(1966) 03 CAL CK 0019

In the Calcutta High Court

Case No : Original Side Appeal No. 3254/50 and Appeal from Original Decree No. 50 of 1963

United Industrial Bank Ltd. APPELLANT

Vs

Bepin Behari Modak RESPONDENT

Date of Decision : 23-03-1966

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Section 80
Public Demands Recovery Rules — Rule 39, 41, 43

Citation : (1967) 1 ILR (Cal) 69

Hon'ble Judges : Mitter, J;Arun K. Mukherjea, J

Bench : Division Bench

Advocate : Siddhartha Roy and Sankar Ghosh, for the Appellant;S.N. Ghorai and K.C. Mukherjee, for Respondent State, for the Respondent

Final Decision : Dismissed

Judgement

Arun K. Mukherjea, J.—This is an appeal against a judgment and decree dated March 30, 1961. The Plaintiff-Appellant''s case in the plaint was as follows:

2. The Plaintiff is a banking company. Defendant No. 1, Bepin Behari Modak and Defendant No. 2 Ranjit Kumar Modak carried on at all material times a business in partnership under the name and style of East Bengal Society at room No. 9 in the premises No. 87/2, College Street, Calcutta. In March 1951, an account was opened with the Plaintiff bank by East Bengal Society. At that time the partners of that Society were Defendant Bepin Behari and one Rash Behari Modak, since deceased, who was the father of Defendant Ranjit. Immediately thereafter Rash Behari died and Ranjit became the partner of Bepin Behari in the said Society. The account that the Defendants No. 1 and 2 had with the Plaintiff bank was, inter alia, on the following terms and conditions:

(a) the drawing limit of the cash credit was fixed originally at Rs. 25,000 and then at Rs. 45,000;

(b) the Defendants were to pay interest at 6?% per annum with monthly rests besides all incidental charges in connection with the said account;

(c) the Defendants were to hypothecate their stock-in-trade and moveable assets in favour of the Plaintiff bank.

3. The Plaintiff bank from time to time lent and advanced various sums of money to the Defendants in their said business in the said account. The Defendants also paid various sums of money in the said account in part payment of the amounts due to the Plaintiff bank. The Plaintiff bank used to collect various amounts at the direction and advice of the Defendants and appropriated them towards part satisfaction of their dues from the Defendants in the said account. As security for the due repayment of the loans and advances made by the Plaintiff bank, the Defendants executed two deeds of hypothecation on August 20, 1951 and September 3, 1951 respectively, whereby they hypothecated all their stocks of goods and merchandise which were stored or might be stored from time to time in the said Defendants'' shop and godown at room No. 9, at 87/2, College Street, Calcutta. Alter appropriating all earlier items of credit towards earlier items of debits in order of time and giving credit for all amounts received from or realised on account of the said Defendants, there was a sum of Rs. 36,921-8 as due to the Plaintiff bank from the Defendants Nos. 1 and 2 calculated upto June 30, 1955. The said Defendants failed and neglected to pay this amount inspite of demands. The Defendants Nos. 1 and 2 from time to time made acknowledgments of liability of the Plaintiff bank''s dues in that account in writing. Such acknowledgments were made on January 9, 1954 and July 26, 1954. The Defendants Nos. 1 and 2 also made a promise in writing on June 26, 1954 to repay the dues of the Plaintiff bank by September 30, 1954. On or about May 21, 1955, the Certificate Officer, 24-Parganas, caused all the goods of the Defendants Nos. 1 and 2 in their said business of East Bengal Society and stored in the said shop and godown to be attached in execution of a claim of the State of West Bengal on account of arrears of sales tax for the sum of Rs. 10,971-5-9 p. The goods were removed by the nazir of the Certificate Officer inspite of protests made on behalf of the Plaintiff bank. The Plaintiff bank contends that since all the goods had already been hypothecated to the Plaintiff by the Defendants Nos. 1 and 2 the State of West Bengal, i.e., the Defendant No. 4 had no right in priority to the claim of the Plaintiff bank in respect of the said hypothecated goods. The Plaintiff bank applied to the Defendant No. 3, the Certificate Officer of 24-Parganas for withdrawing the attachment and for releasing the said goods. But this prayer of the Plaintiff bank was rejected by the Certificate Officer by an order dated June 16, 1955. At the time of filing of the suit the Defendant No. 3 was proceeding to carry out the sale of the attached goods. The Plaintiff bank contended that the Defendant No. 3 had no right to attach or sell the goods and further that the Defendant State of West Bengal was not in any event entitled to the proceeds of the said attached goods in priority to the claim of the Plaintiff bank. The Plaintiff bank also claimed to have suffered a loss because of the attachment and/or sale of the goods by the Defendant No. 3.

The Plaintiff bank claims that amount from the Defendants Nos. 3 and 4 or in any event from the Defendant No. 4, i.e., the State of West Bengal. On these facts the Plaintiff bank has claimed a decree against Defendants Nos. 1 and 2 for Rs. 36,921-8 as. and further interests; a declaration that all the goods, merchandise and movables belonging to the Defendants Nos. 1 and 2 in their business of East Bengal Society are charged for the payment of the Plaintiff bank''s dues and that the Plaintiff bank was entitled to have its dues satisfied out of those goods in priority to any claim to the Defendant State of West Bengal. The Plaintiff bank also prays for the sale of the goods and appropriation of the net sale proceeds towards the Plaintiff bank''s dues and alternatively "if any of the said goods were sold by the Certificate Officer, 24-Parganas, decree for payment to the Plaintiff bank''s dues out of the sale proceeds thereof in priority to the Defendant No. 4 the State of West Bengal." In the further alternative the Plaintiff has asked for a decree against Defendants Nos. 3 and 4 or against Defendant No. 4 for Rs. 36,928-8 as. as damages.

