of about Rs. 1,20,000 which was paid in satisfaction of the money due to Heramba for his share with the consent of the present appellants under orders of this Court. The amount due to Heramba has been reduced to something like Rs. 10,000. The Subordinate Judge in his judgment which is appealed against purported to follow the directions of the High Court in its judgment of the 30th April 1925. It is unnecessary to recite all the observations made in that judgment, but the order was to this effect: "It is ordered that the order of the Court below discharging the Receiver be and the same is hereby set aside and in lieu thereof it is directed that for the present the Receiver do continue in charge of properties in suit till the 31st December 1925." The Subordinate Judge observed that according to the judgment of the High Court, the mortgagees were entitled to make a fresh application for the appointment of a Receiver if the execution of the decree is hampered by the act, or conduct of the defendant; and as he was of opinion that nothing has happened to that effect, the mortgagees were not in a position to apply for the appointment of a Receiver. But the circumstances which the High Court had under consideration were altered by the fact that the mortgagees were not in a position to put the decree into execution before the 31st December 1925. The final decree as has been already stated, had not been passed and although the mortgagees had made an application in November for the final decree, it was not made till the 13th of January, after the date of the judgment appealed against. It is no doubt true that the Subordinate Judge felt himself bound by the observations made by this Court, but the appellants contend that having regard to all the circumstances that have been set forth above, there has been no alteration in the position of the parties since 1916 when the Receiver was appointed and there is no reason whatsoever why the Receiver should be discharged.

2. The grounds on which the appellants base their contention may be shortly stated. First, that the mortgage is an- English mortgage and there has not been payment of any interest to the mortgagees and the order of appointment of a

Receiver under such circumstances is almost a matter of course. Secondly, that the management of the Receiver of the mortgaged properties would be more beneficial. Thirdly, that the value of the mortgaged properties is insufficient for the purpose of payment of the mortgage-debt; and fourthly, that having regard to all the circumstances of the case, it is just and convenient that a Receiver should be appointed.

3. On behalf of the respondent Mr. Bose has taken a preliminary objection that no appeal lies against the order of the Subordinate Judge and his contention is based upon the language of Order XLIII, Rule 1 (s) which runs thus "An appeal shall lie from the following orders under the provisions of Section 101, namely:- (s) an order under Rule 1 or Rule 4 of Order XL, The argument seems to be that under Order XL, the Court may, by order, appoint a Receiver of a property, and there is an appeal against that order, but where the Court declines to appoint a Receiver that is not an order made under Order XL, Rule 1 and, therefore, no appeal lies under Order XLIII, Rule 1 (s) of the Code. This argument does not appeal to us to be at all sound. When an application is made under Order XL for the appointment of a Receiver, the Court may or may not make an order granting that application. If the Court refuses to make an order, granting the application, it is no less an order made under Order XL than if it had made an order granting the application. It, therefore, comes within the provision of Sub-rule. (s) of Rule 1 of Order XLIII. Under the C. P. C. of 1882 such orders were appealable, See the cases of Baidya Nath Adya v. Makjian Lai Adya 17 C. 160 : 8 Ind. Dec. 994, and Khagendra Narain Singh v. Shashadharjha (3) 31 C. 495, Under the present Code a similar objection was raised as regards the maintainability of an appeal from an order refusing to grant a temporary injunction under Order XXXIX of the Code, the language of which is in similar terms as in Order XL It was contended that there was no appeal against an order refusing to grant a temporary injunction. This argument was repelled by this Court in the case of Hari Lal v. Pryag Ram 19 Ind. Cas 553 : 17 C. W. N. 996 : 18 C. L. J. 39, and we need hardly say anything more in support of the proposition that an appeal in this case is maintainable than that we accept the reasoning of the learned Judges in that case. The preliminary objection, therefore, fails.

