

(1947) 12 CAL CK 0004

In the Calcutta High Court

Case No : Appeal from Original Decree No. 55 of 1941

Midnapur Zamindari Company Ltd.

APPELLANT

Vs

Saradindu Mukherji

RESPONDENT

Date of Decision : 18-12-1947

Acts Referred:

Citation : (1947) 12 CAL CK 0004

Final Decision : Allowed

Judgement

Lodge, J.—This is an appeal against the judgment and decree of the Subordinate Judge, Nadia, in a suit on a mortgage.

2. The material facts are not in dispute. On September 18, 1916, Maharaja Kshounish Chandra Ray Bahadur and Satyendra Narayan Bagchi, executors to the estate of Saratmani Debi, deceased, executed a mortgage-deed in respect of the patni taluk, lot Plassey, in consideration of a loan of Rs. 25,000, which was to carry interest at the rate of 12 annas per cent, per month until realisation. Under this patni taluk were a number of subordinate tenures, two of which were darpatnis held by the Midnapur Zamindari Company.

3. In 1927, the executors to the estate of the late Saratmani Debi made over the estate to Deb Nandan Mukherji, who was in control of the estate until August 8, 1930, when he executed a deed of trust in favour of Srimati Maya Debi. Deb Nandan borrowed Rs. 60,000 from Surpat Singh, Mahipat Singh and Bhupat Singh on June 27, 1928 and mortgaged the same properties for the second time. Again, on October 8, 1929, Deb Nandan borrowed Rs. 30,000 from Bipinbihari Laha and executed a third mortgage in respect of the same properties. Thereafter in 1930, Deb Nandan defaulted in payment of rent to the superior zemindar and the taluk was advertised for sale under the provisions of Regulation VIII of 1819. The Midnapur Zamindari Company, being talukdars of the second degree in respect of their two dar-taluks, paid into Court the amount declared due, viz., Rs. 22,974 odd and stayed the final sale. The Midnapur Zamindari Company applied to be put in possession of the taluk under the

provisions of Section 13(fourth) of Regulation VIII of 1819 and possession was given to them by the Collector on November 26, 1930. The Midnapur Zamindari Company" remained in possession of the taluk from that date until after the institution of the present suit.

4. After taking possession of the property, the Midnapur Zamindari Company addressed letters to Srimati Maya Debi, asking for instructions in case the receipts from the taluk should be found insufficient to pay the head rent to the superior zemindar. Answers to the letters were received, though these answers were not signed by Srimati Maya Debi herself and these answers authorised the Midnapur Zamindari Company to advance the money necessary to pay the head rents and to charge 12 per cent interest on the advances. In one such letter, which was signed by Deb Nandan, the Midnapur Zamindari Company were requested to buy in auction sale, other darpatnis held under the taluk, in respect of which decrees for arrears of rent had been obtained. Accordingly, it is the case of the Midnapur Zamindari Company, the company in those years in which the realisations were insufficient to pay the head rents advanced the amount necessary for this purpose; and also, on occasions spent money from the receipts in purchasing other darpatnis held under the patni taluk, when the said darpatnis were put to sale in execution of decrees for arrears of rent.

5. In these circumstances, the suit, out of which this appeal arises, was instituted by the first mortgagee, Saradindu Mukherji.

6. Deb Nandan, successor of the mortgagors, was made Defendant No. 1; the second mortgagees were made Defendants Nos. 2, 3 and 4; the third mortgagee was made Defendant No. 5; Srimati Maya Debi was made Defendant No. 7; and the Midnapur Zamindari Company was made Defendant No. 8. Defendant No. 6 was a fourth mortgagee who compromised with the Plaintiff and does not concern us further.

7. The Plaintiff alleged in para. 7 of the plaint that the amount due to the Midnapur Zamindari Company had been satisfied out of the usufruct.

8. Written statements were filed by Defendant No. 1, by Defendants Nos. 2 to 4 and by Defendant No. 8.

9. Defendant No. 8, in his written statement, asserted that his original deposit had not been satisfied from the income of the estate; that, on the contrary, he had advanced further sums to pay the head rents; and that he had a statutory mortgage lien on the property in respect of the deposit and of these advances; and he contended that the Plaintiff and the puisne mortgagees were not entitled to any relief against him, or to put the mortgaged property sale without first satisfying his claims.

Issues were framed.