4. It appears that during the period between the service of notice u/s 80 of the CPC on July 26, 1955 and the filing of the suit on December 20, 1955, the Certificate Officer actually sold the goods attached under his order for Rs. 7,600 on September 19, 1955. Defendant No. 1 did not contest the suit. A written statement was however filed on behalf of the Defendant No. 2 and another written statement on behalf of the Defendants Nos. 3 and 4. The Defendant Ranjit''s case is as follows: He says that the Defendant Bepin Behari with one Rash Behari Modak, since deceased and one Narendra Krishna Modak, carried on a business in the co-partnership in the name and style of East Bengal Society and had dealings and transactions with the Plaintiff bank. After the death of Rash Behari Modak, the Plaintiff bank, under the terms of hypothecation deed entered into with the said firm, became possessed of the assets of the business for realisation of the balance sums then remaining due and payable by the said firm. Thereafter pursuant to an arrangement agreed upon between the Plaintiff bank and Defendant Bepin Behari and Ranjit who was the eldest son of Rash Behari Modak, the Plaintiff bank allowed the business to be continued in the same name and style and a fresh deed of hypothecation was executed on September 3, 1961, to secure the Plaintiff''s advances in the overdraft account of the said business under the terms contained in the said deed. At the request of the Plaintiff bank Ranjit used to sign various papers and documents but denies that he acknowledged any liability in respect of the Plaintiff''s dues. Ranjit denies that he has any liability for the loans and advances made to the firm. According to Ranjit, the Plaintiff bank has no cause of action against Ranjit and is not entitled to any relief against him.

5. In the written statement filed on behalf of the Defendants Nos. 3 and 4, the Certificate Officer and the State of West Bengal state that the business of East Bengal Society was assessed under the Bengal Finance Sales Tax Act, 1941, for the sum of Rs. 11,633-4-3 p. for four quarters ending on April 13, 1952. The Defendants paid only a sum of Rs. 1,000 towards this liability. Since the balance

amount was not paid by the Defendants, the Commercial Tax Officer sent a requisition under the Public Demands Recovery Act to the Defendant No. 3, the Certificate Officer of 24-Parganas, for realisation of the said sum of Rs. 10,633-4-3 p. through certificate proceedings. The certificate proceedings were thereafter duly held and certain goods of the Defendants Nos. 1 and 2 were duly removed and sold for Rs. 7,730 which sum was appropriated towards the payment of the aforesaid claim of the State of West Bengal. The Defendants have of course traversed the other allegations of the Plaintiff as to hypothecation of the goods and as to certain sums being due to the Plaintiff bank.

6. On these pleadings, three issues were raised on behalf of the Defendant Ranjit and four other issues on behalf of the Defendants Nos. 3 and 4. The issues raised on behalf of Defendant No. 2 are as follows:

(1) Was there any agreement as pleaded in para. 5 of the written statement of Defendant No. 2 and did the Plaintiff bank in terms of the said arrangement allow the business of East Bengal Society to be continued in the same name and style?

(2) Has the Plaintiff bank any cause of action against Defendant No. 2?

(3) To what relief is the Plaintiff entitled against Mr. Ghorai''s client?

The issues raised on behalf of the Certificate Officer and the State of West Bengal were as follows:

(1) Has the Plaintiff any cause of action against Defendant No. 4?

(2)(a) Has there been a wrongful attachment and sale of property by the Certificate Officer as alleged in para. 13 of the plaint?

(b) If so, is the Plaintiff entitled to claim any damages as against Defendant No. 4?

(3)(a) Has a valid charge been created by the alleged deed of hypothecation dated September 3, 1951, with respect to the goods mentioned in Schedule C?

(b) If so, is the Plaintiff entitled to claim priority against the Defendant No. 3?

(4) Is the Plaintiff entitled to claim any relief against Defendant No. 4?

7. The Plaintiff examined two witnesses, viz., Sukhendra Chandra Dey, who was the officer-in-charge of the head office of the United Industrial Bank in 1951 and Anil Chandra Kundu, also an officer of the bank working in the cash and credit department. Defendant Ranjit gave evidence on his own behalf. No verbal evidence was adduced by either Defendant No. 3 or Defendant No. 4. We shall deal with the verbal evidence as well as with the documentary evidence tendered on behalf of the parties while dealing with the issues.

8. The learned trial Judge dismissed the suit as against Defendant West Bengal with costs. As Defendant No. 3 died before the suit came on for hearing, there was no decree in respect of the claim against Defendant No. 3. As against

Defendant Bepin the learned trial Judge granted a decree in favour of the Plaintiff for Rs. 36,921-50 P. with interest on judgment at six per cent per annum and costs of an undefended suit. As against Ranjit the learned Judge granted a decree for the sum of Rs. 36,921-50 P. less a sum of Rs. 22,303-1-9 p. i.e. to say, the sum of Rs. 14,618-39 P. but did not allow any costs. The decree against Ranjit is to bear interest on judgment at 6 per cent per annum. The Appellant has now appealed against that judgment and decree.

9. Though S.C. Banerjee, Certificate Officer, 24-Parganas, the Defendant No. 3 still appears in the records as Respondent No. 3, we find from the judgment of the learned trial Judge that he died before the suit came on for hearing. Apparently, no steps have been taken either to make substitution against his name or to have his name cancelled. We need not, therefore, trouble ourselves about the Plaintiff''s claim against Defendant No. 3. As against Defendant No. 1 Bepin, the Plaintiff has obtained the decree that he had asked for and Bepin has not appealed against that decree. Therefore, we need not concern ourselves with the decree against Defendant Bepin either. We are left, therefore, with the case of the Plaintiff against Defendant Ranjit and against the Defendant State of West Bengal.

