
(1972) 06 CAL CK 0014
In the Calcutta High Court
Case No : Matter No. 53 of 1972

West Bengal Financial Corporation and Another APPELLANT
Vs
Gluko Series Private Ltd. RESPONDENT

Date of Decision : 08-06-1972

Acts Referred:

Contract Act, 1872 — Section 39
State Financial Corporations Act, 1951 — Section 31, 32, 32(11), 32(4)

Citation : AIR 1973 Cal 268 : (1973) 1 CALLT 447 : (1973) 1 ILR (Cal) 434

Hon'ble Judges : Hazra, J

Bench : Single Bench

Advocate : Gouri Mitter, General, for the Appellant; I.P. Mukherjee, for the Respondent

Judgement

Hazra, J.—The petitioner West Bengal Financial Corporation is a body corporate established under the State Financial Corporations Act, 1951 (Act, LXIII of 1951) (hereinafter referred to as the said Act). The petitioner No. 2 Shri Kalipada Chatterjee is an Officer of the West Bengal Financial Corporation (hereinafter referred to as the Financial Corporation). The respondent is a private limited company incorporated under the Companies Act, 1956 (hereinafter referred to as the respondent company).

2. This application by the petitioner is under Sections 31 and 32 of the said Act. The prayer of the petitioner is for (a) sale of land, buildings, machinery and other assets mortgaged and charged in favour of the Financial Corporation, (b) ad interim order of attachment (c) ad interim order of injunction (d) for notice to be issued calling upon the respondent company to show cause why the ad interim orders of attachment and injunction should not be made absolute, (e) if the respondents fail to show sufficient cause then the ad interim orders may be made absolute, (f) for appointment of receiver to take possession (g) receiver be directed to sell the mortgaged property and (h) ad interim order in terms of prayers (f) and (g) ad interim orders for appointment of receiver and for sale by

Receiver and costs.

3. In this application the petitioners are not only asking for reliefs mentioned in Section 31 of the said Act, but in addition are asking for appointment of receiver and for sale by the Receiver of the mortgaged and charged properties.

4. The petitioner No. 1 is a Corporation solely established under the said Act. The Act contains elaborate provisions as to incorporation of State Financial Corporation their capital and management. The general superintendence and management of the affairs of the business of the Financial Corporation vests in a Board of Directors which, with the assistance of an executive committee and a managing director, exercise all the powers which may be exercised or discharged by the Financial Corporation. The powers and duties of the Board are set out in Chapter III of the said Act. The Board in discharging its functions under the Act shall act on business principles, due regard being had by it to the interests of industry, commerce and general public. Section 25 enumerates the business which the Financial Corporation may transact. The several kinds of business it may transact are set out in Section 24 of the Act.

5. u/s 29. of the said Act where any industrial concern is under a liability to Financial Corporation, under an agreement makes any default in repayment of loan or advance it has right to take over the management of the industrial concern as well as the right to transfer by way of lease or sale and realise the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation. This right or power of the Financial Corporation can be exercised by it without coming to Court.

6. u/s 30 of the said Act the Financial Corporation has power to call for repayment before the agreed period. This section provides that, notwithstanding anything in any agreement to the contrary, the Financial Corporation may, by notice in writing, require any industrial concern to which It has granted any loan or advance to discharge forthwith in full its liabilities to the Financial Corporation if the industrial concern has failed to comply with the terms of the contract with the Financial Corporation in the matter of the loan or advance or if there is a reasonable apprehension that the industrial concern is unable to pay its debts or if the property pledged, mortgaged or hypothecated for the loan is not insured or kept insured by the industrial concern to the satisfaction of the Financial Corporation.

7. The Act provides special provisions for enforcement of claims by the Financial Corporation which is contained in Section 31 of the Act. This application has been made under the special provisions contained u/s 31 and Section 32 of the said Act. The relevant provisions of the aforesaid sections are set out hereunder.