Issue No. 11 reads:

What is the legal position of the Defendant No. 8, so far as the Plaintiff is concerned? Can the Defendant No. 8 claim priority over the mortgage of the Plaintiff? If so, is Defendant No. 8 entitled to priority in respect of the first deposit u/s 13 of Regulation VIII of 1819 or is it also entitled to priority in respect of subsequent advances, if any?

And issue No 13 reads:

Has the sum deposited by the Defendant No. 8 u/s 13 of Regulation VIII of 1819 been paid off as alleged by the Plaintiff? Have the legal dues of the Defendant No. 8 been paid off as alleged?

10. On issue No. 13, the learned Subordinate Judge found that the sum deposited u/s 13 of the Regulation and the legal dues of Defendant No. 8 had not been paid off.

11. On issue No. 11, the learned Subordinate Judge held that the Defendant No. 8 did not acquire a first charge on the patni taluk by virtue of his deposit u/s 13 of Regulation VIII; and that the Defendant No. 8 could not claim any priority over the Plaintiff and the puisne mortgagees in respect of the advances made by him in order to pay the head rents. The learned Subordinate Judge, accordingly, decreed the suit against Defendants Nos. 1 to 5 and 7 and 8, determined the amount due to the Plaintiff under his mortgage and directed Defendants Nos. 1 to 5 and 7 and 8 to pay the amount due in four instalments and ordered that in default of such payments, the mortgaged property be sold. The learned Subordinate Judge did not determine the amounts due to Defendant No. 8 or to the puisne mortgagees.

Defendant No. 8 has appealed.

Mr. Gupta for the Appellant contended--

1. that the lien acquired by the Appellant by his deposit u/s 13 of Regulation VIII takes precedence over all other mortgages;

2. that subsequent advances by Defendant No. 8 to pay the head rents and so preserve the estate for the benefit of all, also take precedence over all other mortgages.

12. Mr. Gupta also contended that the Appellant, after taking possession of the taluk, was entitled to deal with each year's receipts as follows:

He was first to deduct the expenses of collection; from the balance he was to pay as far as possible the head rent due to the zemindar; from the balance, if any, he was entitled to purchase subordinate tenures at the request of the patnidar, from the balance, after these payments, he was entitled first to recoup himself for any advances made in order to pay the head rent to the zemindar and then to pay off the original deposit u/s 13.

13. Mr. Gupta also contended that the dues of the Appellant should have been

ascertained and a decree passed either in form No. 9 or form No. 10 of appendix D to the Code of Civil Procedure. The Plaintiff filed a cross-objection, claiming that the amount due was larger than that allowed in the decree.

14. That cross-objection has not been pressed. A cross-objection by the successors of the mortgagor was filed, in which it was urged that the Court should have ascertained the dues of the puisne mortgagees and of Defendant No. 8. Another cross-objection was filed by Defendants Nos. 2, 3 and 4, in which they questioned the Subordinate Judge's findings on issue No. 13 and urged that Defendant No. 8 had acquired no charge or lien over the properties in suit.

15. The first question for our consideration is:

Does the original deposit u/s 13 of Regulation VIII of 1819 take precedence over all other mortgages?

16. Mr. Gupta conceded that this Court had held in *Ramjiban Bhadra v. Tazuddin Kazi* (1911) 15 C.W.N. 404 that a darpatnidar did not, by virtue of a deposit u/s 13 of Regulation, acquire a first charge on the property, but he contended that this decision could no longer be regarded as good law or as binding on us in view of the decision in *Forbes v. Maharaj Bahadur Singh* (1914) ILR 41 Cal. 926 : L.R. 41 IndAp 91. Mr. Gupta contended that in *Ramjiban Bhadra v. Tazuddin Kazi* two questions were decided, namely--

(a) that Section 13(fourth) of Regulation VIII of 1819 does not create a first charge, i.e., a salvage lien, and

(b) that Section 13(fourth) provides two alternative remedies and that election must be made between the two.

17. He contended that the judgment in *Forbes and Maharaj Bahadur Singh* clearly overrules the second of these findings and is inconsistent with the first. It is, therefore, necessary for us to examine these decisions with some care.

18. In the case of *Ramjiban Bhadra v. Tazuddin Kazi* the darpatnidar made a deposit and took possession u/s 13 of Regulation VIII. He subsequently advanced loans from his own pocket to pay the head rents, but ultimately defaulted and the taluk was sold under the provisions of the Regulation. The purchaser was one who had held a mortgage of the patni, executed by the patnidar at a date prior to the deposit u/s 13 of Act VIII by the darpatnidar. The darpatnidar sued to recover his dues out of the surplus sale-proceeds, claiming that, in respect of his original deposit and of his subsequent advances, he was entitled to priority over the mortgagee.