10. We shall deal first with the Plaintiff''s case against Defendant Ranjit. The Plaintiff, of course, asked for the same decree against Ranjit as he has asked for and obtained against Bepin, i.e. to say, for the sum of Rs. 36,921-50 P. and further interests. The claim was made against Ranjit as a partner of a partnership firm carrying on business under the name and style of East Bengal Society. We have already indicated the defence with which Ranjit came to Court. That defence, appears in paras. 4 and 5 of the written statement. Ranjit, we have been, contended that pursuant to an arrangement agreed upon between the Plaintiff bank, Defendants Bepin and Ranjit, the bank allowed the business of East Bengal Society to be continued in the same name and style after the death of Ranjit''s father Rash Behari. It is important to note that while raising issues Ranjit did not raise any specific issue regarding dissolution, but a contention was, however, made on his behalf that with the death of Rash Behari the old partnership firm had been dissolved and the Plaintiff bank was not entitled to make Ranjit liable for the debit balance of the old partnership account, on the basis of the existing pleading of the Plaintiff and at any rate without impleading the heirs of Rash Behari as Defendants. When the new account was opened after the death of Rash Behari a sum of Rs. 22,303-1-9 p. was transferred from the old account to the new account as a debit balance. It was contended on behalf of Ranjit that since it was not the Plaintiff bank''s case in the plaint that there was any agreement between the parties that the outstanding liability of the previous partnership firm should be brought on as debit balance to the new account opened in the name of Bepin Behari and Ranjit, Ranjit could not be made liable for the sum that was actually carried over from the old account to the new. The learned Judge accepted this contention on behalf of Ranjit and as we have seen, gave credit to Ranjit to the extent of Rs. 22,303-1-9 p.

11. The learned Counsel appearing for the Plaintiff bank argued before us that there should have been a decree for the whole amount, i.e. for Rs. 36,921-50 P. also against Ranjit. It was contended that there was no dissolution of the earlier firm: the same business continued, but Ranjit came in as a new partner after his father''s death. The argument of the learned Counsel was developed more or less in the following manner. Ranjit did not come to Court with any case of dissolution. There was no issue regarding dissolution raised by Ranjit. Both the oral evidence and the documentary evidence on record would also show that the old partnership firm continued. On this basis Ranjit would be liable to the bank for the entire amount of Rs. 36,921-50 P.

12. From the evidence on record we have no doubt that with the death of Ranjit''s father Ranjit came in as a new partner and continued with the same business. Ranjit''s story that he was not a partner and that he was carrying on the business under a special arrangement reached between the bank, Bepin Behari Modak and himself is difficult to believe. There are large number of documents which he signs as partner. The deed of hypothecation dated August 20, 1951, executed by East Bengal Society in favour of the Plaintiff bank (Ex. A) is signed by Ranjit who describes himself as a partner in that deed. The second deed of hypothecation executed on September 3, 1951 (marked as Ex. B at the time of trial and filed with the plaint) was also executed by Ranjit. He has signed his name twice in that deed in two places. In the first place he does not give any description of his name but in the second place there is a rubber stamp describing him as a partner of the East Bengal Society. On July 26, 1954, Ranjit signs on behalf of the East Bengal Society an acknowledgment slip addressed to the Plaintiff bank in which he confirms on behalf of East Bengal Society that the balance of the cash credit account of East Bengal Society on June 30, 1954, due by that Society to the bank was Rs. 25,545-3-6 p., an amount which was shown in a statement of account submitted by the bank on June 30, 1954. Ranjit describes himself as a partner in that slip. This figures of Rs. 25,545-3-6 p. incidentally agrees with the sum shown as debit balance on June 30, 1954, in the account of East Bengal Society annexed to the plaint (see paper book, p. 48). Ex. J(1) is an invoice of goods hypothecated to the bank. It is dated March 15, 1955 and signed on behalf of East. Bengal Society by Ranjit Kumar Modak describing himself as a partner. Exhibit K(1) is a periodical statement of stock from January 7, to March 12, 1955, signed on behalf of East Bengal Society by Ranjit describing himself as partner. Exhibit P is a bearer cheque drawn upon the Plaintiff bank by Ranjit on behalf of East Bengal Society. The cheque is also drawn by him in his capacity as a partner. The, endorsement on the back of the cheque is also by Ranjit as partner. Even apart from these documents, there is enough admission in Ranjit''s evidence that he used to sign himself as a partner (See qq. 25, 30, 35, 38, 40 and 42). He does not say that he was compelled by the Plaintiff bank to do so (see qq. 49 to 54). When the bank addressed two letters of demand to Bepin Behari and Ranjit on October 3, 1955 and November 24, 1955 respectively, describing both of them as partners in the business of

East Bengal Society, Ranjit never protested and never told the bank that he was not a partner and that he had no liability for the cash credit account of the East Bengal Society. If he were really not a partner, one would have expected him to challenge the bank''s statements describing him as partner and also the claims of the bank made on the basis that he was such partner. Ranjit never made such a challenge (see. qq. 87 to 93). On the other hand, Ranjit admitted in q. 11 that there was an arrangement for repayment of the loan that was due after his father''s death (q. 11). The arrangement must have been that he was to become a partner and carry on the business. That is also confirmed by the evidence of Sukhendra Dey on behalf of the bank (q. 43). That would also explain Ranjit''s conduct in executing the various deeds of hypothecation on behalf of the Society and also in acknowledging the liability to the bank (Item 2 of Ex. D). Ranjit''s bald assertion in q. 12 that he never carried on business because he was a student, can hardly be accepted in view of the fact that it appears that he was signing very important documents on behalf of the East Bengal Society. Besides, Ranjit never came to Court with the particular case that he made out later on. He did not even raise issue that he was not a partner. We are in respectful disagreement with the learned trial Judge when his Lordship held that this matter arises in the pleadings and is implied in the question as to what amount is due to the Plaintiff and that on this ground the Defendant is entitled to raise this plea.

