

(1956) 12 PAT CK 0010

In the Patna High Court

Case No : First Appeal No. 429 of 1951 and Miscellaneous Appeal No. 226 of 1950

Sailendra Narayan Bhanj Deo

APPELLANT

Vs

Jagat Kishore Prasad Narayan Singh

RESPONDENT

Date of Decision : 04-12-1956

Acts Referred:

Bihar Land Reforms Act, 1950 — Section 35
Bihar Tenancy Act, 1885 — Section 171
Civil Procedure Code, 1908 (CPC) — Order 22 Rule 6, 9
Transfer of Property Act, 1882 — Section 76, 77

Citation : AIR 1957 Patna 564 : (1957) 5 BLJR 493

Hon'ble Judges : Rai, J;Kanhaiya Singh, J

Bench : Division Bench

Advocate : R.S. Chatterji, Ramanugrah Prasad and Sukumar Chatterji, for the Appellant; Lalnarain Sinha and L.M. Sharma, for the Respondent

Final Decision : Dismissed

Judgement

Kanhaiya Singh, J.—These appeals, First Appeal No. 429 of 1951 and Miscellaneous Appeal No. 226 of 1950, were heard together as they arise out of the same transaction and involve common facts, and this judgment will govern both. It will be more convenient to deal with them separately.

2. F. A. 429/51. -- The First Appeal has been brought from the judgment of the Additional Subordinate Judge, dated 22nd August, 1951, by which he decreed the plaintiff's suit for accounts. The facts may be shortly put as follows. The dispute relates to the estate of late Chandreshwar Prasad Narayan Singh, the proprietor of Maksudpur Raj. On 17-2-1924 he executed in favour of Raja Bahadur Sir Rajendra Narayan Bhanj Deo of Kanika, whose son Raja Sailendra Narayan Bhanj Deo is the defendant in the suit (hereinafter referred to as the Raja of Kanika), a simple mortgage hypothecating the properties mentioned in Schedule A to the plaint to secure repayment of Rs. 4,00,000.

On 1-6-1935 the Raja of Kanika instituted Mortgage Suit No. 27 of 1935 in the Court of the 3rd Subordinate Judge, Patna, to enforce the said mortgage and on 22nd April, 1936, obtained a preliminary decree for Rs 6,00,000 which decree was made final on 16-3-1937. In 1938 he levied execution of the decree in Execution Case No. 13 of 1938, and the Court ordered execution by appointing a Receiver as provided in Section 51 of the Civil Procedure Code. The Receiver appointed by the Court was no other than the judgment-debtor himself, namely, Chandreshwar Prasad Narayan Singh. This appointment was made on 20-12-1938, and he worked as a Receiver till 4-5-1940 when he was succeeded by Mr. Ramanugrah Prasad, Advocate, as a Receiver.

3. The mortgaged property constituted the mokarrari tenure of the mortgagor who had undertaken under the mortgage the liability to pay to the superior landlord the rent of the tenure which came to Rs. 21,330-3-6 including cess. The proprietor of this tenure was Rani Bhuneshwari Kuer, the Rani of Amawan and the owner of seven annas Tikari Raj. She had mortgaged her proprietary interest usufructually to the Maharaja of Darbhanga. When the rent of the tenure in question fell into arrears the Maharaja of Darbhanga as a mortgagee-proprietor started certificate proceedings for realisation of the arrears and obtained in 1940 a certificate for the arrear rents of the tenure amounting to Rs. 83,267.

In execution of the certificate the Darbhanga Raj brought the tenure to sale and in order to protect his interest as a mortgagee of the tenure the Raja of Kanika deposited the entire certificate dues in Court on 28th September, 1940, in accordance with the provisions of Section 171 of the Bihar Tenancy Act and obtained delivery of possession on 23-11-1940 in respect of the villages mortgaged to him as described in Schedule A to the plaint and the other villages which were out- side the mortgage as mentioned In Schedule B to the plaint.

4. It will appear from the above that the position towards the end of 1940 was that the Raja of Kanika in execution of whose mortgage decree Mr. Ramanugrah Prasad, Advocate, had been appointed Receiver, obtained possession of the mortgaged property as well as other villages and was in possession of those villages as a mortgagee by virtue of the provisions of Section 171 of the Bihar Tenancy Act. On 23rd September, 1941, Chandreshwar-Prasad Narayan Singh, it is alleged, executed a will in respect of his entire estate in favour of Kumar Jagat Kishore Narayan Singh, the plaintiff, who is his daughter's son.

