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(1939) 01 PAT CK 0024

In the Patna High Court

Sourendra Mohan Sinha and Others APPELLANT

Vs

Kumar Jogendra Narain Sinha and Others RESPONDENT

Date of Decision : 27-01-1939

Acts Referred:

Citation : AIR 1939 Patna 467

Hon'ble Judges : Harington, J

Bench : Single Bench

Judgement

1. These three applications in revision are directed against an order of the learned Subordinate Judge of Bhagalpur in an Administration Suit (No. 617 of 1928) relating to the Maheshpur Estate in the district of the Santal Parganas. The suit was originally instituted at Pakaur in the Santal Parganas but was under the orders of this Court transferred to Bhagalpur. It appears that in about 1872 the estate was held by Maharani Janki Kumari who died on 20th February 1893. By a will she bequeathed it to her younger son, Indra Narain, her elder son Harendra Narain having pre-deceased her. Indra Narain died in 1896 leaving a widow, Radha Peari, and four sons Jogendra Narain, Devendra Narain, Jyanendra Narain and Fanindra Narain. By his will he had made his widow, Radha Peari, executrix of his estate. She took out probate and administered the estate till her death. Thereafter, the four sons of Indra Narain became executors of the estate under the terms of the will of Indra Narain. One of the sons, Devendra, died leaving a son Kali Kinker who is the plaintiff in the administration suit, while his uncles are defendants. Rai Bahadur Suraj Narain Singh, the ancestor of the petitioners, in Civil Revision No. 339 of 1938 had advanced on 30fch April 1874 to Maharani Janki Kumari a sum of Rupees 30,000 and obtained a mortgage from her.

2. Certain payments were made and later on the said Maharani executed a second mortgage in favour of the Rai Bahadur on 9th May 1881. The loans swelled up and on 6th January 1893 there was a third mortgage for Rs. 1,64,488-8-3 which included the amounts due under the two earlier mortgages also which had remained unpaid. There was on the same date another mortgage

for one lac of rupees by the Maharani and Kumar Indra Narain in favour of the Rai Bahadur. Then again on 10th March 1894, Kumar Indra Narain who, at that time had become the sole owner of the Maheshpur Estate executed a mortgage for two lacs of rupees in favour of the Rai Bahadur. This covered various sums advanced which need not be stated in detail. Thus, the Rai Bahadur held three mortgages, two dated 6th January 1893 executed by the Maharani and Kumar Indra Narain, one for Rs. 1,64,481 and the other for Rs. 1,00,000 and a third dated 10th March 1894 for Rs. 2,00.000 executed by Kumar Indra Narain alone.

3. The Rai Bahadur brought a suit to enforce the three mortgages in the Court of the Subordinate Judge of Murshidabad (Suit No. 368 of 1903). The claim was for Rs. 10,24,030. The Murshidabad Court was selected obviously to avoid the application of the special rule of interest prevailing in the Santal Parganas, viz. Section 6 of Regn. 3 of 1872, though the bulk of the properties mortgaged was situated in that district. The suit was contested and decreed and there was an appeal by the defendants to the Calcutta High Court where a compromise was effected. Its terms need not be mentioned here in detail. The decree was executed, an objection to its execution was disallowed and an appeal against the order was dismissed on 20th December 1915. Two suits were however instituted in the Court of the Subordinate Judge of Pakaur, one in 1914 by Rani Radha Peari, the executrix of the estate of her deceased husband, Kumar Indra Narain, and another in 1916 by some other members of the family. The first suit was for redemption of the aforesaid three mortgages in favour of Rai Bahadur Suraj Narain Singh on payment of Rs. 5,58,000 or for an injunction against the execution of the compromise decree which the Rai Bahadur had obtained in the High Court, and the second was for a declaration that the mortgage decree was invalid and in the alternative for redemption on taking accounts.

4. The first suit was by an order of the Calcutta High Court transferred to Alipur in the 24 Parganas, where a compromise was effected between all the parties concerned. It was to the effect that the amount of the decree of the Rai Bahadur be fixed at 17 lacs of rupees. This was to be paid in 22 instalments of Rs. 50,000 each and a 23rd instalment of 6 lacs of rupees. Each instalment was to be paid on 13th April of each year (last day of Chait of the Bengali era) commencing from 1917, and the last instalment of 6 lacs of rupees was payable on 13th April 1939. It was provided that in case of default interest would be payable at 9 per cent, per annum on the amount not paid and in case of two successive defaults the entire decretal amount then due would be realizable at once. The instalments were paid up till April 1934 and then there was a default, and the petitioners in Civil Revision No. 339 of 1938 who are the representatives of the Rai Bahadur want to execute the decree according to the terms of the compromise. In the meantime Kali Kinker Singh instituted a suit for the administration of the estate in which his three uncles are defendants. The suit which was instituted at Pakaur was, as has been stated, transferred to Bhagalpur and there, under the circumstances which will be stated later, a receiver was appointed under an order dated 1st March 1930. After various changes which will be dealt with later, the

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present receiver, Rai Sahib Surendra Nath Basu has been in charge of the estate.