8. Section 31 of the said Act is as follows:

"31 (1) Where an industrial concern, in breach of any agreement, makes any default in repayment of any loan or advance pr any instalment thereof or

otherwise fails to comply with the terms of its agreement with the Financial Corporation or where the Financial Corporation requires an industrial concern to make immediate repayment of any loan or advance u/s 29 and the industrial concern fails to make such repayment (then, without prejudice to provisions of Section 29 of this Act and of Section 69 of the Transfer of Property Act 1882) any officer of the Financial Corporation generally or specially authorised by the Board in this behalf, may apply to the District Judge within the limits of whose jurisdiction the industrial concern carries on the whole or a substantial part of its business for one or more of the following reliefs namely :

(a) for an order for the sale of the property pledged, mortgaged hypothecated or assigned to the Financial Corporation as security for the loan or advance or

(b) for

(c) for an ad interim injunction restraining the industrial concern from transferring or removing its machinery or plant or equipment from the premises of the industrial concern without the permission of the Board where such removal is apprehended.

2. An application under Sub-section (1) shall state the nature and extent of the liability of the industrial concern to the Financial Corporation, the ground on which it is made and such other particulars as may be prescribed.

9. Section 32 of the said Act is as follows:

"32 (1) -- When the application is for the reliefs mentioned in clauses (a) and (c) of Sub-section (1) of Section 31. the district judge shall pass an ad interim order attaching the security, or so much of the property of the industrial concern as would on being sold realise in his estimate an amount equivalent in value to the outstanding liability of the industrial concern to the Financial Corporation, together with the costs of the proceedings taken u/s 61. with or without an ad interim injunction, restraining the industrial concern from transferring or removing its machinery, plant or equipment.

(2) When the application is for the relief mentioned in Clause (b) of Sub-section (1) of Section 31. the district judge shall grant an ad interim injunction restraining the industrial concern from transferring or removing its machinery, plant or equipment and issue a notice calling upon the industrial concern to show cause on a date to be specified in the notice, why the management of the industrial concern should not be transferred to the Financial Corporation.

(3) Before passing any order under Sub-section (1) or Sub-section (2) the district judge may, if he thinks fit, examine the officer making the application.

(4) At the same time as he passes an order under Sub-section (1), the district Judge shall issue to the industrial concern a notice accompanied by copies of the order, the application and the evidence, if any, recorded by him calling upon it to show cause on a date to be specified in the notice why the ad interim order of

attachment should not be made absolute or the injunction confirmed.

(5) If no cause is shown on or before the date specified in the notice under Sub-sections (2) and (4). the district judge shall forthwith make the ad interim order absolute and direct the sale of the attached property or transfer the management of the industrial concern to the Financial Corporation or confirm the injunction.

(6) If cause is shown, the District Judge shall proceed to investigate the claim of the Financial Corporation in accordance with the provisions contained in the Code of Civil Procedure, 1908 (Act V of 1908). in so far as such provisions may be applied thereto.

(7) After making an investigation under Sub-section (6). the District Judge may-

(a) confirm the orders of attachment and direct the sale of the attached property;

(b) vary the order of attachment so as to release a portion of the property from attachment and direct the sale of the remainder of the attached property;

(c) release the property from attachment;

(d) confirm or dissolve the injunction; or

(e) transfer the management of the industrial concern to Financial Corporation or reject the claim made in this behalf:

Provided that when making an order under clause (c), the district judge may make such further orders as he thinks necessary to protect the interests of the Financial Corporation and may apportion the costs of the proceedings in such manner as he thinks fit:

Provided further that unless the Financial Corporation intimates to the district judge that it will not appeal against any order releasing any property from attachment, such order shall not be given effect, to. until the expiry of the period fixed under Sub-section (9) within which an appeal may be preferred or. if an appeal is preferred, unless the High Court otherwise directs, until the appeal is disposed of.