4. Now the appeal being admissible it appears that the plaintiffs have made a prima facie case for the appointment of a Receiver. It is settled law in this country that the Court may appoint a Receiver at the instance of a mortgagee where the action is either for foreclosure or sale if there is reason to suspect that the security is insufficient or if the interest is in arrear. [Ghanashyam Misser v. Gobinda Moni Dasi 7 C. W. N. 452; Eastern Mortgage & Agency Co. Ltd. v. Rakea Khatun 17 Ind. Cas. 202 : 16 C. W. N. 997 and Weatherall v. Eastern Mortgage & Agency Co. Ltd. 9 Ind. Cas. 985 : 13 C. L. J. 495] 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. It is argued on behalf of the respondent by Mr. Bose that in this case the mortgagor is not to blame for the non-payment of interest as the lady did not get into possession of the property till May 21, 1914 and she remained in possession till the 10th January 1917. Previous to May 1914 the Administrator General was in possession of the properties as Administrator to the Estate of her father and the Administrator-General had been paying off other debts charged on the property. It is also urged that the present appellants might have got one half of the sums paid to Heramba in liquidation of his share of the mortgage money. But it was by their consent that they did not receive any portion of that amount. Therefore, the principle of those cases do not apply. It is the misfortune of the mortgagor that she did not get possession of the property till 9th May 1914 but the mortgagee may complain that whatever may be the reason the interest payable is in arrear and he is about to suffer. Besides nothing has been shown why this lady could not pay any portion of the interest during the two and a-half years she was in direct management of the property, before the management was taken by the Receiver from her hands. She cannot gain any credit for the payments made by the Receiver out of the income of the property in liquidation of the mortgaged-debt. The mortgagees may very well say that it is due to the good management of the Receiver that such amounts were paid and they urge that as a good ground why the management by the Receiver should continue. It is next urged on behalf of the respondents that there is a sum of about Rs. 1,50,000 as outstandings due from the tenants which the lady would be able to realise more quickly than the Receiver, owing to her personal influence. This seems to be quite problematical because if she exerted herself, by the exercise of her personal influence she could have enabled the Receiver to realise those sums out of which the mortgage-money might have been reduced; to a considerable extent. There was no reason why she should have remained idle if by her personal assistance the Receiver could have possibly realised a considerable amount of money from the mortgaged properties.

6. It is unnecessary for us to state at this stage anything as regards the value of the properties because that may be a matter for decision by the Court in subsequent proceedings. But the fact that the relation between the parties are strained to the utmost limit and that they entertain ill feelings against each other must be taken into consideration. If the management is left with the lady, the plaintiffs, if they so desire, will be able to put difficulties in her way, they being co sharers, and on the other hand the lady may not desire to make the path of the plaintiffs easy for the realisation of their just dues. It has been stated before us that the lady would undertake to pay all the profits to the plaintiffs. If this is sincere what benefit would be gained by her by taking over the management? She is a pardanashin lady who must depend upon others for looking after her affairs, and her past management did not show any good results. It seems to be an endeavour to realise whatever is possible from the property for her own purposes. It, therefore, seems to us to be just and convenient, that the property should remain in the hands, of the Receiver till the mortgage-money is received

by the sale of the properties in execution of the decree or paid to the mortgagees. To leave the property in the hands of the lady under the circumstances which have appeared in the proceedings before us would have the effect, to use words of Lord Buckmaster in the case referred to, of opening a prospect of litigation inviting to all who enjoy quarrels themselves or profit by the quarrels of others, and it may be added that this would be for the benefit of prowlers about the Courts in this country.

7. The order of the Subordinate Judge is, therefore, discharged and in lieu thereof it is ordered that a Receiver be appointed for the realisation of the rents and profits of the property till the mortgage-money is paid off either by sale in execution of the decree or by payment by the mortgagor. It will be open to the Court to make proper orders" on the Receiver to give facilities to intending purchasers who may be introduced by the mortgagor or her people to purchase by private treaty the whole or a sufficient portion of the mortgaged property for the liquidation of the mortgage debt. It should, however, be remembered that the mortgagee would not be bound to realise any portion of the mortgaged property on receipt of a portion of the mortgage-debt. The Court will appoint the Receiver who was acting as such till the 31st December to take charge of the property on the same security. If that gentleman is not available the Court will appoint a fit and proper person as Receiver to take charge of the property at once.

8. The appellants are entitled to the costs of this appeal-hearing fee five gold mohurs.

9. No order is necessary in the Rule.

10. Let the records be sent down at once.