5. The decree-holders applied for leave to execute the decree referred to above against the receiver, to which various objections were raised and in order to appreciate them it is necessary to detail some facts leading up to the present receiver taking charge of the estate. It appears that in the beginning of 1930 the executors of the estate, who are defendants in the administration suit, were unable to pay the instalment of the decree-holders which was to fall due in the April of that year. On 1st March 1930 the learned Subordinate Judge ordered the appointment of a receiver. Rai Bahadur Nilamani De, a retired Deputy Collector, was willing to act as a receiver and offered to find a creditor who would advance Rs. 55,000 for the immediate needs of the estate, out of which Rs. 50,000 was to be paid as the instalment due to the decree holders in April of that year. This was on the condition that the creditor be given the first charge on the estate for the money advanced by him. The learned Subordinate Judge was inclined to accept the terms and appoint the Rai Bahadur as the receiver. There was an appeal, and by its order dated 7th March 1930 in Miscellaneous Appeal No. 81 of 1930 this Court upheld the order to appoint a receiver but did not approve of the appointment of the Rai Bahadur on the aforesaid terms. It observed as follows:

The question is who should be appointed receiver of the estate. Now the learned Subordinate Judge has suggested that Rai Bahadur Nilamani De, who is a retired officer of the Government be appointed receiver upon his undertaking to find a creditor who will be in a position to advance Rs. 55,000. Since the order of the Subordinate Judge Mr. Nilamani De has written to him a letter, a copy of which has been given to us by Mr. Hasan Imam. This is a joint application by himself and one Surendra Nath Basu who is an advocate of Bhagalpur Court. Therein the two gentlemen intimate to the Court that they are willing to advance Rs. 55,000 as a loan to the estate at an interest of 15 per cent, per annum on condition that the said loan is made a first charge over all other charges on the whole estate of Maheshpus Raj and that Rai Bahadur Nilamani De is appointed receiver by the Court. The conditions put forward by Rai Bahadur Nilamani De are impossible. The loan proposed to be advanced by him cannot in law be made a first charge over the previously secured charges on the estate and it cannot be made a condition precedent that for the advance of the aforesaid loan he should be appointed as a receiver of the estate. It seems to us that in the circumstances of the case it is not desirable that a stranger should be appointed receiver of the estate.

5. This Court then ordered as follows:

We therefore direct that the defendants be appointed receivers of the estate in the administration suit. We further direct that the defendants will arrange to pay the next instalment due under the mortgage decree within 31st March 1930 as undertaken by them when the former appeal in this Court by the plaintiff was disposed of. They should try to raise this amount by making collections from the estate, and if that be not possible, they should apply to the Court below in time

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to obtain the permission of that Court to raise a loan at a reasonable rate of interest....

6. The defendants were unable to raise funds by the date fixed, and the time for making arrangements for the payment of money was extended till 12th April 1930. The instalment was due for payment on 13th April. But money could not be arranged even by that date and therefore on 12th April the learned Subordinate Judge discharged the defendants from the receiver-ship of the estate and Rai Bahadur Nilamani De who was ready to arrange the payment of the instalment money was appointed receiver and was authorized to raise a loan on a handnote to be executed by him on behalf of the Court and then to execute a regular registered mortgage bond in favour of the creditor by hypothecating the entire estate. The loan to be raised by him was made a first charge on the estate. The facts were reported to this Court and on this the following order was passed:

Considered letter No. 194 dated the 12th April 1930 from the Subordinate Judge to the Deputy Registrar and letter dated 13th April 1930 from Rai Bahadur Nilamani De to the Registrar of this Court. The Court below intimates that the defendants have been discharged as receivers in view of the previous order of this Court Nos. 8 to 11. The Sub Judge further states that the new Receiver Rai Bahadur Nilamani De has raised Rs, 50,000 with interest at 15 per cent, Per annum, making it a first charge on the estate to pay the instalment which falls due on the 13th. The question as to whether the loan raised by the Receiver Rai Bahadur Nilamani De will be a first charge or not depends upon whether there are prior mortgages or not and no direction in that behalf can be made by the Court at this stage.

7. By this time Rupees 50,000 had already been borrowed by the receiver from Rai Saheb Surendro Nath Basu and Dhirendra Nath Sen and paid to the decree-holder as the instalment due on 13th April 1930. Later on, on 8th May 1930 another Rupees 15,000 was required for the payment of Patni rent to the superior landlord. This was also advanced by the said two gentlemen in equal shares. The Court while sanctioning this loan of Rs. 15,000 directed that it would be a first charge if permissible under the law. Later on a mortgage bond for Rs. 65,000 was executed by the receiver on behalf of the Court, in favour of Rai Sahib Surendro Nath Basu and Babu Dhirendra Nath Sen.