(8) An order of attachment of sale of property under this section shall be carried into effect as far as practicable in the manner provided in the Code of Civil Procedure, 1908 (Act V of 1908) for the attachment or sale of property in execution of a decree "as if the Financial Corporation were the decree-holder

(8-A)

(9) Any party aggrieved by an order under Sub-section (5) of Sub-section (7) may. within thirty days from the date of the order, appeal to the High Court, and upon such appeal the High Court may. after hearing the parties, pass such orders thereon as it thinks proper.

(10)

(11) The functions of a District Judge under this section shall be exercisable-

(a) in a presidency town, where there is a City Civil Court having jurisdiction, by a Judge of that Court and in the absence of such Court by the High Court; and

(b) elsewhere, also by an additional District Judge.

10. The application was moved as Court application on February 18, 1972 and on the prayers of the petitioners ex parte ad interim order was passed by Ghose. J. in terms of prayer (f) of the petition, appointing Mr. S. Roy Chowdhury and Mr. A. K. Mondal as joint receivers.

11. Question has been raised in this application as to whether ad interim receivers could be appointed in an application u/s 31 of the said Act ?

12. Opening the case for the petitioner Mr. Gouri Mitter, the learned Advocate-General placed before me a decision of the Madras High Court reported in AIR 1942 Mad 396. (Nareppa Naidu v. Asethu Reddi) and submitted that appointment of an ad interim receiver is in itself a form of attachment and as such the said ex parte order was duly made.

13. The learned Advocate-General also stated that previous to this order by Ghose. J. there were also several orders passed by this Court and ad interim receivers were appointed. He referred to me an order passed by A. N. Sen, J. on 20-2-1968 in matter No. 732 of 1967 (Cal). (Industrial Finance Corporation of India v. Agrind Fabrications Ltd.) under the Industrial Finance Corporation Act, 1948. where the learned Judge appointed ad interim receivers. He also referred me to another order dated July 20, 1970 by S. C. Ghose J. in matter No. 256 of 1970 (West Bengal Financial Corporation v. Eastern National Engineering Works Ltd.) under Sections 31 and 32 of the Act. where the learned Judge appointed an ad interim receiver. Again in matter No. 195 of 1971 (Cal). (Industrial Finance Corporation of India v. Britania Building and Iron Co. Ltd.), Remendra Mohan Dutta. J. also appointed receivers u/s 30 of the Industrial Finance Corporation Act by his order dated June 28, 1971.

14. In this connection, the learned Advocate-General also stated that there is a recent decision of the Patna High Court reported in Industrial Finance Corporation of India and Another Vs. Thakur Paper Mills Ltd. and Another, where u/s 30 of the Industrial Finance Corporation Act, 1948. the Patna High Court has taken the view that Court has power to appoint receiver under Order 40, Rule 1 of the CPC inasmuch as a proceeding u/s 30 of the Industrial Finance Corporation Act, 1948 is a proceeding of the kind contemplated by Section 141 of the Code of Civil Procedure.

15. Learned Advocate-General then contended that Section 32, Sub-section (4) of the said Act, does not require any notice to show cause why the property should not be sold. All that is stated here is that why ad interim order of attachment should not be made absolute or injunction confirmed. u/s 32. Sub-section (6) if the cause is shown, the District Judge shall proceed to investigate

the claim of the Financial Corporation in accordance with the provisions contained in the CPC (Act V of 1908) in so far as such provision may be applicable. The learned Advocate-General stressed that the investigation is with regard to the claim of the Financial Corporation and therefore if an application u/s 31 is made, only the claim of the Financial Corporation will be investigated and if the defendant Company makes a claim or counter-claim against the Financial Corporation the same cannot be decided in this application.