13. In this view of the matter we find in favour of the Plaintiff bank and hold that the bank should get a decree for the whole amount of Rs. 36,921-50 P. against Ranjit also.

14. We now turn to the case against the State of West Bengal. The learned trial Judge found against the Plaintiff in regard to the Plaintiff''s case against the State of West Bengal on the following main grounds: First, the deeds of hypothecation on which the Plaintiff has been relying (Exs. A and B) are according to the learned Judge mere agreements to hypothecate future goods. There was no immediate hypothecation or transfer of the goods of East Bengal Society under those deeds. Secondly, though the bank could take possession of the goods and sell them under the deeds of hypothecation, the bank did riot actually do so and can now, therefore, claim only an equitable charge in respect of the goods agreed to be hypothecated. Thirdly, the bank had taken no steps to stop the sale and could not complain against the sale. Between the time when the Defendant Certificate Officer attached the goods under the Public Demands Recovery Act and the date when the said Officer put the goods to sale, there was enough time for the bank to take steps to file a suit in support of its alleged priority over the goods. Not having done so in time, the bank cannot now complain. Fourthly, the goods have already been sold and since the auction purchaser who bought the goods at the sale without notice of the bank''s claim of equitable charge and consequent priority in respect of these goods, has not been made a party in the present suit, the suit is incompetent and the Plaintiff bank cannot have any relief. Fifthly, no question of priority can be gone into now because there are no funds in the hands of the Court.

15. Mr. Siddhartha Roy, the learned Counsel appearing on behalf of the Plaintiff-Appellant, contended that the learned trial Judge came to an erroneous finding regarding the nature of the deed because the learned Judge took into consideration only Clause (1) of the deeds of hypothecation. Had the learned Judge considered also the effect of Clauses 5, 6, 7, 9 and 11 of the deeds, he should have come to the conclusion that on a true construction of all the clauses the deeds amounted to valid hypothecation. The argument was developed in the following manner. The learned trial Judge wrongly relied on the word ''shall'' in Clause (1) of the deeds of hypothecation. (It may be convenient here to note that both the deeds are practically in the same language. So that it is enough for our purpose to consider either of the deeds). The learned Judge also relies on an erroneous finding of fact to the effect that no money had been lent out on September 3, 1951 and that the loan was to be granted only in the future. This is, however, not correct. Ex. C clearly shows that on September 3, 1951, which is the date of the second hypothecation, the Modaks, i.e., Bepin Behari and Ranjit were withdrawing the sum of Rs. 22,303-1-9 p. There was, therefore, a loan on that date. As regards the earlier deed of hypothecation dated August 20, 1951, viz., Ex. A, the position does not appear from the statement of account filed with the Plaintiff, but the oral evidence on the question of hypothecation makes the position quite clear. Learned Counsel complains that the learned Judge does not take any notice of oral evidence on the question of hypothecation. Thus, Sukhendra''s evidence (in answer to qq. 4 to 10,17-18, 44-48, 54-57) as well as Ranjit''s evidence (in answer to qq. 32 and 89) would show clearly the nature of the transaction between the bank and Bepin Behari and Ranjit. There is little doubt that it was not a case of future hypothecation. After carefully considering the oral evidence as well as the documents on record viz., the deeds of hypothecation and in particular Ex. J(1), we cannot hold that there was no actual hypothecation of the goods. The learned Judge apparently considered-that in order to constitute valid hypothecation of the goods there must be transfer of possession of the goods to the bank, but in our opinion, it is not necessary for a valid hypothecation that the goods should be immediately transferred to the hypothecatee. It is well-known that in India there can be hypothecation of future goods. If that be the position, why should there be insistence on immediate transfer to make out a valid hypothecation? In Sir Dinshah Mulla''s commentary on the Transfer of Property Act, 1882 (4th ed.) at p. 368, there is an observation to the following effect:

A mortgagee of moveable property, if in possession had a right to sell the property without the intervention of the Court, if after proper notice the mortgagor fails to repay the mortgage money. But delivery of possession is not necessary to constitute a mortgage of moveable property and a hypothecation of moveable property though not accompanied with delivery of possession is valid and recognized in Indian law. As a transfer of moveable property is not complete without delivery of possession such hypothecations have been described as creating an equitable charge.

We have no reasons to doubt the correctness of these observations in the learned author''s commentary. Three things appear clearly from these observations: (i) hypothecation is valid without delivery of possession; (ii) hypothecation does not require transfer of moveable property; and (iii) hypothecation without a delivery of possession creates an equitable charge. In the celebrated book on the Law of Mortgages in India (4th ed.), Sir Rashbehari Ghosh holds that hypothecation is valid in India and also says that hypothecation differs from a pledge in that there is no delivery of the property. In effect, therefore, the learned author holds that hypothecation without delivery of possession is a valid transaction. We are, therefore, unable to accept the learned Judge''s finding that there was no valid hypothecation in the present case. In our opinion, the learned Judge gave too much importance to the statement of Sukhendra in answer to q. 157 that the bank was not in physical possession of the goods. From the facts of this case it is quite clear that the witness was correct in so far as he stated that the bank was not in physical possession. But the learned Judge, in our respectful opinion, failed to consider that physical possession is not the only kind of possession in respect of goods and also that a hypothecatee in any event need not have physical possession. Though the word ''shall'' in Clause (1) of the deeds of hypothecation ordinarily denotes futurity, the provisions of the deeds and evidence show that hypothecation had actually taken place. The learned Judge, in our respectful opinion, was wrong in coming to the conclusion that there was no hypothecation merely from the premise that there had been no immediate transfer of goods. We need not dilate on this point in great details because Mr. K.C. Mukherjee appearing for the State of West Bengal has made our task easier by intervening even while Mr. Roy was arguing and admitting that there was hypothecation and that the bank had an equitable charge over the goods. Mr. Mukherjee''s only complaint is that the bank did not ''perfect'', the equitable charge by taking possession or by filing a suit for declaration of charge. The Plaintiff bank, according to Mr. Mukherjee''s contention, has lost its security as there is now a third party in the field who has purchased the goods in question without notice of the bank''s equitable charge. We shall deal with this contention presently.