Next July Rai Bahadur Nilamani De resigned from the receivership and the defendants were again appointed receivers. They undertook before this Court to pay up the loans raised by the receiver by 31st January 1931, and it was ordered that on their default a third party would be appointed as receiver. They defaulted, and for some time Rai Bahadur Suresh Chander Chakervarty was appointed receiver: and when he was unable to raise a loan, Rai Sahib Surendro Nath Basu, the present Receiver, was appointed on 18thMaroh 1932.

8. The new receiver represented to the Court that Rs. 90,000 more was urgently

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required to meet the pressing demands on the estate, such as the payment of patni rent, settlement cost and arrears of cesses. He was authorized on 22nd March 1932 to raise the money by borrowing. The money was advanced by Babu Dhirendra Nath Sen (one of the creditors in whose favour the earlier mortgage was executed) Srimati Sarala Bala Dasi and Srimati Mangalmoyee Sarkar at 12 per cent, and the Subordinate Judge ordered that this loan was to be the first charge on the estate if permissible under the law. A mortgage bond for Rupees 90,000 was thus executed by the present receiver. It appears that the entire amount was utilized in the payment of the instalments of the decree-holders due on Chait 1337 (1931) and Chait 1338 (1932), but it is not necessary to examine this in detail for reasons which will appear later on, Suffice it to say that there are thus outstanding two mortgages executed by the receivers, one for Rs. 65,000 in favour of Rai Sahib Surendro Nath Basu, the present receiver and Dhirendra Nath Sen and a second for Rs. 90,000 in favour of Dhirendra Nath Sen and the two ladies named above. When the representatives of Rai Bahadur Suraj Narain Singh (hereinafter called the decree-holders) applied to the Court administering the estate for executing the compromise decree of the Alipur Court, three sets of objections were raised. One was by the receiver who was asked to and made a report, the second by the judgment-debtors of the decree who are defendants in the administration suit, and the third on behalf of the creditors who were holding the two mortgages from the receiver (hereinafter called creditors).

9. The substance of the receiver''s objection was that leave to execute the decree could not be granted till the mortgages created by the receiver under the orders of the Court were discharged. It was also urged that the debts due to the late Rai Bahadur Suraj Narain Singh and his heirs from the estate had not only been paid up but there had been excess payment as under the special regulation in force in the Santal Parganas interest could not exceed the principal and in fact 4 lacs of rupees in excess of the principal and interest equal to it, had already been paid. In the end it was urged that if permission to execute the decree be granted, it should be conditional on the payment of the receiver''s lien by way of salaries, loans, management, cost, etc., either by the decree-holder or purchaser, whoever it might be, before the sale took place and in any case before he could be allowed to take possession of the estate.

10. The objection of the creditors, who held the two mortgages executed by the receiver, was also to the effect that leave to execute the decree could not be granted and, if granted, their mortgages should have priority over the decree sought to be executed. The objection of the judgment-debtors of the decree was that it was not executable on various grounds, the main ground being that the debts incurred by the estate from Rai Bahadur Suraj Narain Singh had already been overpaid in view of Section 6 of Regn. 3 of 1872. It may be mentioned here that the decree-holders before applying for leave to execute the decree had already made an application to the Alipur Court for its execution, but they explained that they had to do so as otherwise the decree would have become

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barred. The learned Subordinate Judge by his order dated 10th June 1938 gave conditional leave to the decree-holders to execute the decree. He held the first mortgage for Rs. 65,000 to be a first charge on the estate and directed that the decree-holders should pay up this encumbrance before proceeding against the mortgage properties or, in the alternative that they should proceed against them subject to the liability of paying Rs. 65,000 to the creditors. He was of the view that the Court in ignorance of the order of this Court had made the first loan of Rs. 50,000 a first charge on the estate and the remaining Rs. 15,000 was borrowed for the protection of the estate, i.e. the payment of patni rent and the creditors had a salvage lien for this amount.

11. As has been stated above, three applications in revision were filed against this order. Civil Revision No. 339 of 1938 is on behalf of the decree-holders who ask that the condition imposed by the learned Sub-ordinate Judge be withdrawn and the order modified accordingly. Civil Revision No. 442 of 1938 is on behalf of the creditors, Dhirendra Nath Sen and the two ladies. They ask that the second mortgage of Rs. 90,000 created by the receiver under the orders of the Court should also have priority over the decretal dues of the decree-holders. Civil Revision No. 443 of 1938 is on behalf of the judgment, debtors, who repeat their prayer that leave should be refused inasmuch as the debt has already been overpaid and in view of certain objections raised by them the decree was inexecutable.