16. With regard to the facts of the present application it was submitted as follows:

On August 10, 1964 the petitioner lent and advanced a sum of Rs. 4,38,000/- and agreed to advance a further sum of Rs. 1.62.000/- to be lent and advanced and the defendant company duly mortgaged and charged in favour of the Financial Corporation all lands, buildings and plants described in parts 1 and 2 of the first and second schedule of the deed of mortgage on the terms and conditions set out in the deed. A copy of the deed of mortgage is annexed to the petition. It will appear from clause (1) of the deed of mortgage that the mortgage was executed in consideration of Rs. 4,38,000/- which was lent, advanced and paid by the Financial Corporation and in further consideration of Rupees 1,62,000/- to be lent, advanced and paid by the Corporation, in its discretion, and in such instalments as it thinks fit, to the defendant company in the event of the company complying with all obligations as are applicable under this deed. The company covenanted to the Corporation that the company shall repay to the Corporation in terms of the agreement. So far as repayment is concerned clause (1a) provided that in the event of advances being made by the Corporation to the extent of Rs. 6,00,000/- the repayment would be made in certain manner and within certain dates.

17. Clause (i). Sub-clause (b) provides that in the event of the Corporation not advancing to the company the full amount of Rs. 6,00,000/- then the said sum of Rs. 4,38,000/- or such other principal sum as may be advanced, repayment will be made by yearly instalment of Rs. 60,000/- and the first of such instalment to be paid on December 31, 1967 and other subsequent instalments would be paid on December 31 on each and every succeeding year together with interest on the said sum of Rs 6,00,000/- or the sum of Rs. 4,38,000/- or such other principal sum as may be advanced.

18. Clause 4, Sub-clause (5) of deed of mortgage provides that the company will at all times during the continuance of the agreement keep the mortgaged premises and every part thereof in good and substantial state of repair and working order and also keep the building sheds plant and machinery insured in the joint names of the company as mortgagor and the Corporation as mortgagee against loss or damage by fire as also by riot or other civil commotion or other risks or such of them as may be required by the Corporation from time to time in their full value (to be determined by the Corporation in its sole discretion), in some insurance office of repute to be approved of in writing by the Corporation

the said value determined by the Corporation as aforesaid to be apportioned between the mortgaged premises in such manner as the Corporation may prescribe or approve of and the company shall pay all premia for renewal of such insurance at least one week before the same shall become due. Again clause 5 (2) of the deed of mortgage provides that further sums to be lent, advanced and paid by the Corporation to the company as mentioned in Clause (I) of his deed shall be paid at such time and shall be for such amounts as and when in the opinion of the Corporation (which is final) assets of sufficient value are owned by the company or acquired by the company and mortgaged to the Corporation or deemed so to be and the company has carried out all its obligations under this mortgage.

19. Under Clause 14. the Corporation may by notice require the company forthwith to discharge in full its liabilities to the Corporation, if the Company has failed to comply with any of the terms of its contracts with the Corporation in the matter of the said loan.

20. Under Clause 15 of the deed of mortgage, the Corporation has the right by notice in writing to require the company forthwith to discharge its liabilities to the Corporation in any of the following cases and in any of such cases the whole of the amount then remaining payable to the Corporation shall at the option of the Corporation become payable to the Corporation if the time for the payment thereof had expired, namely, (a) if default shall be committed by the company for a period exceeding one month in payment of any instalment of the said principal sum or (b) if interest amount to at least Rs. 500/-shall be in arrear and unpaid for one month after becoming due and (f) if default shall be committed by the company in observance or performance of any of the covenants, conditions or provisions of these presents.

21. The case of the petitioner is that the respondent failed and neglected to comply with the terms of the said deed of mortgage and committed breaches thereof which are, inter alia, as follows :

(a) the respondent failed and neglected to pay four annual instalments of Rs. 60,000/- each which fell due on 21st of December 1967, 31st December 1968, 31st December 1969 and 31st December 1970; (b) the respondent further failed and neglected to pay the interest due under the mortgage (c) the respondent failed to pay the insurance premium amounting to Rs. 9,139.24 P.

22. In the premises, the Corporation became entitled to and duly exercised its option to call for repayment of its dues. By notice in writing dated September 25, 1971. the Corporation duly required and called upon the respondent to discharge forthwith in full its liabilities. There is now due and owing from the respondent to the Corporation a sum of Rs. 6,82,854.09 p. being the principal amount, interest calculated up to December 31, 1971 and for insurance premium.