About 5 days after the execution of the will he died on 28-9-1941 leaving him surviving four daughters, namely, Janak Kishori Devi, Girja Kishori Devi, Raj Kish"ori Devi and Krishna Kishori Devi (mother of the plaintiff). On 10-12-1945 the plaintiff obtained from the High Court a probate of the will.

5. Mr. Ramanugrah Prasad, Advocate, who was the Receiver in the execution of the mortgage decree continued to be so till February 1949, and by the order of the High Court dated 17-2-1949 the plaintiff was appointed Receiver in his place. He obtained charge from Mr. Ramanugrah Prasad on 28-9-1949, As the executor

and the principal legatee under the last will and testament of Chandreshwar Prasad Narayan Singh, the plaintiff became the mortgagor, and he was also the Receiver appointed by Court. In his dual capacity as Receiver and mortgagor he instituted the present suit on 20th September, 1949, for redemption of the mortgages, and possession of the mortgaged properties after rendition of account by the defendant.

He averred that the defendant was liable to render accounts to him in respect of receipts and disbursements of the usufruct of the said properties, that the amount of the usufruct received by the defendant far exceeded the mortgage moneys under the two mortgages, that he was liable to refund to the plaintiff the surplus in his hands and that he had refused a demand for accounts.

6. The defendant opposed the plaintiff's claim substantially on the grounds that the plaintiff was incompetent to maintain the suit, that he was not at all accountable to the plaintiff u/s 171 of the Bihar Tenancy Act and that he was entitled in law to remain in possession until the entire sum of Rs. 83,267 was paid off with interest. There was a further plea that the income of the estate had considerably diminished and there was practically no saving.

7. Several issues were framed in the suit; out of which three, namely, issue No. 8 relating to the amount of rent and profit the defendant has and might have received during his possession over the mukarrari tenure in question u/s 171, Bihar Tenancy Act, issue No. 9 relating to the question whether any portion of the mortgage due still remained unsatisfied, and issue No. 10 regarding the amount of rent and cess payable for the tenure in question, were by consent of the parties left to be determined by the pleader commissioner who, in the event of decree, will be eventually appointed to take the accounts.

The parties went to trial only on two main issues, namely, whether the plaintiff was competent to maintain the suit and continue the proceedings, and whether the defendant was liable to render accounts of the usufruct of the properties in his possession by virtue of the provisions of Section 171 of the Bihar Tenancy Act.

8. The learned Subordinate Judge held that the suit was maintainable and that the defendant was accountable to the plaintiff and decreed the suit with costs.

9. Mr. R.S. Chatterji appearing for the appellant has advanced three-fold arguments. First, he contended that because of the cessation of the interest of the plaintiff both as a Receiver and as a legatee, the decree passed by the Court below was invalid and inoperative and the Plaintiff was incompetent to maintain and prosecute this appeal. It will be observed that during the pendency of the suit on 19-3-1951 the appointment of the plaintiff as a Receiver was set aside by the Supreme Court. Again, on 22nd August, 1951, the order of a Single Judge of this Court granting probate of the will was set aside in Letters Patent Appeal No. 3 of 1946, and the will was held to be forged.

It will be seen that on that very day, that is, on 22nd August, 1951, the learned

Subordinate Judge delivered judgment in the suit. It is quite plain that when the suit was first instituted there was no defect in the title of the plaintiff. On the contrary, the plaintiff, both as a Receiver and as the sole legatee under the probated will, was the only person entitled to institute the suit. As a legatee, He represented the entire estate of Maksudpur which embraced the disputed properties, and as a Receiver also he represented the estate in respect of the mortgaged properties.

So long as the order granting to him the probate of the will remained unrevoked Kumar Jagat Kishore Prasad Narayan Singh was, to all intents and purposes, the sole owner of the estate and, as such, he and he alone could represent the deceased and his estate (vide *Debendra Nath Dutt v. Administrator General of Bengal*, ILR 35 Cal 955 (A)). When there was no initial defect in the institution of the suit, the cancellation of his appointment as a Receiver could not cause abatement of the suit, as he in another capacity of the sole legatee under the probated will could legally continue the proceedings. It is true that on the date the judgment was pronounced the probate was revoked.