Civil Revisions Nos. 339 and 442 of 1938.

12. These two applications, one by the decree-holders and the other by the creditors, are taken up together as the point involved in them is the same, namely whether the order giving the first charge to the mortgages created by the receiver under the orders of the Court is permissible under the law and, if so, to what extent. No law has been placed before us to show that a Court while administering an estate through a receiver has power to order that the priority of the mortgages already created on the estate should be altered in favour of a debt incurred by the receiver under its orders except in favour of salvees, viz. those who advance money for the protection of the estate itself so that the advances benefit the prior mortgagees as well, for instance money advanced for the payment of the Government revenue or the rent due to the superior landlord which, if not paid, will entail forfeiture of the property or its sale free from encumbrances of prior mortgagees or debts incurred for the preservation of the property from destruction or annihilation.

13. If debts are incurred for these purposes, that is to say for the preservation of the property for the benefit of all, the priority is in the inverse order, viz. the person who advances money last has priority over the one who had advanced money before him, and so on. The principle of this rule of salvage liens which is applied in India as a rule of justice, equity and good conscience is obvious. If these debts are not given priority, the property itself is in danger of being destroyed and the mortgagee himself will suffer. As the man who advances

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money last benefits those who had advanced money before him, he saves the property for the benefit of them also and, therefore, has priority over them. This is conceded by Mr. P.R. Das who frankly admitted that money advanced for saving the interest of the decree-holders should have priority over the decretal debt. But apart from this salvage lien, there is no right vested in the Courts to interfere with mortgages already created on the property which they are administering through a receiver, nor is there any authority for the proposition that a Court when administering an estate of mortgagors in a suit between them inter se has power to destroy or curtail the rights of the mortgagees in the exercise of its discretion to grant them leave to sue on the mortgage or execute a mortgage decree already obtained. The interest of the mortgagee is not really involved in any suit between the mortgagors. The paramount right of the mortgagee is outside the scope of a suit between the mortgagors.

14. A man''s property is a bundle of rights in it vested in him. If the owner of a property creates a mortgage of it, he thereby transfers a part of his interest in it to the mortgagee. Under the Transfer of Property Act, a mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan etc. etc. Therefore, after a mortgage has been created, what is left in the owner of the property is his original, full rights minus the right which he has already transferred in favour of the mortgagee, and if thereafter the property of the owner comes under the administration of a Court and the Court administers it through a receiver, what is being administered is not the entire interest of the owner but only what is left in him after his transfer in favour of the mortgagee. What has already been transferred is not the subject-matter of administration and is therefore not under the control of the Court.

15. There is a good deal of force in the argument of Mr. P.R. Das, appearing on behalf of the decree-holders that his clients had a paramount right in the property which was not in the least affected by the administration suit. The decree-holders were no parties to it and any order passed in the suit cannot in any way affect the rights which had already been created before the property came in custodia legis. It is unthinkable that, when the cosharers of a property who had already mortgaged it to third persons fight among themselves and one of them institutes a suit and for the preservation of their rights the Court takes charge of the property and administers it, it can, by any order to which the mortgagee is not a party, destroy or diminish the mortgage lien either by giving the first charge to newly incurred loans or by imposing on the mortgagee conditions which will have this effect. The position is so dear that it need not be discussed in detail. The only exception as has been stated is in cases of salvage liens when the Court orders a receiver to borrow money for the preservation of the property itself. In such cases the mortgagee is also bound by this loan because if it be not incurred his own right will be destroyed. The learned Subordinate Judge has nevertheless allowed the first mortgage of Rs. 65,000 to have priority on the ground that the Court had however inadvertently ordered so

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in respect of Rs. 50,000 and the pledge given by the Court must be respected and Rs. 15,000 was borrowed for the protection of the property. Let us examine the two grounds separately.