16. With regard to the learned Judge''s finding that the bank can only claim an equitable charge in respect of the goods, Mr. Roy says that he does not claim anything more than an equitable charge in respect of these goods and his claim is founded on that equitable charge. Therefore, he has no quarrel with that finding. He only disputes the Judge''s finding when he says that the equitable charge is in respect of goods which had been agreed to be hypothecated. According to Mr. Roy the equitable charge was in respect of goods that had actually been hypothecated.

17. With regard to the third finding of the learned Judge that not having taken proper steps to stop the sale in time, the bank cannot be heard to complain against the sale, Mr. Roy sought to meet the difficulty by saying that after the completion of the sale the charge shifted to the sale proceeds and the Plaintiff

bank claims priority over the State of West Bengal in regard to the sale proceeds. We shall presently examine in detail how Mr. Roy builds up this aspect of his case.

18. With regard to the learned Judge''s fourth finding that the Plaintiff bank cannot have any relief against the auction-purchaser, Mr. Roy, of course, had to accept the position because the auction-purchaser has not been made a party to the suit. He, therefore, can no longer ask for any relief in respect of the goods, which had been attached and sold by the Certificate Officer. As I have already said, Mr. Roy made out his entire claim only in respect of the sale proceeds. Let us, therefore, deal with Mr. Roy''s case with regard to the sale proceeds.

19. In substance, Mr. Roy''s entire case against the State of West Bengal was as follows: The hypothecation created by the deeds of August 20, 1951 and September 3, 1951, gave rise to an equitable charge in favour of the Plaintiff bank over the goods belonging to the East Bengal Society as soon as such goods came into existence. As long as the equitable charge remained, the Plaintiff bank was a secured creditor. The Plaintiff bank could, therefore, claim priority vis-a-vis the State''s claim in respect of these goods. The State of West Bengal cannot by its own action, as for example, by selling it to an auction-purchaser take advantage of its own wrong and appropriate the sale proceeds. Mr. Roy relied on the case of Jared v. Clements (1903) 1 Ch. 428 for the proposition that a purchaser who has, before completion of his purchase, received notice of an outstanding equitable interest. must, in order to get a good title from his vendor, take care to see that that interest is got in or destroyed. If it appears later that the equitable interest subsisting at the date of purchase of the property then the legal estate and the possession of the title deeds would afford no protection to the purchaser and the holder of the equitable interets would have priority over the purchaser''s claim. It was argued that in this particular case the Certificate Officer had notice of the security in favour of the bank. His nazir, when he went to seize the goods, had been informed by the representatives of the Plaintiff bank that the goods in question were hypothecated to the Plaintiff bank. Besides, the Plaintiff bank had made a claim petition before the Certificate Officer under Rule 39 of the Public Demands Recovery Act of 1913. Therefore, since the Certificate Officer sold the property inspite of such notice, Government cannot take any advantage of such sale. After the sale the goods are now represented by money. The learned Counsel made a preferential claim for this money in favour of the Plaintiff bank and argued that the Plaintiff bank was entitled to follow the sale proceeds. On the question of notice it was admitted on behalf of the State by Mr. K.C. Mukherjee that the State had notice of alleged hypothecation. In view of this admission Mr. Roy argued that though the goods have now disappeared as a result of the sale the charge in favour of the Plaintiff bank has fastened itself upon the sale proceeds. Mr. Roy''s next contention was that since the State had acted wrongly in having the goods seized and sold, the bank could either challenge the sale and recover the goods on the basis of conversion or, in the alternative, waive the tort of conversion, confirm the sale and sue for the sale proceeds. The Plaintiff bank, according to Mr. Roy, has