23. It was pointed out that by the letter dated July 30, 1966 which is annexed to the affidavit-in-opposition on behalf of the respondent it was admitted that the

company was unable to make payment of interest at present. By the letter dated April 5, 1966. it will also appear that the Corporation also required that the company shall arrange to pay premiums for riot and strike risks in respect of the policies.

24. With regard to the interest it is stated that the interest was agreed to be paid at the rate of 7 1/2% per annum payable quarterly on March 31, June 30, September 30, and December 31 each year.

25. It is submitted that u/s 32, Sub-clause (6) the Court shall proceed to investigate the claim of the Financial Corporation as stated in the petition, but there cannot be any dispute with regard to the figures. The loan advanced is admitted. The rate of interest is also agreed and the calculation is not disputed. The question of non-payment of insurance premia is also not disputed. Therefore, there is no dispute as to the claim and there is no question of investigation as to the amount of the claim.

26. Mr. I. P. Mukherjee, the learned counsel for the respondent took the preliminary point that the show cause notice dated February 18, 1972 served upon his client u/s 32. Sub-section (4) of the said Act is not a proper notice and is not in accordance with the said Act. It appears from the notice that ad interim order was passed appointing Mr. S. Roy Choudhury and Mr. S. K. Mondal as joint receivers in terms of prayer (f) of the petition, and by the said notice the respondent was required u/s 32. Sub-section (4). to show cause why the ad interim order dated February 18, 1972 should not be made absolute. Mr. Mukherjee contended that, his client is showing cause to this notice by stating that there is no provision for appointment of ad interim receiver u/s 32 Sub-section (1) of the said Act. and therefore there is no question of the said appointment of ad interim receiver being made absolute u/s 32, Sub-section (4) of the said Act.

27. The further points taken by Mr. Mukherjee on behalf of the respondent are that the agreement under which the loan was advanced contained reciprocal promises and as the corporation refused to perform its part of the agreement, the respondent accepted the repudiation. According to Mr. Mukherjee, Section 31 of the said Act has no application and there cannot be any claim by the petitioner, as there is no subsisting contract.

28. Mr. Mukherjee contended that the liability of respondent is disputed in the sense that there is no subsisting agreement, the respondent is not liable at all. Mr. Mukherjee submitted that in case of disputed liability receiver should not be appointed.

29. Mr. Mukherjee contended that there cannot be any case of English mortgage of movables. So far as the immovable properties of the respondent are concerned the same were not in jeopardy and there was no reasonable apprehension of loss or deterioration of the movable or immovable properties of the respondent. Therefore, the principle under which a receiver is appointed in

an English mortgage does not apply in the facts of this case.

30. Mr. Mukherjee referred to paragraph 6 of the petition and submitted that an interim order was obtained from Court on untrue alienations and on suppression of real facts. He submitted that the statements made by the petitioner that no further loan was advanced to the respondent by consent of the parties express or implied, are not true and correct, because the respondent not only wanted the loan of Rs. 6,00,000/- to be given, but also applied for further loan and further loan was sanctioned by the Corporation.

31. With regard to the clause in the mortgage deed where it is provided that further loan may be given at the "discretion" of the petitioner. Mr. Mukherjee contended that the petitioner had abandoned this discretionary power in view of the statement in paragraph 6 of the petition, that by consent of parties no further loan was advanced.

32. With regard to the preliminary point that the notice served on the respondent u/s 32(4) of the Act is bad and receiver should not have been appointed. Mr. Mukherjee referred to several decisions. He relied on AIR 1945 Cal 387. (Satyanarayan Banerjee v. Kalyani Prasad). The head-note of this case runs thus:

"The appointment of a receiver under Order 40, Rule 1 though it might operate to change positions, cannot affect the title to the property which remains in those in whom it was vested when the appointment was made." A receiver appointed in a suit under Order 40, Rule 1 is not representative of the party to the suit within the meaning of Section 47.

33. Mr. Mukherjee contended that Section 31(c) expressly provided what reliefs could be claimed when an application u/s 31 is made. These are for an order for sale of the property pledged, mortgaged, etc. and (c) for an ad interim injunction restraining the industrial concern from transferring or removing the machinery, plant or equipment.