16. Sir Sultan Ahmed has supported the order and has urged that however wrong the order of the Court in respect of Rupees 50,000 might have been, once it was passed and the creditors advanced money in reliance on the promise of the Court, that, promise must be carried out at any cost and the Court must exercise all the powers, which it possesses in order to see that nobody suffers on account of its wrong order. He relied upon the case in Girdhari Lal v. Dhirendra Kristo (1907) 34 Cal. 427. The learned Subordinate Judge has considered the case and rightly held that it does not help the creditors. The facts of the case are these. The head-note is in. general terms which are rather misleading. Daring the pendency of a suit for partition of a family property on the original side of the Calcutta High Court, some members of the family borrowed money on an equitable mortgage for paying the patni rent due from the estate. Thereafter, a receiver was appointed in the suit, and the Court ordered the receiver to raise a loan of two lacs of rupees for the preservation of the estate. It was also ordered that the loan so raised would be a first charge on the estate. The equitable mortgagee from whom some of the members had borrowed money brought a suit in the Court of the Subordinate Judge of Hooghly to enforce the mortgage. The question arose whether the mortgage of the plaintiff of the suit or the mortgage created by the receiver should have priority. The learned Judge of the Court below gave the plaintiff a personal decree against defendants 1 to 5 and 9 but refused to pass a mortgage decree. There was an appeal where there was difference between Rampini and Woodroffe JJ. The former was of opinion that the plaintiff should have priority and that the mortgage created by the receiver in favour of defendant 8 being subsequent to it must give way. Woodroffe J. was however of opinion that the mortgage created by the receiver should have priority. The case was placed before Harington J. who upheld the view of Woodroffe J., and held that the mortgage of defendant 8 created by the receiver should have priority over the plaintiff''s mortgage. The suit was therefore decreed accordingly.

17. It is to be observed that in the above case the mortgage created by the receiver under the orders of the Court was for preserving the property, and the money was advanced by the plaintiff during the pendency of the partition suit and therefore was subject to any decree which might be passed in it. In fact, the principle of salvage lien was applied, about which there is no controversy before us. Woodroffe J. observed as follows (page 437):

On the other hand, the receiver''s mortgage was ordered to be effected by the Court for the preservation of the property, and had it not been so effected there might have been no property, against which the plaintiff might proceed in this suit.

Harington J. who agreed with Woodroffe J. distinctly relied upon the principle of

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salvage lien. His observations (page 441) are as follows:

The question resolves itself into a very short point, viz,, had the Court power to order that the receiver''s mortgage should be a first charge on the property?

The loan, which the receiver was authorized to make, was for the purpose of preserving the property for the benefit of all the beneficiaries; it was to save the property.

As is pointed out in Fisher on Mortgages, Edition 4, para. 958, there is a notable exception to the general rule ''qui prior est tempore, potior est jure'' to be found in advances, made to save the encumbered property from loss or destruction. These advances, says the learned author, are payable in priority to all other charges of earlier date, and amongst themselves have precedence according to the inverse order of their respective dates.

This principle has already been referred to above and is well settled. The case is clearly no authority for the proposition that the Court can order any loan to have priority over the previous encumbrances without regard to the circumstances of the previous encumbrances and the purpose for which the receiver was going to take the loan. Sir Sultan Ahmed however did not rely so much upon the decision of the case as on the observations of Woodroffe and Harington JJ. which are to be found at pp. 438 and 442 respectively of the report. Woodroffe J., while dealing with the principle of law that if a Court authorizes a. receiver to take a loan for the preservation of a property and gives it a first charge the order of the Court must prevail, observed as follows:

It would be to me a matter of regret, if those, who on the faith of assurances contained in orders by this Court, have advanced money to the receiver, were not entitled in all cases to see that those assurances are carried out.

Harington J. observed as follows :

I agree with Woodroffe J. that the consequenoes would be lamentable, if after money had been advanced on the strength of the order of the Court directing that the loan should be a first charge, that order is to be treated as a nullity, although it-has never been set aside.

18. It is true that it will be a matter of extreme regret that those who advance money on the assurance of a Court are to suffer, but it will be much more regrettable if in order to carry out its promise to a creditor the Court robs a third person of his just rights when he was no party to the proceedings in which the assurance was given and could not have resisted it. In this case however, the question of the Court''s promise does not in fact arise. It is true that the learned Subordinate Judge by his order dated 12th April 1930 authorized Rai Bahadur Nilamani De to raise loans and ordered that the loans would have priority over other mortgages, but this was in entire disregard of the orders-of this Court dated 7th March. The learned Subordinate Judge whose order is under revision has observed that his predecessor who gave this assurance to Rai Bahadur

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Nilamani De did so perhaps in ignorance of the order of the High Court. This is inconceivable. It was by the order of this Court that the defendants were appointed receivers and a certain time given to them to make arrangements for the payment of the instalment of Rs. 50,000 payable to the decree-holders on 13th April 1930, and the order of the learned Subordinate Judge appointing Rai Bahadur Nilamani De, receiver was passed in continuation of the order of this Court when the defendant receivers were unable to make arrangemerits for the payment of the instalment. It is therefore very difficult to imagine that the clear observations of the High Court escaped the attention of the learned Subordinate Judge. Moreover, when the matter came up here on a report from the learned Subordinate Judge, this Court observed that the question of giving priority to the loans raised by Rai Bahadur Nilamani De would be considered with due regard to the rights of those who held prior encumbrances upon the estate. One of the creditors who had advanced first Rs. 50,000 and later Rs. 15,000 is a lawyer. He is the present receiver of the estate. It cannot be imagined that he was unaware of the order of the High Court or of the law in this respect. It seems clear that the creditors deliberately took the risk for which this Court was in no way responsible. Further, whatever may be said about the first loan of Rs. 50,000, the additional loan of Rupees 15,000 was taken on the clear understanding that it was to have priority if permissible under the law, and the same is true in respect of the second mortgage of Rupees 90,000 also.