It is well to remember, however, that appeal against the judgment of the High Court revoking the probate is pending in the Supreme Court. The question is whether the decree, in the circumstances, was a nullity. The loss of his character as, legatee in consequence of the reversal of the order granting probate between the conclusion of the hearing and the pronouncing of the judgment had not the effect of arresting the prosecution of the suit and did not nullify the decree as a whole. At best it may be regarded as tantamount to his civil death as regards the present litigation. As laid down in Rule 6 of Order 22 of the CPC the death of any party after the conclusion of the hearing but before the pronouncement of " the judgment will not render the decree invalid.

That being so, the judgment will have the same force and effect as if it had been pronounced before the plaintiff ceased to represent the estate. The decree, in such a case, will enure to the benefit of those on whom the estate devolved, on Chandreshwar Prasad Narayan Singh, the last full male owner, dying intestate. The decree cannot, therefore, be said to be legally invalid. Apart from this, the defendant preferred this appeal and impleaded Kumar Jagat Kishore Prasad Narayan Singh as the respondent, and subsequently the four daughters of Chandreshwar Prasad Narayan Singh mentioned above appeared in this appeal and were, by an order of this Court dated the 22nd December, 1952, added as respondents to this appeal.

Thus, whatever irregularity, if any, was there has been removed, and they are competent, therefore, to defend the decree of the Court below. In my opinion, the decree cannot be regarded as void ab initio, and the contention of Mr. Chatterji is wholly untenable.

10. It was next contended by Mr. Chatterji that the respondent, as the statutory mortgagee u/s 171 of the Bihar Tenancy Act, is not at all accountable to the

mortgagor and that he is entitled in law to remain in possession until the entire amount of rent deposited by the mortgagee is paid off by the mortgagor independent of the appropriation by him of the usufruct of the land in his possession. He submitted that the mortgagor was not at all entitled to the usufruct of the land so long as it was in possession of the mortgagee, as in law it was to be applied to the interest accruing due on the amount deposited, and that the only condition on which the property could be released of the mortgage created u/s 171 of the Bihar Tenancy Act was the payment of the amount deposited by the mortgagee irrespective of the profits he had derived from the lands. He further urged that Section 171 of the Bihar Tenancy Act should be read subject to the provisions of Section 77 of the Transfer of Property Act.

In order to appreciate his argument, it will be necessary to determine the nature and character of the mortgage created by Section 171 of the Bihar Tenancy Act. Section 170 of the Bihar Tenancy Act lays down the conditions on which a tenure or holding may be released from attachment. The attachment may be lifted only when either the amount of the decree including the costs of execution and sale are paid, or the decree-holder applies for the release on the ground of satisfaction of the decree out of Court, before it is knocked down to the auction-purchaser. Sub-section (3) of Section 170 prescribes the persons who can deposit the decretal amount.

According to this sub-section only two persons are qualified to make the deposit to secure release of the tenure or holding from attachment, namely, (1) the judgment-debtor, and (2) any person whose interests are affected by the sale. Section 171 enumerates the rights and privileges of the depositor. It lays down :

"1. When any person having, in a tenure or holding advertised for sale under this Chapter, or in execution of a certificate for arrears of rent due in respect thereof, signed under the Bihar and Orissa Public Demands Recovery Act, 1914, an interest which would be avoidable upon the sale, pays into Court the amount requisite to prevent the sale --

(a) the amount so paid by him shall be deemed to be a debt bearing interest at twelve per centum per annum and secured by a mortgage of the tenure or holding to him ;

(b) his mortgage shall take priority of every other charge on the tenure Or holding other than a charge for arrear of rent; and

(c) he shall be entitled to possession of the tenure or holding as mortgagee of the tenant, and to retain possession of it as such until the debt, with the interest due thereon, has been discharged.

2. * * * * "

Under this section, the amount so deposited will be deemed to be a debt bearing interest at 12 per centum per annum and will further be deemed to be secured by a mortgage of the tenure or holding. In other words, this section creates a

statutory mortgage of the tenure or holding, in order to avert the sale of which the amount had been deposited and the person making the deposit has been given the right to obtain possession of the holding or tenure and to retain possession until the debt with interest due thereon has been discharged. It is noteworthy that the amount of interest which he is entitled to charge on the amount so paid by him has been fixed by statute, and it cannot exceed in any event 12 per centum per annum.