chosen to adopt the second alternative procedure, i.e. to say, the bank has confirmed the sale and is now waiving the tort and suing for the sale proceeds against the State of West Bengal. Mr. Roy strongly relied on a judgment of the House of Lords in United Australia Ltd. v. Barclays Bank Ltd. (1941) A.C. 1. The facts of that case were as follows: In November, 1934, certain debtors of the Appellant United Australia Ltd. sent to them a crossed cheque for ?1900 payable to their order. Shortly thereafter that cheque purporting to have been endorsed in favour of the M.F.G. Trust Ltd. (hereinafter called MFG) was presented at a branch of the Respondent bank for payment into the account of MFG at that branch. The amount was shortly afterwards collected, received and paid by the Respondent bank. The endorsement of the cheque in favour of MFG was made by one Emons, Secretary of the Appellant company. The Appellant alleged that Emons had no authority to endorse the cheque and issue a writ against MFG claiming ?1900 as money lent by the Appellant to MFG or as money had and received to the Appellant''s use. MFG afterwards went into liquidation. On December 10, 1935, the Appellants put in a proof in the liquidation for money lent, but the proof had not yet been admitted when on November 8, 1937, the Appellants brought an action against the Respondents claiming ?1900 as damages for conversion of the cheque or, alternatively, for negligence founded on the plea that the dealings of Emons MFG and the Respondents had been tortious. Goddard, J. who heard the original suit dismissed it. He held that the Appellants having made a claim for breach of contract only in their action against MFG and also having made a similar claim in their proof in the subsequent liquidation proceedings had waived their right to claim in tort so that even if Emons had acted without their authority the Appellants could not succeed in the action. On appeal the Court of Appeal held that the Appellants had by bringing their first action for breach of contract only, had elected to waive their right to bring the second action for tort, notwithsanding that the first action had not proceeded to judgment and that the Respondents in the second action had not been made Defendants in the first action. The matter went up on appeal to the House of Lords who held that the Appellants by merely initiating proceedings against MFG for money lent or for money had and received had not thereby elected to waive the tort so as to be precluded from bringing the second action in tort. In such a case it is only adjustment and satisfaction in the first action and not merely bringing in the first action which would constitute a bar to the second action. Mr. Roy cited and relied on this case only for the proposition of law confirmed by the House of Lords that a person who is entitled to complain of a conversion of his property may waive the tort and bring his action for money had and received for the proceeds of goods wrongfully sold. Mr. Roy argued that this is excatly what the Plaintiff bank was doing in this suit. The bank was waiving the tort committed by the State of West Bengal in selling the goods in disregard of the equitable charge held over those goods by the Plaintiff bank and was now suing for the sale proceeds. Mr. Roy even argued that the State of West Bengal was to be regarded as an agent acting on behalf of the Plaintiff bank in regard to the sale of the goods. In dealing with Mr. Roy''s contentions the first thing that strikes us is that he is really making out a case which is not in the plaint at all. The Plaintiff bank asks for a decree against the Defendants Nos. 1 and 2 for the sum of Rs. 36,921-8 as and further interests on that sum. It is true that the Plaintiff also asks for declaration of charge and for a declaration that the bank is entitled to have its dues satisfied out of the sale proceeds of the goods in priority to any claim of the State of West Bengal. Indeed, the Plaintiff has itself asked for sale of the goods and appropriation of the net sale proceeds towards it own claim. But it is only as an alternative relief that the Plaintiff bank has asked that "if any of the said goods were sold by the Certificate Officer, 24-Parganas" it should get "a decree for payment of the Plaintiff bank''s dues out of the sale proceeds thereof in priority to the Defendant No. 4 the State of West Bengal". This relief, of course, presupposes that the money or the sale proceeds is with the Certificate Officer. The Plaintiff bank has asked, as a further alternative, for a decree against Defendants No. 3 and 4 for Rs. 36,921-8 as. as damages. The plaint has clearly been drawn up on the basis that either the goods have not been sold or the sale proceeds are in the hands of the Certificate Officer. Neither of these propositions was true at the date of the filing of the suit. Indeed, the sale proceeds had already been appropriated towards the claim of the State of West Bengal. It is significant that the decree that the bank has asked for against the Defendants Nos. 3 and 4, i.e. the Defendant Certificate Officer and the Defendant State of West Bengal, is by way of damages. This relief, read in the context of paras. 11 and 12 of the plaint, makes it abundantly clear that the Plaintiff bank was asking for damages on the ground that the Defendant Certificate Officer had no right to attach and sell the goods. The case that in the matter of sale the Defendant State of West Bengal and the Defendant Certificate Officer were to be regarded as acting as the Plaintiff''s agents is neither made out in the plaint nor was it made out before the leraned trial Judge. Nor is there any foundation for such a case in the issues that were framed. In these circumstances we do not think that the Plaintiff should be allowed to make out a case of this nature. Besides, the whole contention of Mr. Roy is founded on a confusion that the Certificate Officer was an agent of the State of West Bengal. The Certificate Officer was at least a quasi-judicial officer exercising certain powers conferred upon him by the Public Demands Recovery Act. There is no suggestion that he exceeded the powers given under that Act. The seizure of the goods by a nazir of the Certificate Officer is in effect equivalent to attachment and seizure of goods under the order of an executing Court. Just as an executing Court cannot be regarded as an agent of the decree-holder, a certificate officer cannot also be regarded as an agent of the State Government. Even when the Certificate Officer held the sale, it is impossible to suggest that he held the sale as an agent of the State of West Bengal. Under these circumstances, it is not understood how an action would lie against an officer who, in discharge of certain quasi-judicial duties and functions, seizes the property over which a person claims certain equitable interest and puts the said property to sale. The Certificate Officer was merely discharging a statutory function. If the Plaintiff bank had any grievance against the order of the Certificate Officer, he could have gone on appeal against that order or he could have asked for revision of that order before appropriate authorities. The Plaintiff bank could also have filed a suit to sustain its claim. The Public Demands Recovery Act and the rules framed under it contain adequte provisions for relief against any order passed by the Certificate Officer. Rule 43, in particular, provides that

where a claim or an objection is preferred, the party against whom an order is made may institute a suit in a Civil Court to establish the right which he claims to the property in dispute but subject to the result of such suit (if any) the order shall be conclusive.