19. However regrettable it may be that the Subordinate Judge somehow accepted the condition that the loan of Rs. 50,000 was to be a first charge and later on approved of the mortgage bond making the sum of Rs. 65,000 a first charge, we are clear that the Court will not be justified in recouping these creditors at the cost of those who would seem to have a prior right to proceed against the estate which could not be properly touched in the administration suit. The next question for consideration is whether it makes any difference that the money was utilized towards the payment of the instalment of the decree-holders. It is clear that it does not. The decree-holders have credited the amount in the decree, which to that extent stands satisfied. Beyond this, the loan did not benefit them and cannot be said to have saved the mortgaged properties for them; the benefit they derived was no more than they were entitled to and has been allowed for. The learned Subordinate Judge does not seem to have realized the effect of his conditional leave to execute the decree, viz. that it would practically deprive the decree-holders of at least Rs. 50,000 for no fault of theirs; whether the additional sum of Rs. 15,000 can be given priority on the principle of a salvage lien will be considered later. But the ordor that Rs. 65,000 should be paid by the decree-holders before they proceed against the mortgaged properties or that they may proceed against the properties provided they remain liable to pay this amount to the creditors overlooks the fact that the decree-holders will themselves have no means of realizing it from the judgment-debtors. There can only be two possibilities, either the security is sufficient for the satisfaction of the claims of both the decree-holders and the creditors, or it is not.

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20. In the former case, the creditors could realize their money (as the decree-holders could realize theirs) without the former being given the first charge. But if the decree-holders be called upon to pay the money as the lower Court has in effect done--it is difficult to see how they can recoup themselves. If, however, the security is not sufficient to satisfy both the claims and if a first charge is given to the creditors to the extent of Rs. 65,000 this means a practical reduction of the decretal dues to that extent by a proceeding which moreover gives the decree-holders no right of appeal. It amounts to calling upon the decree-holders to refund a part of what was paid to them in satisfaction of the decree, though the decree would still stand satisfied to the extent of the refund. This appears to us to be opposed to all Canons of justice, equity and good conscience; our attention has not been drawn to any provision of the law under which a portion of the decree which stands satisfied could be revived upon the decree-holders making a refund as required in obtaining leave to proceed against properties in the hands of the receiver.

21. An attempt was made in the Court below to prove that the decree-holders had consented to the order of making Rs. 50,000 as a first charge. The attempt failed and the Court has not relied upon it. There is nothing to show that the decree-holders ever knew of this order. Even if they knew, it was not their duty to appear in the administration suit and object, nor could they refuse to accept the payment of the instalment for which the loan was incurred. Assuming, moreover, that the Court administering an estate for the benefit of the parties to the suit can create a first charge for loans incurred for purposes other than the preservation of the property for the benefit of all concerned (including prior creditors), the question still remains whether the creditor can enforce the charge on a decree-holder''s application for leave to execute his decree against properties in the hands of a receiver, when the order giving conditional leave is not appealable. This in substance is what will happen if the order of the lower Court were to stand. A summary proceeding for giving leave is not appropriate for settling disputed priorities and is even less so for enforcing them. The proper course would plainly be to allow the creditors to proceed I with their execution and face proceedings in which the question of priority could in the ordinary course be decided by an order having the force of a decree and thus subject to appeal. The object of requiring leave to sue a receiver is that the Court which is administering an estate should know the claims which third persons are likely to make against it so that, if on a summary enquiry, it finds that the claims are just and unanswerable, it may order the receiver to satisfy them, and also to avoid frivolous and vexatious suits against a receiver who is an officer of the Court as they will needlessly hamper the administration of the estate by the Court. In Braja Bhusan v. Sris Chandra A.I.R (1918) . Pat 100 it was observed:

There is no statutory provision which requires a party to take the leave of the Court to sue a receiver. The rule has come down to us as a part of the rules of equity, binding upon all English Courts of justice in this country. It is a rule based upon public policy which requires that when the Court has assumed possession of

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a property in the interest of the litigants before it, the authority of that Court is not to be obstructed by suits designed to disturb the possession of the Court. The institution of such suits is in the eye of the law a contempt of the authority of the Court and therefore the party contemplating such a suit is required to take the leave of the Court so as to absolve himself from that charge. The grant of such leave is made not in exercise of any power conferred by statute but in exercise of the inherent power which every Court possesses to prevent acts which constitute or are akin to an abuse of its authority.