Further, unlike other mortgages under the Transfer of Property Act, there is absolutely no correspondence between the amount deposited and the area of the holding or tenure. Under this section the person making the deposit is entitled to possession of the entire tenure or holding, irrespective of the amount deposited by him. The consequence of this provision is that the income from the tenure or holding may be much, whereas the amount deposited may be very small. Assume, there is a holding of 50 bighas yielding an annual income of Rs. 500, whereas the amount for which the holding was attached and brought to sale was only Rs. 200. The person depositing Rs. 200 will be entitled to take possession of the entire 50 bighas of the land, although the annual income was Rs. 500.

The amount paid has no relation, therefore, to the area of the holding taken possession of by him. The mortgage that comes into operation is unlike the mortgage effected by private bargain where the area of the land mortgaged is determined and fixed after due consideration of the amount of the mortgage money and the rate of interest agreed to by the parties. Section 171 imposes a mortgage on the tenure or holding, as the case may be, independent of the will of the mortgagor or the mortgagee and a person making a deposit u/s 170 of the Bihar Tenancy Act cannot claim a right higher than that conferred upon him by Section 171. The nature of the mortgage that comes into operation u/s 171 is that of a usufructuary mortgage.

It does not seek to create a mortgage different from the kind of mortgages laid down in the Transfer of Property Act. Further, the rights and duties of the mortgagor and the mortgagee have not been provided therein. In the absence of any such provision or limitation, the rights and liabilities of the mortgagor and the mortgagee will naturally be regulated in accordance with the general law as embodied in the Transfer of Property Act.

11. Now, the usufructuary mortgage has been defined by Section 58(d) of the Transfer of Property Act as follows :

"Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and

the mortgagee an usufructuary mortgagee."

12. One of the essential characteristics of the usufructuary mortgage is that the rents and profits accruing from the mortgaged properties are appropriated by the mortgagee in lieu of interest, or payment of the mortgaged money, or both, as may be agreed to between the parties. There is no contract here and, therefore, the question of appropriation of the usufruct will have to be determined with reference to the provisions of Section 171. This Section does not lay down any mode of the application of the usufruct of the mortgaged land. It only fixes the rate of interest payable on the amount deposited at 12 per centum per annum,

Nor does it, expressly or impliedly, abrogate the statutory duties of the usufructuary mortgagee. There is, therefore, no reason why the statutory mortgagee shall not be subject to the same rights and liabilities as the one under the Transfer of Property Act. The liabilities of the usufructuary mortgagee have been enumerated in Section 76 of the Transfer of Property Act. They have to perform several duties concerning the property in mortgage. The duties which are relevant for the present purpose are those embodied in Clauses (g) and (h) of Section 76. Clause (g) requires the mortgagee to keep clear, full and accurate accounts of all sums received and spent by him as mortgagee, and, at any time during the continuance of the mortgage, give the mortgagor, at his request and costs, true copies of such accounts and of the vouchers by which they are supported.

Clause (h) prescribes the mode of accounting and the manner of application of the usufruct of the mortgaged property. It provides that the receipts of the mortgagee from the mortgaged property, or, where such property is personally occupied by him, a fair occupation rent in respect thereof, shall, after deducting the expenses properly incurred for the management of the property and the collection of rents and profits and the other expenses mentioned in Clauses (c) and (d), and interest thereon, be debited against him in reduction of the amount, if any, from time to time due to him on account of interest and, so far as such receipts exceed any interest due, in reduction or discharge of the mortgage money; the surplus, if any, shall be paid to the mortgagor.

The liabilities of the usufructuary mortgagee, as provided in Clauses (g) and (h) are absolute, and, subject to Section 77 of the Transfer of Property Act, the parties are not at liberty to contract themselves out of the liability imposed upon them by statute. The provisions of Section 76 govern, in my opinion, all usufructuary mortgages, statutory or contractual. The combined effect of Section 171 of the Bihar Tenancy Act and Section 76 of the Transfer of Property Act is that like the usufructuary mortgagee under the Transfer of Property Act, not falling under the provisions of Section 77 of the Transfer of Property Act, the statutory mortgagee u/s 171 of the Bihar Tenancy Act is liable to render account to the mortgagor of the receipts from the mortgaged property and is further under a legal obligation to apply the receipts of the mortgaged property, after deducting the legal charges and expenses to the payment of interest at 12 per

centum per annum on the principal sum deposited and the balance to the discharge of the debt, and if after the liquidation of the entire debt and the interest accrued due thereon there is some surplus, that surplus has to be paid to the mortgagor.