19. This Court held that Section 13(fourth) of Regulation VIII of 1819 does not create a first charge. The Court further held that, inasmuch as the Regulation provided a particular relief, it was doubtful whether the darpatnidar could claim another relief by setting up a salvage lien such as that given by Section 171, Bengal Tenancy Act, but that, if it was open to a darpatnidar making such a

deposit to set up such a salvage lien, he would have to elect whether to claim the relief provided by the Regulation or to claim relief under the salvage lien. In that case, inasmuch as the darpatnidar had availed himself of the relief provided by Section 13 of Regulation and had taken possession of the property, he was not entitled to claim relief on the basis of a salvage lien.

Thus the Court decided--

(a) Section 13 of Regulation VIII does not create a first charge i.e., a salvage lien;

(b) that it was doubtful whether, in the case of a deposit by a darpatnidar, that any salvage lien was created; the reason given for holding that it was doubtful was that the section provided a remedy which was not a salvage lien; and

(c) that if a salvage lien was also created by such a deposit, the darpatnidar could not avail himself of that lien, if he availed himself of the special relief provided by Section 13 of Regulation VIII.

20. Forbes v. Maharaj Bahadur Singh was an appeal from a decision of this Court reported: Maharaj Bahadur Singh v. Forbes (1908) ILR 35 Cal. 737.

21. The facts of the case were as follows:

In 1893, Rai Dhanpat Singh, owner of a zamindari, transferred that zamindari to Mussammat Bhagwanbati Chaudhurani, reserving to himself arrears of rent due from patnidars. In 1896, Rai Dhanpat Singh obtained a decree for arrears of rent against the patnidar (Chattrapat Singh) in respect of arrears which fell due prior to the transfer in 1893. The patnidar was in arrears with regard to rent of subsequent years and the zemindar, Bhagwanbati Chaudhurani, took action under Regulation VIII of 1819 and had the patni taluk advertised for sale. Thereupon, Forbes, a darpatnidar, made a deposit u/s 13 of the Regulation and had the sale stayed. Forbes applied for and obtained possession of the taluk under the provisions of Section 13(fourth). Thereafter, another person purchased the patni in execution of a money-decree. The representative of Rai Dhanpat Singh, the original zemindar, sought to execute the decree obtained by him in 1896 against the patnidar and advertised the patni for sale u/s 166, Bengal Tenancy Act. Forbes, the darpatnidar, made an application in execution, which was disallowed and then instituted a suit for a declaration that the patni was not liable to be sold in execution of the decree of 1896. The first Court held that the decree of 1896 was not a decree which could be executed under the provisions of the Bengal Tenancy Act and that Forbes by his deposit u/s 13 of Regulation had acquired a first charge on the taluk. The first Court decreed the suit. The representative of the original zemindar appealed. This Court allowed the appeal, holding that the decree of 1896 was a decree for rent and that rent was a first charge on the patni; that the darpatnidar making a deposit u/s 13 of Regulation had a lien, but not a first charge on the patni and that, therefore, the decree of 1896 was entitled to priority over the darpatnidar's lien. The Judicial Committee

held that the right to bring the tenure or holding to sale exists only so long as the relationship of landlord and tenant exists and that, as the original zemindar had parted with the zamindari before he obtained his decree for arrears of rent in 1896, his representative was not entitled u/s 65 of the Bengal Tenancy Act to put the holding to sale. In other words, the decree of 1896 was a money-decree and not a rent-decree. But their Lordships added that there was another equally fatal objection to the claim of the representative of the original zemindar. They pointed out that, prior to the Bengal Tenancy Act, rent was not a first charge on the tenure or holding, that it was made a first charge by that Act, which however in Section 195 provided that nothing in the Act should affect any enactment relating to patni tenures, so far as it relates to those tenures. Therefore, inasmuch as the darpatnidar's lien was created by Regulation VIII, that lien was not affected by the provision in the Bengal Tenancy Act that the rent should be a first charge. In other words, the rent was not a charge having priority over the lien created by Section 13 of Regulation VIII of 1819. I am unable to hold that their Lordships in this case decided that the lien acquired by the darpatnidar, making a deposit u/s 13 of Regulation, had priority over any other mortgage. They merely held that rent, which would be a charge prior to most other charges, would not have priority over the darpatnidar's lien and this, owing to the specific provision of Section 195, Bengal Tenancy Act.