22. Earlier in the same judgment Mullick J. said:

The general principle applying to cases of this kind, in which application is made to sue a receiver in respect of properties in charge of the Court is, that unless the Court is satisfied that there is no question at all to try, or there is no legal foundation to the claim, leave should as a matter of course be granted. The onus is therefore strongly on the Court to show that no foundation for any claim has been made out.

It cannot be said in this case that the decree-holders have no claim whatever to be tried in the ordinary course by a Court of competent jurisdiction. It is true that while giving leave to sue a receiver, the Court can give directions, but we consider it very doubtful whether this power can be used to require an applicant for leave to give up a portion of his claim without any good reason on pain of finding himself unable to prosecute his claim, however substantial it may be, in the ordinary course of justice. It may also be doubted whether in this case leave was necessary only to execute the decree. As at present advised, we are inclined to share the view expressed in the following extract from Woodroffe''s Tagore Law Lectures on Receivers (Edn. 4, pp. 81-82):

That for a suit upon promissory notes and an equitable mortgage made by the executors of a deceased person whose estate (including the property subject to mortgage) was subsequently placed in the hands of a receiver, leave is not necessary. It might be urged that though the suit was not brought directly against the receiver, leave was necessary as the suit was against parties over whose property a receiver had been appointed, such receiver being in possession of the mortgage premises. But it is submitted (and the Court appeared to be of such opinion) that leave was unnecessary. Since the receiver''s possession would not be affected until a decree for sale was made and the purchaser took possession which might never occur, for the executors might discharge the debt out of other assets in their hands. If however, a decree for sale was made, an application might subsequently be made for leave to take possession.

23. The reference is to the case in Chartered Bank of India, Australia and China v. Hurish Chander Neogy 5 C.W.N. 15 (n). It is however not necessary to pronounce definitely on this aspect of the matter. For assuming that leave is necessary even to execute the decree, the Court is beyond question entitled to examine the facts before granting leave. The applicants have a decree in their

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favour and no Court has held that it is incapable of execution on the grounds which have been raised by the judgment-debtors, and which, we will deal with, later. In these circumstances it seems clear that leave to execute ought to have been granted as a matter of course and that the restriction imposed upon the decree-holders is improper. The question of priority, to say the least, is controversial and ought to be decided in the ordinary way and not in a summary proceeding for leave under the inherent powers of a Court. The next question for consideration is as to the sum of Rs. 15,000 which is a part of the first mortgage executed by Rai Bahadur Nilamani De under the orders of the Court. The lower Court has directed the payment of this amount by the decree-holders on the ground that the creditors have a salvage lien in respect of it. Mr. Das, on the other hand, has urged that it has not been established that the money was in fact used for saving the property from sale on account of default in the payment of the patni rents. The expenditure of Rs. 15,000 as given by the receiver in his report is as follows:

Rs. as. p. Advance made to Babu Surendra Nath ioi payment of patni rent of Kankjole in the "Astham" procedure ... ... 6070 12 0 Advance made to Upendra Nath Roy to pay rents to Nashipur Raj ... 7240 6 3 Deposited with the Imperial Bank ... 688 13 9 _______________ Total ... Rs. 15.000 _______________ 24. Mr. P. R. Das argued that the payment of patni rent of Kankjole was not for the preservation of the properties mortgaged to the decree-holders. It is conceded before us that the decree-holders were not at all interested in Kankjole nor can the amount deposited in the Imperial Bank be held to carry a salvage lien in any case. No priority can therefore be allowed in respect of the two items which amount to over Rs. 7700. Mr. Das, while conceding that the amount of Rs. 7240-6-3, if paid to the Nashipur Raj as rent, could legitimately carry a salvage lien on the mortgaged properties, has contended that the account books have not been produced to show that there was no money available in the hands of the receiver to pay this amount.

25. It is however not necessary to pursue this matter further as out of the mortgage bond of Rs. 65,000 a very large amount has been satisfied and therefore to the extent which the loan could properly be given priority on the principle of a salvage lien, it has already been satisfied, as will be presently shown. But it must be conceded that whatever the reason, the Subordinate Judge did give a first charge in respect of Rs. 50,000 and that the creditors may have believed that the remaining Rs. 15,000 was being taken for purposes which would entitle them to a salvage lien on the property. Though in respect of Rs. 90,000 these considerations do not arise, nevertheless, this amount also was borrowed under the orders of the Court. It is therefore the duty of the Court to see that, without causing harm to the decree-holders, the creditors are not put to loss, as far as it may be practicable to do so. At one time we thought of ordering that certain properties be sold in order to satisfy the claim of the creditors, but an examination of the figures showed that this course is not really necessary. From the accounts given by the receiver it appears that the present

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position is as follows:

Rupees. Debtdue to S.N. Basu and D.N. Sen on mortgage bond dated 21st June 1930 after part payment on 6th February 1981 ... 62,800 Interest for six years and eight months due up to 6th Ootober 1937 ... 52,800 ___________ ... 1,05,600 Less paid up to 5th December 1938 ... 25,000 ___________ Balance ... 80,600 Debt due to Sm. Sarala Sundri Debi and others on mortgage bond dated 23rd April 1932 at 12 per cent. ... 90,000 Interest due from 8th April 1932 to 8th August 1910 ... ... 90,000 ___________ ... 1,80,000 Less paid up to 5th December 1938 (approximately) ... ... 33,000 ___________ Balance ... 1,47,000 ___________ GRAND TOTAL ... 2,27,600 Average payment per year 56,900

26. There is no question of any future interest as in each case the interest has already reached the amount of principal and under the Santal Parganas Regulation it cannot be more. Therefore, in about four years'' time, the entire debt under the two mortgages can be wiped off and as, it will be presently shown, there is going to be strenuous opposition on behalf of the judgment-debtors against the execution of the decree, there is no chance of the properties being sold, and the auction purchaser being in a position to obtain possession of the properties, in less than four years'' time. There will thus be no harm in fact if the decree-holders are allowed to execute the decree unconditionally with a provision that the receiver should not be dispossessed of the, mortgage properties before the end of four years or before the satisfaction of the two mortgages, whichever event happens earlier.

Civil Revision No. 443 of 1938.

27. As has been stated before, this is an application by the judgment-debtors, whose objection against giving leave to the decree-holders to execute the mortgage decree of the Alipur Court on the ground that the decree had already been satisfied, rather there had been over payment, was overruled by the learned Subordinate Judge. It was also contended that the decree passed toy the Alipur Court was void for various treasons. The details of the objection need not be stated. The learned Subordinate Judge has examined them and has overruled them. The question is, however, too elaborate to be considered in a summary proceeding for giving leave to the decree- holders to execute the decree. The matter can be gone into by the executing Court in the course of the execution proceeding or in such other proceeding as may be taken by the judgment-debtors. It has already been indicated that though at the time of giving leave to sue a receiver or to execute a decree against a receiver, the Court is entitled to examine the facts of the case and to give directions, when there is a controversial question of law and fact to be decided, the best course is to give the party who applies for leave to proceed in regular Courts of law. This is not a case in which it may be said that the decree-holders have to legal foundation for their claim to execute the decree. However strong the objections of the

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judgment-debtors may be, it is clear that those objections should not be gone into at this stage, and we therefore express no opinion in respect to them. The findings of the learned Subordinate Judge in this connexion which are somewhat against the judgment-debtors will have no binding effect and are set aside.

28. Sir Sultan Ahmed, however, asked us to direct the decree-holders to bring the decree to Pakaur for execution. It was conceded before us that the decree could not be executed by the Alipur Court as no portion of the mortgaged properties is situated within its jurisdiction. Mr. P. R. Das on behalf of the decree-holders intimated to us that steps would be taken to bring the decree for execution either to Murshidabad or to Suri (Birbhum) where some of the mortgage properties are situated. We however do not think fit to give any directions in connexion with a matter which is in the discretion of the Alipur Court subject to the revising power of the Calcutta High Court. When the decree-holders apply for transfer of the decree either to Suri (Birbhum) or to Murshidabad, it will be open to the judgment-debtors to represent the matter to the Alipur Court and if necessary take it to the Calcutta High Court. The judgment-debtors are anxious to have the execution proceeding in the Santal Parganas as Regn. 3 of 1872 is in force there. The decree holders want to avoid that District. It has however been settled by the Privy Council that all Courts exercising jurisdiction in Santal Parganas are bound by its provisions.

29. The revision applications are, therefore, allowed in these terms. The condition imposed by the learned Subordinate Judge in giving leave to the decree-holders for executing the decree is set aside, and in lieu thereof it is ordered that the decree-holders, when advertising the mortgage properties for sale, do indicate in the sale proclamation that the auction-purchaser will not be entitled to take delivery of possession of the properties purchased by him within four years from today or till the two mortgages executed by the receiver, one dated 21st June 1930 and the other dated 23rd April 1932, are satisfied, which ever event happens earlier, and that he will not be entitled to any compensation or mesne profits for being kept out of possession. The finding of the learned Subordinate Judge about the objections of the judgment-debtors is set aside, and the questions of the validity of the decree and of its executability are left open for determination by a proper Court either in the execution proceeding or in such other proceeding as the judgment-debtors may be advised to take. The learned Subordinate Judge is directed to give all facilities and help to the receiver to pay up the two mortgages, and the receiver should be impressed with the importance of such payment. There will be no order for costs.

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