The mortgagor has thus a legal right to demand accounts and also to recover possession of the tenure or holding, if the amount deposited has been discharged from the mortgaged property and also to claim from the mortgagee a refund of the surplus in his hands. This is the position that emerges u/s 171 of the Bihar Tenancy Act. If that be the position, then the plain meaning of Section 171 does not support the contention of Mr. Chatterji. If his contention were to prevail and if the entire usufruct of the land were to be appropriated only towards the Interest accruing due on the amount, the mortgagee will recover from the mortgagor-tenant by way of interest an amount far in excess of the original debt, and the statutory limitation of the interest to 12 per centum per annum will be rendered nugatory.

Mr. Chatterji did not contend that the provisions of the Transfer of Property Act will not govern such mortgages. If the provisions of the Transfer of Property Act applied, and there is no dispute about that, then there is no doubt at all about the accountability of the mortgagee to the mortgagor. Mr. Chatterji was conscious of the unconscionable nature of the bargain which will emerge consistent with his interpretation, and he submitted, therefore, that such a stringent provision has been enacted in Section 171 of the Bihar Tenancy Act in order to bring, pressure upon the tenant to make prompt repayment of the amount.

It is difficult to conceive that the legislature wanted to punish the defaulting tenant and benefit the depositor. The reasonable assumption is that the intention of the legislature was to square up the equities between the mortgagor and the statutory mortgagees, and while providing for deprivation of the tenant of his holding it assumed at the same time that the possession would not continue longer than what was necessary to discharge the debt. His contention will bring about a complete stalemate. All that Section 171 of the Bihar Tenancy Act says is that the statutory mortgagee will retain possession of the holding or tenure until the debt with interest due thereon has been discharged.

It does not prescribe the manner of discharge. It does not say that the discharge can be brought about only by repayment of the interest. If that was the intention of the legislature, it was very easy for it to provide therein specifically that the entire usufruct will be applied towards the payment of interest. Mr. Chatterji, however, urged that the proper section of the Transfer of Property Act which governed the present case was Section 77 of the Transfer of Property Act. This section provides an exception to the provisions of Section 76 and saves contracts especially made by the parties for the application of the usufruct in the manner laid down therein.

The effect of the provisions of Section 77 is that the absolute liability arising

under Clauses (b), (d), (g) and (h) in Section 76 does not apply to cases where the parties have entered into a contract that the receipts from the mortgaged property shall be taken in lieu of interest on the principal money or in lieu of such interest and defined portions of the principal. Where there is no such special contract, as in the present case, the general provisions of Section 76 will apply. Section 77, therefore, has clearly no application. There is thus no force in the contention of Mr. Chatterji.

The view I have expressed above is amply supported by authorities. Reference may be made to *Mt. Bibi Ganshul Fatma and Others Vs. Badri Singh and Another*, and *Satdeo Singh and Another Vs. Kamal Singh and Others*, . The case of *Ram Lal Jha Another Vs. Thakur Das and Another*, , relied upon by Mr. Chatterji has no application, because this point was not specifically raised and decided therein. At any rate, that is a Single Judge case, and I am not inclined to adopt the views expressed therein in preference to the decisions of the two Division Bench cases referred to above. In my considered opinion, the appellant is liable to render account to the respondent of the rents and profits received by him from the mortgaged property, and the contention of Mr. Chatterji must be overruled.

13. Lastly, it was contended by Mr. Chatterji that the provisions of Section 35 of the Bihar Land Reforms Act bar the suit out of which this appeal arises. - It appears that during the pendency of this appeal the estate of Chandreshwar Prasad Narayan Singh deceased vested in the State of Bihar under the Bihar Land Reforms Act in May, 1952, and the State of Bihar obtained possession in about August, 1952. On the respondent's application, the State of Bihar also was impleaded as a party in this Court. As required by the provisions of Section 14 of the Bihar Land Reforms Act, the appellant preferred a claim before the Claims Officer, Gaya, in respect of both the simple mortgage bond of 1924 and the said statutory mortgage.