34. Again u/s 32. Sub-section (1) expressly provides that when an application is for the reliefs mentioned in Clauses (a) and (c) of Sub-section (1) of Section 31 the District Judge shall pass an ad interim order attaching the security or so much of the property etc. u/s 32, Sub-section (4). the District Judge shall issue to the industrial concern a notice accompanied by the copies of the order, the application and the evidence stating why the ad interim order of attachment should not be made absolute or the injunction confirmed.

35. Mr. Mukherjee stated that what happened in this case is as follows : On February 18, 1972 this application was moved ex parte on behalf of the Financial Corporation and the Court passed an ad interim order in terms of prayer (f) appointing Mr. S. Roy Chowdhury and Mr. A. K. Mondal as joint receivers. A notice was also issued in terms of prayer (d) of the petition which means a show cause notice why the ad interim order of attachment and injunction should not be made absolute. It appears that on February 23, 1972 this matter was

mentioned again by the learned counsel for the Financial Corporation and on the submission of the learned counsel the Court made the ad interim order of appointment of Receivers and thereafter the notice that was issued was the only notice to show cause why the receivers appointed by the interim order dated February 18 1972 would not be made absolute. Mr. Mukherjee stated that this could not be done. The notice is bad. There is no provision for appointment of receiver and no question of making the appointment of receiver absolute. Mr. Mukherjee cited many cases but the leading case on the point is 67 Ind ADP 222 at P. 237 Secy. of State v. Mask & Co.), 44 Cal WN 708 = (AIR 1940 PC 105) where the Privy Council enunciated the law as hereunder :

"The determination of this question must rest on the terms of the particular statute which is under consideration and decisions on other statutory provisions are not of material assistance except in so far as general principles of construction are laid down. The main principles to be observed in the present case are to be found in the well-known judgment of Willes, J. in *Wolverhampton New Waterworks C. v. Hawkesford*. which was approved of in the House of Lords in *Neville v. London Express Newspaper, Ltd*. The question is whether the present case falls under the third claw stated by Willes. J. "Where a liability not existing of common law is created by statute which at the same time gives a special end particular remedy for enforcing it." With respect to that class it has always been held that the party must adopt to form of remedy given by the statute."

36. Mr. Mukherjee submitted that if the statute save a particular power, the Court can exercise that power and nothing else. If a special statute gives a special power only that power can be exercised. This Act gives the power to pass the order for injunction and attachment and. therefore, ad interim order of receiver was not within the power or authority of the Court and the notice has become a bad notice.

37. Mr. Mukherjee referred to *Official Trustee, West Bengal and Others Vs. Sachindra Nath Chatterjee and Another*, and submitted that one has to be careful to distinguish between exercise of jurisdiction from existence of jurisdiction and in the instant case when the application is made under the special statute, there is no jurisdiction to appoint joint receivers.

38. With regard to the case reported in AIR 1942 Mad 396. where it was held that an appointment of receiver is itself a form of attachment, which was relied upon by the learned Advocate General in his opening Mr. I. P. Mukherjee. submitted that the said observation in the judgment referred to by the learned Advocate General is an "obiter dictum". In the Madras case the question was whether the appointment of the receiver in execution prior to attachment is invalid or not. It was held in the aforesaid judgment that it was not so, and the present CPC does not appear to contemplate an attachment as a necessary preliminary for appointment of receiver in execution.

39. With regard to *Industrial Finance Corporation of India and Another Vs.*

Thakur Paper Mills Ltd. and Another, . referred to by the learned Advocate General Mr. Mukherjee contended that if the attention of the Court was drawn to the decision of the Supreme Court re-reported in Official Trustee, West Bengal and Others Vs. Sachindra Nath Chatterjee and Another, and the decision of the Privy Council in Mask's case reported in 67 Ind App 222= (AIR 1940 PC 105). the Court would not have held that receiver could be appointed under Order 40, Rule 1 in an application under special Statute where special powers of the Court are invoked. However, even in the Patna case although it was held that the Court had power to appoint receiver the Court did not appoint receiver. Therefore, in the circumstances of this case also there is no question of appointment of ad interim receiver.