22. Mr. Gupta laid special emphasis on the following paragraph in the judgment of the Privy Council, viz.--

It will be seen, therefore, that the Appellant in this case, by his admitted deposit of the arrears for which the superior tenure was advertised for sale at the instance of the Chaudhurani zemindar, acquired the special lien created by the Regulation which may well be called a statutory salvage lien arising not from any implication of the law but under the express directions and declarations of the Act.

23. Mr. Gupta contended that by this observation, their Lordships held that the lien created by the Regulation was a salvage lien and that, therefore, all the consequences attaching to a salvage lien attached to it.

24. We are unable to accept this view. Their Lordships throughout the judgment made it clear that the lien was created by the Regulation and they did not consider whether, apart from the Regulation, any salvage lien would be created by such a deposit. Indeed, by inference, it seems that their Lordships held that there was no question of any lien created other than by the statute--because, if a salvage lien had been created other than by the statute, the reservation in Section 195 would scarcely be applicable.

25. Therefore, their Lordships held that the depositor's right was created by the statute and was merely the right defined in the statute. But they described that right as "a statutory salvage lien." We are unable to read this as meaning a right having all the incidents of salvage liens known to Maritime Law or to the Irish

Courts. In our opinion, the words were used merely as descriptive of the right and were not intended to indicate the legal consequences of the right or to suggest that rights in excess of those specifically mentioned in the Regulation were acquired by the depositor.

26. It seems worthy of note that this Court held specifically that a darpatnidar, making a deposit, acquired a lien, but not a first charge and this finding was not specifically overruled by the Privy Council.

27. We are unable therefore, to hold that the decision in Ramjiban Bhadra. Tazuddin Kazi must no longer be regarded as good law in view of the decision in Forbes v. Maharaj Bahadur-Singh.

28. It is now necessary to consider whether, independently of Section 13 of Regulation VIII, a darpatnidar by making a payment of the head rent due to the zemindar, thereby preventing the patni being sold for arrears and thereby protecting the interests of all incumbrances, acquires a "salvage lien" taking priority over all other liens. In this connection, our attention was drawn to an observation of the Judicial Committee in *Nugender Chunder Ghose v. Kaminee Dossee* (1867) 11 M.I.A. 241, 258. One of the questions which arose in that case was whether a mortgagee making deposit, u/s 9 of Act I of 1845, of arrears of Government revenue and thereby preventing the estate from being sold for arrears, acquired a lien on the estate. The section merely provided that the depositor "shall be entitled to recover the amount of the deposit "with interest from the proprietor of the said estate." The High Court held that, under the section, only a personal right against the proprietor was given and that no equitable lien on the estate was created. The Privy Council observed:

Considering that the payment of the revenue by the mortgagee will prevent the taluk from being sold, their Lordships would, if that were the sole question for their consideration, find it difficult to come to any other conclusion, than that the person who had such an interest in the taluk as entitled him to pay the revenue due to Government and did actually pay it was thereby entitled to a charge on the taluk as against all persons interested therein for the amount of money so paid.

29. At first sight this seems to be a clear recognition that, independently of the statute, a salvage lien was created by the deposit in such circumstances. The meaning of this observation was considered by a Full Bench of this Court in *Kinu Ram Das v. Mozaffer Hosain Shaha* (1887) ILR 14 Cal. 809 and it was held by a majority of the Judges, that, in spite of this observation, no salvage lien was created by such a deposit.

30. In our opinion, the interpretation placed by the Full Bench on the dictum of the Privy Council is binding on us, unless it has since been overruled. The matter came again before the Privy Council in *Manohar Das Mohanta v. Hazarimull* (1931) ILR 59 Cal. 463 : L.R. 58 IndAp 341, which was a case involving the deposit by a mortgagee u/s 9 of Act XI of 1859, whereby the estate was saved

from sale for arrears of Government revenue. Their Lordships referred to the case of *Nugender Chunder Ghose v. Kaminee Dossee* (supra) and quoted with approval the passage cited above, but again they did not hold that a "salvage lien" was created independent of the statute.

31. In our opinion, the repetition of the above passage in this later ruling cannot be interpreted as overruling the interpretation put upon the passage by the Full Bench.

32. We are, therefore, of opinion that no "salvage lien" independent of statute was created by the darpatnidar making a deposit.

33. It follows, therefore, that the darpatnidar merely obtained a lien which would be postponed to all the prior mortgages.