The Claims Officer registered two cases, namely, Case No. 2 of 1952/4 of 1954 relating to the simple mortgage, and Case No. 3 of 1952/ 5 of 1954 relating to the statutory mortgage. In both the cases, the daughters of Chandreshwar Prasad Narayan Singh deceased, who are respondents in this appeal, were impleaded as parties. The respondents did not enter appearance in the latter case, and it was disposed of by the Claims Officer ex parte. By his order dated the 15th January, 1955, he fixed the amount which the mortgagee, namely, the appellant, was to recover from the mortgagors, namely, the respondents at Rs. 25,034/4/-, including interest, besides costs and pleader's fee of Rs. 32/-, with future interest at 4 per centum per annum simple on the principal amount of Rs. 20,68973/- until realisation.

It is submitted by Mr. Chatterji that the question of rendition of account has been finally and conclusively determined by a Court of competent jurisdiction, and by virtue of the provisions of Section 35 of the Land Reforms Act, it cannot be reopened, and the jurisdiction of the Civil Court is barred.

14. Section 35 of the Bihar Land Reforms Act provides as follows :

"No suit shall be brought in any Civil Court in respect of any entry in or omission from a Compensation Assessment-roll or in respect of any order passed under Chapters II to VI or concerning any matter which is or has already been the subject of any application made or proceedings taken under the said Chapters."

This section gives a finality to (i) Compensation Assessment-Roll, (ii) any order passed under Chapters II to VI of the Act and (iii) any matter which is the subject of any application made or proceedings taken under the aforesaid Chapters. We are not concerned in this case with Compensation Assessment-roll or the order passed under Chapters II to VI. Mr. Chatterji contended that the question involved in this suit is" really a matter which was the subject of the application made by the mortgagee before the Claims Officer.

His submissions are that the Claims Officer could not finally and effectually determine the amount payable to the mortgagee without taking into consideration the claims of the mortgagor, if any, against him, and thus the question raised in this appeal was substantially before the Claims Officer, and when once the Claims Officer has given his judgment and settled the claim under the statutory mortgage, a separate suit by the mortgagor for rendition of account by the mortgagee is incompetent, as, in effect, it will render invalid the order of the Claims Officer. He argued, therefore, that the order passed by the Claims Officer, though ex parte, was thus final and conclusive.

He relied strongly on the observations of Lord Esher, M. R., in *The Queen v. Commissioners for Special Purposes of the Income Tax* (1888) 21 QBD 313 (E), approvingly quoted by the Supreme Court in the case of *Rai Brij Raj Krishna and Another Vs. S.K. Shaw and Brothers*, , and contended that the jurisdiction entrusted to the Claims Officer to determine the claim of the mortgagee includes also the jurisdiction to determine whether the mortgagor had any claim against the mortgagee, and when the determination of this question was essential for the exercise of his jurisdiction to determine the claim of the mortgagee, the Order of the Claims Officer, even if erroneous, cannot be impeached collaterally.

He pointed out that the effect of a fresh determination of the claim of the mortgagee will Practically undo the order made by the Claims Officer and, consequently, such a suit by the mort-, gagor was barred under the provisions of the Land Reforms Act. The determination of this question depends upon whether the Claims Officer was competent to entertain and dispose of a claim by a mortgagor for redemption and rendition of account by the mortgagee. If such a matter was totally outside the jurisdiction of the Claims Officer, it cannot be regarded as a subject of the proceedings taken by the mortgagee under Chapter IV of the Act so as to attract the provisions of Section 35.

None of the provisions of this Act specifically bars the jurisdiction of the Civil Court in respect of such a suit by the mortgagor. On the contrary, some of the provisions of the Act indicate that the investigation of such a counter-claim by

the mortgagor was beyond the jurisdiction of the Claims Officer. There is a specific provision barring a suit by the mortgagee to enforce the mortgage. Section 4 (d) of the Act provides as follows;

"No suit shall lie in any Civil Court for the recovery of any money due from such proprietor or tenure-holder the payment of which is secured by a mortgage of, or is a charge on, such estate or tenure and all suits and proceedings for the recovery of any such money which may be pending on the date of vesting shall be dropped."