In this view of the matter it is impossible to contend that the Certificate Officer was guilty of a tort even if it be found that the Certificate Officer had wrongly rejected the claim petition of the Plaintiff bank under Rule 39. Therefore, the Plaintiff bank cannot possibly use as the foundation of its claim a supposed tortious act of the Certificate Officer. Further and this is not an altogether negligible point, the Defendant Certificate Officer died before the suit was heard. Therefore, in any event, no claim for damages against a dead person can be heard on the ground that he had committed a tort. The successors of the Certificate Officer have not been brought on record. Indeed, no attempt was made at any stage to make any substitution in lieu and stead of the deceased Certificate Officer. This, of course, we must say, must have been done with deliberation and as far as we can see, correctly for even if there was any tortious liability of the Certificate Officer in the circumstances of this case, the maxim actio personalis moritur cum persona would certainly operate and no legal representative of the Certificate Officer could be made liable in respect of such supposed tort of the Certificate Officer. This is so far as the claim against the Certificate Officer is concerned. Can it be argued that the State of West Bengal committed a wrong in attaching the property or putting it to sale? The obvious answer to this proposition is that the State of West Bengal did not attach the property nor did the State of West Bengal put the property to sale. Therefore, even if the attachment and sale were wrongful it would be impossible to suggest that the State of West Bengal had been guilty of such wrongful action. Some liability could have been foisted on the State of West Bengal if the Certificate Officer could have been made out to be its agent. But that, as we have seen, is not possible. Therefore, it is impossible to hold the State of West Bengal responsible for wrongful attachment and sale and that is exactly the complaint on the basis of which the plaint has been founded. Mr. Roy, of course, tried to make out a case that since the bank had a preferential claim over the goods or its sale proceeds, it was wrongful on the part of the State to take the sale proceeds in appropriation of its own claim and the State must, therefore, be held to have been guilty of conversion., But this case is not made in the plaint. Indeed, it could not have been in the plaint because the plaint does not proceed on the basis that the goods had been sold. Until the goods are sold there is no question of appropriation of the sale proceeds by the State of West Bengal and therefore, no question of conversion. Therefore, it is obvious that the Plaintiff did not and could not make out a case of conversion against the State of West Bengal in the plaint. Such a case of conversion, as we have said, has not been made out in the issues either. In the circumstances we cannot say that there is any substance in this contention of Mr. Roy.

20. In this connection we must consider two points made out by Mr. K.C. Mukherjee, the learned Counsel on behalf of the State of West Bengal. Mr. Mukherjee argued that the Plaintiff has been guilty of laches and delay. The Plaintiff bank could have filed a suit immediately after the attachment of the goods by the Certificate Officer and even after the rejection of the Plaintiff''s claim petition by the Certificate Officer could have, asked for an injunction restraining the sale of the goods or in any event restraining the appropriation of the funds arising out of the sale. The goods, it may be remembered, were attached by the Certificate Officer''s nazir on May 21, 1955. The bank filed a claim petition before the Certificate Officer under Rules 39 and 41 of the Public Demands Recovery Act Rules. The claim petition was rejected on June 16, 1955. The goods were, however, not sold before September 19, 1955. Therefore, between the rejection of the claim petition and the sale of the goods there elapsed a period of three months in course of which the Plaintiff bank could easily have served a notice u/s 80 of the CPC and filed the present suit and taken appropriate interim orders to protect its equitable interest. Since the Plaintiff did not do so, the Plaintiff''s equitable interest must be taken as defeated by the Plaintiff''s'' delay and laches. Secondly, Mr. Mukherjee argued that if it is a suit founded on tort and if the Plaintiff asks for a decree against the Defendant State of West Bengal in damages, the Plaintiff must show what was the actual damage suffered by it. For this purpose, the Plaintiff bank must show the amount of money that it had realised from the Defendants Nos. 1 and 2. Only the shortfall in realisation of its dues from Defendants Nos. 1 and 2 can be attributed to the loss of security suffered by the Plaintiff as a result of the alleged tortious act on the part of the State of West Bengal. But since the Plaintiff has not shown the quantum of such shortfall as indeed the Plaintiff cannot possibly show at this stage, the Plaintiff cannot proceed against the State of West Bengal for damages.

21. We must say that these contentions of Mr. K.C. Mukherjee are not altogether without substance and that these criticisms do indicate some of the additional difficulties in the way of the Plaintiff bank founding an action against the State of West Bengal on tort. Mr. K.C. Mukherjee also argued that the money has already been appropriated to the State of West Bengal and there are now no funds with the Certificate Officer to which the alleged priority of the claim of the Plaintiff bank could attach itself. Question of priority would have been relevant only if some funds were available in the hands of the Certificate Officer, i.e. to say, before the funds had been distributed. Since, however, there are now no funds in the hands of the Certificate Officer, no question of priority can arise. This argument is also, in our opinion, of substance. There are no funds now in the hands of the Certificate Officer and we cannot pass any order in terms of prayer (e) or prayer (f) of the plaint.

22. There is only one other question outstanding in this connection. By reason of the hypothecation deeds there was an equitable charge over the goods in favour of the Plaintiff bank. What happened to that charge when the goods were sold? Did the charge disappear as soon as the goods went over to a bona fide purchaser without notice? Presumably, the charge could not go with the goods. Therefore, did the charge pass on to the sale proceeds? Mr. K.C. Mukherjee, the learned Counsel for the State of West Bengal, argued that charge passes on to the sale proceeds only when the property put to sale was a property covered by trusts. Mr. Mukherjee argued that the right title and interest of the judgment-debtor, i.e. to say, of the East Bengal Society in the goods had been sold by the Certificate Officer. That is to say the Certificate Officer sold only the judgment-debtor''s right of redemption or in other words, the purchaser of the goods has taken the goods subject to the charge in favour of the Plaintiff bank. Therefore, the claim of the Plaintiff bank, if any, must be pursued against the goods. That the Plaintiff bank is not in a position to do just now as the purchaser is not a party to the suit. In any event, the Plaintiff bank cannot make out a claim in respect of the sale proceeds because this being not a case of trust. The charge did not shift to the sale proceeds.