34. Mr. Gupta drew our attention to the amendment to Section 13 of Regulation VIII of 1819 effected by Section 7 of Bengal Act XV of 1940. By this amendment, two clauses were added to the section, providing that a "salvage lien" of the nature of that provided by Section 171, Bengal Tenancy Act, be created in favour of any person whose interests are affected by the sale of a patni taluk or a share or a portion thereof, who makes a deposit and thereby prevents the sale. It was pointed out that the right conferred on a darpatnidar under the old law was maintained intact and it was argued that this was an indication that the legislature regarded the original section as giving to the darpatnidars rights at least as extensive as those conferred by the amendment on other persons whose interests are affected. We are unable to accept this view. It follows from what has been stated above that Defendant No. 8 did not obtain a lien having priority over any of the mortgages in the present case, either by virtue of his original deposit or by virtue of his subsequent payments of the, head rent.

35. The question then arises whether the darpatnidar (Defendant No. 8) was entitled to add the amounts of his subsequent payments to the original charge under the provisions of Section 72 of the Transfer of Property Act. In this connection, our attention was drawn to Section 59A of the Act and it was contended that, before this could be done, notice of the intended payments must be given not only to the mortgagor but also to the puisne mortgagees. In our opinion, it is not reasonable to give Section 59A such a wide meaning and we consider that the section refers only to such persons as heirs executors and assigns, who derive title as mortgagor or mortgagee.

36. In our opinion, the learned Subordinate Judge was right in holding that the letters Exs. 1 and M series show that sufficient notice was given to enable the darpatnidar to add the amounts of these payments to the original charge. It was agreed by all parties before us that it is desirable that the dues of the puisne mortgagees and of the darpatnidar (Defendant No. 8) be determined in this suit and that a decree be drawn up in form No. 9. If this is to be done, the method of accounting must be determined; and the question arises whether the darpatnidar, being a mortgagee in possession, was entitled to apply the net

income of any year to purchasing subordinate tenures or to liquidation of subsequent advances before applying it to the satisfaction of his claim in respect of the original deposit. Reference was made to the case of Behari Lal Biswas v. Nasimannessa Bibi (1927) 27 C.L.J. 480 in which Beachcroft J. clearly expressed the opinion that a darpatnidar, making a deposit under Regulation VIII, is not entitled to add to his demand the rent paid to the superior landlord for the years during which he was in possession. This was at best an obiter dictum and purported to be based on an earlier decision of this Court. But that earlier decision does not support this view. We are of opinion that the darpatnidar is entitled u/s 72, Transfer of Property Act to add the subsequent payments to his original deposit.

37. In considering how the mortgagee in possession is to apply the net income of the property, it must be borne in mind that the holder of a simple mortgage is entitled merely to have the corpus kept intact and preserved from waste, etc. and he has no interest in the manner in which the income from the property is spent. We can see no reason why the mortgagee in possession should not spend the income in any way agreed upon between him and the mortgagor, provided that the security of prior mortgagees is not thereby imperilled. It is clear that if the darpatnidar spent the income in purchasing subordinate tenures in auction sale, the security of the prior mortgagees, far from being imperilled, was improved. In our opinion, the darpatnidar was entitled, at the request of the mortgagor, to devote the income of any year to the purchase of subordinate tenures, thus enhancing the value of the security. We are, therefore, of opinion that Mr. Gupta was right in urging that his clients were entitled to devote the receipts of any particular year to payments in the following order, viz.:

- (a) payment of expenses of collection,
- (b) payment of patni rent to zemindar,
- (c) purchase of subordinate tenures if requested to do so by the patnidar,
- (d) liquidation of his own claims against the patnidar for advances made subsequent to his original deposit, and
- (e) payments towards the original deposit.

38. The result is that the appeal is allowed in part only. The finding of the learned Subordinate Judge that the deposit of the Defendant No. 8 and his subsequent payments of rent do not have priority over the prior mortgages is upheld, but the suit is * remanded to the lower Court for determination of the dues of the puisne mortgagees and of Defendant No. 8 in order that a decree in form No. 9, App. D, First Schedule of the CPC be drawn up. The parties will be allowed to adduce additional evidence on this point if they so desire. The cross-objections other than that dealt with above were not pressed.

39. As the main contentions of the Appellant have been overruled and as the Appellant failed in the Court below to provide material from which the amount

due to him could be determined, we direct that the Appellant do pay the costs of the appeal to the contesting mortgagee Respondents. There will be one set of costs to be divided among the contesting Respondents.

G.N. Das, J.

40. I agree.