15. There is thus express provision debarring Civil Courts from entertaining any suit by a mortgagee for the recovery of any money, the payment of which has been secured by mortgage of the estate or tenure. There is no similar provision, express or implied, barring a suit by the mortgagor, for redemption of the mortgage and for accounts. The connected provision of Sub-section (5) of Section 24 of the said Act creates a charge for the amount settled under Chapter IV of the Act on the compensation determined and payable under the said Act in respect of the mortgaged estate or tenure and limits the amount of compensation payable to the secured creditors to the amount so settled.

The mortgagee, therefore, has no right under the mortgage other than the right to recover the amount determined under Chapter IV of the Act out of the compensation payable to the mortgagor proprietor or tenure-holder, as the case may be. If the usufruct received by the usufructuary mortgagee exceeds the principal amount and the interest accrued due thereon, there is no provision in the Act how the mortgagor shall recover the surplus in the hands of the mortgagee which, under law, is payable to him. It follows that the Eihar Land Reforms Act does not, expressly or by necessary implication, divest the Civil Court of its jurisdiction to entertain a suit by a mort-gagor against the mortgagee for redemption of the mortgage and for accounts.

This view is further reinforced by the fact that such a question is beyond the competence of the Claims Officer. Section 14 provides for the preferment of a claim by a mortgagee in respect of his mortgage before the Claims Officer. Sub-section (3) of Section 14 bars all claims, if any, not laid within the statutory period. Section 16 lays down the method of determining the amount which a secured creditor will be entitled to recover from the mortgagor. It is not necessary to quote here the whole section. I would reproduce only the provisions of Clauses (b) and (d) of Sub-section (2) of Section 16 which have a direct bearing on this question. They are as follows :

"(b) he shall ascertain the amount of the interest already paid or realised and shall set off towards the amount of the principal any amount paid or realised as simple interest in excess of six per centum per annum or the stipulated rate of interest, whichever is lower;"

"(d) if he finds that in any case the creditor has received or realised by way of interest an amount equal to or more than the amount of the principal, he shall

not allow any further interest to run on such principal;

Explanation.--In the case of a usufructuary mortgage, zarpeshgi lease or a satua patua lease of an estate or tenure, or in the case of possession of such estate or tenure or part thereof by a widow in lieu of her dower debt, the net amount of rents and profits accruing from such estate or tenure shall be deemed to be the interest for the purposes of the section."

They make it clear that notwithstanding any contract to the contrary the mortgagee cannot recover interest at a rate higher than 6 per centum per annum or the stipulated rate of interest, whichever is lower. In case of usufructuary mortgage the net amount of rents and profits accruing from the mortgaged estate or tenure shall be deemed to be the interest for the purpose of the section. Any amount realised by the mortgagee by way of interest in excess of the statutory rate shall be set off towards the amount of the principal. In case the amount of interest is equal to or more than the amount of the principal, there will be no further accrual of interest. It is easy, however, to conceive cases where the amount of interest paid by the mortgagor, or the net amount of rents and profits received by the mortgagee may exceed the principal amount and the interest thereon at the statutory rate.

Under Section 76 of the Transfer of Property Act, this surplus is recoverable by the mortgagor from the mortgagee. Now, Section 16, or, for the matter of that, any provision of the Land Reforms Act does not provide for the recovery by the mortgagor from the mortgagee of the surplus amount in the hands of the latter, nor is there any provision de-barring the mortgagor from realising the excess amount. It may be argued with some plausibility that in cases where the total amount of mortgage money and the interest accrued due thereon have been scaled down by the statute, the surplus in the hands of the mortgagee in the absence of any express provision to that effect is not recoverable. But, there may be usufructuary mortgages, under the terms of which the mortgagee is liable to re-fund to the mortgagor the entire amount of the usufruct received by him from the mortgaged property in excess of the principal amount and the stipulated interest, the rate of which may, in some cases, be higher than the statutory rate under clause (b) of Sub-section (2).

The position in respect of a statutory mortgage u/s 171 of the Bihar Tenancy Act is still worse. The amount deposited u/s 170 of the Bihar Tenancy Act may be very small, whereas the net amount of the profits from the holding or tenure which the depositor possesses u/s 171 of the Bihar Tenancy Act may be far in excess of the amount deposited and the interest accrued due thereon at the rate prescribed therein. Can it be said that in such cases also a mortgagor is without a remedy and cannot recover from the mortgagee, statutory or contractual, the surplus amount to which, as held above, he is legally entitled? In my opinion, the right of the mortgagor to recover the surplus amount from the Mortgagee cannot be taken away, and the jurisdiction of the Civil Court to entertain such suits cannot be ousted, unless it is so provided by the Land Reforms Act.