23. Mr. Shankar Ghosh who gave the reply on behalf of the Appellant bank made certain interesting arguments. He first argued that the nature of the change created by the deeds of hypothecation was such that it allowed sale of goods to the purchaser as unincumbered goods. The goods though forming the subject-matter of the deeds of hypothecation, were to be unincumbered after sale. He relied on Clauses 1, 6 and 7 of either of the two deeds of hypothecation to show that the sale of the goods were not to be of any limited interest. If the debtor himself had sold the goods he would have received the whole sale value and it could not have been argued that the goods which were sold to a third party would be subject to any charge. It was contended by Mr. Ghosh that the nature of the charge was such that the goods if sold were to be unincumbered and the sale proceeds themselves would be subject to the charge. In our opinion Mr. Ghosh is correct, in so far as he contends that the goods were to become free of encumbrance when sold to a third party, for, otherwise the borrower could never get the full value of the property and that was certainly not the intention of commercial documents like the deeds of hypothecation, with which we are concerned in the instant case. Mr. Ghosh relied on the celebrated case of In re Hallett''s Estate Knatchbull v. Hallett (1879) L.R. 13 Ch.D. 696, in support of his contention that the charge transferred to the sale proceeds. It was held in that case that if money held by a person in a fiduciary character, though not as trustee, has been paid by him to his account at his bankers, the person for whom he held the money can follow it and has a charge on the balance in the bankers'' hands. Jessel, M.R. held in that case:

The modern doctrine of equity as regards property disposed of by persons in a fiduciary position is a very clear and well-established doctrine. You can, if the sale was rightful, take the proceeds of the sale, if you can identify them. If the sale was wrongful _you can still take the proceeds of the sale, in a sense adopting the sale for the purpose of taking the proceeds if you can identify them. There is no distinction, therefore, between a rightful and a wrongful disposition of the property, so far as regards the right of the beneficial owner to follow the proceeds.

For this purpose the learned Master of the Rolls also held that there is no distinction between an express trustee, or an agent, or a bailee, or a collector of rents, or anybody else in a fiduciary position. From this Mr. Ghosh argued that the State of West Bengal took the sale proceeds subject to the equitable charge in favour of the Plaintiff bank and the Plaintiff bank has a right to follow the sale proceeds in the hands of the State. There are, however, two difficulties in this argument of Mr. Ghosh. Firstly, this is an argument which was neither made at the trial of the suit nor even when the appeal was argued before us by Mr. Roy. Besides, it does not seem to us to be possible to invoke the principle of law laid down in In re Hallett''s Estate Supra for the very simple reason that the person who held the sale in this case was certainly not a person who can be described to have been a trustee. Even assuming that we give an extended meaning to the word ''trustee'' and include all persons in a fiduciary relation, it is not possible for us to say that the Certificate Officer stood in a fiduciary relation to any of the parties, far less vis-a-vis the bank, Jessel, M.R. clearly said that according to the modern doctrine of equity the right to the charge follows only when a person in a fiduciary relation mixes the trust money with his own. Mr. Ghosh relied on Clause 7 of the deed of hypothecation for the proposition that when the goods were to be sold the whole property was sold and the charge was to attach to the sale proceeds. But Clause 7 only applies to cases where the goods were sold by the East Bengal Society, i.e. by Bepin and Ranjit. Clause 7 does not certainly apply to sales by a Certificate Officer in pursuance of the provisions of the Public Demands Recovery Act. Mr. Ghosh relied on the case of Bibhuti Bhusan Majumdar v. Majibar Rahaman I.L.R.(1934) Cal. 956. That was a case of sale of a property in a mortgage suit. A house in Calcutta was sold in execution of a mortgage decree by the Registrar, High Court, Original Side. The sale proclamation, according to the usual practice, contained the provision that the purchaser was not to be liable to pay the outgoing previous to the date of payment of the purchase money. The notification of sale did not mention the statutory charge which the Corporation of Calcutta had for its dues. At or before the sale a letter was read out by which the Corporation gave notice of its due. It was held that the sum due to the Corporation must first be deducted from the purchase price and the balance only paid to the Plaintiff mortgagee. Mr. Ghosh argued on the analogy of this case that the charge in favour of the Plaintiff bank in the instant case is to be satisfied from the purchase price of the goods and the balance was only to be paid to the certificate-holder, i.e., the State of West Bengal. We cannot, however, agree to this contention of Mr. Ghosh. The real principle in this case was that since the property was sold subject to a clean title being given free from any prior mortgage or charge, the mortgagee was not entitled to the purchase money until he was in a position to give such a title. He could not in that case give any such title until the first charge in favour of the Corporation had been disposed of. Secondly, the money in Court could not be paid out to him until and unless these claims had been settled. To our mind, the principle laid down in this case has no application to the facts of the instant case. Mr. Ghosh also relied on an observation made in Saunders v. Dehew (1692) 2 Vern. 271 : 23 E.R. 775. Though he did, not, cite the case he drew our attention to the substance of the legal proposition enunciated in that case from vol. 35 of the English and Empire Digest at p. 909. The proposition on which he relies reads like this,

A purchaser or mortgagee shall not protect himself by taking a conveyance from a trustee after notice of the trust, for by taking such conveyance he becomes the trustee himself.

This observation has no application to the facts of the present case for, first, the goods were not taken from a trustee in this case and secondly, there is no question of the purchaser protecting himself because the Plaintiff bank has not really proceeded against the purchaser.

24. There was no other point argued on behalf of the Plaintiff bank. The result is that in our opinion the Plaintiff has failed to make out a case against the Defendant State of West Bengal.

25. In the circumstances the appeal is allowed only in part. The Plaintiff bank will get a decree against Ranjit for the whole amount, i.e., for Rs. 36,921.50 P. This decretal amount will bear interest on judgment at 6 per cent per annum. The Plaintiff bank will also be entitled to costs against Ranjit both in the suit below as well as in this appeal. The decree of the learned trial Judge is modified to this extent. As against the State of West Bengal, the appeal is dismissed with costs. Certified for two counsel.

Mitter, J.

26. I agree.