There is no provision, as discussed above, barring such suits. The fundamental principle of law is that where there is a right, there is a remedy, and as provided by Section 9 of the Code of Civil Procedure, the Courts shall have jurisdiction to try all suits of a civil nature, excepting suits of which their cognizance is either expressly or impliedly barred. This section recognises the power of the legislature to vest in another tribunal exclusive powers over any given subject-matter, and where exclusive jurisdiction is thus created by the legislature, the Civil Court evidently cannot interfere with it. But, there must be some provision, express or implied, which purports to take away the jurisdiction ordinarily possessed by a Civil Court.

On a proper construction of the relevant provisions of the Land Reforms Act it is evident that the Claims Officers cannot give full and complete relief to the parties. They have no power under the Act to direct the mortgagee to refund to the mortgagor the surplus amount in his hands. When they possess no such power, and the mortgagor has a right under law to recover that amount from the mortgagee, his remedy to enforce that right in a Civil Court is not barred. Such questions may incidentally arise before the Claims Officer, but when he is incompetent to give full and complete relief, the jurisdiction of the Civil Court is not ousted. It is futile to adjudge here the effect of the decree in such a suit on the order passed by the Claims Officer.

It may create anomaly in some cases, and it is likely that on the set-off of the decree against the claim of the mortgagee determined by the Claims Officer the mortgagee may not get anything from the mortgagor, and in some cases he may have to refund something to the mortgagor himself. The results may be anomalous, but the anomaly, however obnoxious to the parties, can not determine the jurisdiction of a Civil Court. It seems to me that while enacting the provisions of the Land Reforms Act, all the rights and liabilities of the mortgagor and the mortgagee arising under different situations were not fully taken into consideration, otherwise this anomaly would have been avoided.

Be that as it may, the fact remains that the Claims Officer has no jurisdiction over such a matter. It is not a case where the determination of the counter-claim of the mortgagor was essential to give jurisdiction to the Claims Officer to adjudge the claim of the mortgagee. It is a case where a substantial relief on a different cause of action had to be given, and it was beyond the competence of the Claims Officer. The present case, therefore, does not come within the mischief of the principles laid down by the Supreme Court in the case referred to above, and the suit, in my opinion, is maintainable. The contention of Mr. Chatterji is overruled.

16. In the result, the First Appeal fails and is hereby dismissed with costs.

17. M. A. 226/50.--In the title suit which gave rise to the First Appeal aforesaid the plaintiff filed an application under Order 38, Rule 5, Civil Procedure Code, for attachment before judgment of (1) the mortgage decree obtained by the

defendant; (2) Rs. 85,000/- deposited as security by the plaintiff on his appointment as a Receiver of the mortgaged property; and (3) Rs. 1,00,000/- deposited in Court by the Receiver to the credit of the defendant. He obtained an ad interim order of attachment. After hearing the parties, the learned Subordinate Judge by his order dated the 26th erf May, 1950, vacated the order of attachment. He however, made a direction that the defendant would not withdraw the money in deposit until the disposal of the suit or until further orders. The defendant has come in appeal, and his main grievance is that the Court should not have withheld the withdrawal by him of the sum of Rs. 1,00,000/- until the disposal of the suit.

18. It will be observed that the order of attachment was vacated, and this is not an appeal against any order concerning attachment. The Court has only debarred the defendant from withdrawing the sum of Rs. 1,00,000/- until the disposal of the suit. This order of the Court is not appealable. Mr. Chatterji however, has argued that this appeal may be treated as an application for revision of the said order. I am afraid, this cannot be done. The claim of the mortgagee has been settled under the provisions of the Land Reforms Act, as observed above. There is no evidence to show whether or not in fixing the amount the Claims Officer also took into consideration this sum of Rs. 1,00,000/-. This is purely a question of fact and does not come within the scope of the revisional jurisdiction. Therefore, this appeal cannot be treated as an application in revision. The appeal fails and is dismissed with costs.

Rai, J.

19. I agree.