40. In support of his submission that this is a case of reciprocal promises between the parties and the petitioner did not perform its promise and repudiated the agreement and the respondent accepted the repudiation and the contract came to an end. Mr. Mukherjee relied upon Section 39 of the Indian Contract Act.

41. I shall deal with the points raised by Mr. Mukherjee as hereunder:

42. The question is whether Section 39 of the Indian Contract Act is attracted?

Section 39 of the Indian Contract Act provides as follows:

"When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance."

43. In order to attract Section 39 of the Indian Contract Act. it has to be considered, whether the petitioner has refused to perform its promises "in its entirety" and whether the respondent has put an end to the contract or has signified by words or conduct its acquiescence in its continuance. The meaning of the words "in its entirety" is also important.

44. The kind of refusal contemplated in Section 39 of the Contract Act is one which affects the vital part of the contract and prevents the promisee from getting in substance what he bargained for. It must be shown that the party to the contract has made it quite plain that his own intention is not to perform the contract. But what has happened in this case? The petitioner has not refused to perform any part of the contract but only exercised its discretion, under the contract. The petitioner asked the respondent to carry out its obligations under the contract. The respondent was asked to insure and to repay the interest and also to repay the instalments due and payable under the contract but the respondent failed to carry out its obligations under the contract. Therefore it is the respondent which did not carry out its part of the contract. The respondent has acquiesced in the contract. The loan of Rs. 4,38,000/- which was granted to the respondent was accepted by the respondent and the respondent asked for

further money. As the respondent did not carry out its part of the contract, the petitioner in the exercise of its discretion under the contract did not lend any further amount.

45. I agree with the contention of the learned Advocate General that the petitioner had a discretion to make further loan and the respondent had no light to compel the petitioner to make further loan. In the exercise of its discretion, the petitioner did not make further loan. Therefore, it cannot be said that u/s 39 of the Indian Contract Act, the petitioner has refused to perform its promise in its entirety. In the premises there is no question of putting an end to the contract by the respondent.

46. I also accept the contention of the Learned Advocate General that in the instance case, the petitioner wanted that the respondent should perform its part of the agreement by paying the interest and by paying the instalments and the insurance premia. Apparently, the respondent did not perform its part of the agreement. Therefore how can the respondent take recourse to Section 39 of the Indian Contract Act, and say that the petitioner has repudiated the contract and the respondent has accepted the repudiation? In any event, it appears that till the last moment before this petition was filed the respondent was trying to get loan from the petitioner. It further appears from the letter dated June 12, 1967 on behalf of the petitioner to the respondent that the petitioner complained that there was default made by the respondent by which the entire loan has become recoverable at once. On June 21, 1967, the respondent did not deny that there was no default on the part of the respondent and, thereafter the respondent was silent till 1972 when this petition was filed. The Learned Advocate General has rightly pointed out that the respondent has impliedly accepted the position that it defaulted in repaying the loan and even if the respondent says that it repudiated the contract the respondent has to refund the amount which was advanced with interest and this has not been done.

47. Therefore in my view Section 39 of the Indian Contract Act has no application in this case. Further, admittedly, acceptance of repudiation, if any, by the respondent was made for the first time in the affidavit-in-opposition. Mr. Mukherjee in course of his argument had to admit that the repudiation had been accepted by the respondent not before the filing of the petition but only in paragraph 11 of the affidavit-in-opposition of the respondent, which was affirmed on March 20, 1972.

48. The rights of the parties are to be determined on the date of the institution of the application. Therefore, I cannot accept the contention of Mr. Mukherjee that Section 39 of the Indian Contract Act applies in the case. As there was no question of repudiation on the date of the filing of the petition, the agreement must be held to be a subsisting agreement at the date when this application was made.

49. In my view, the Learned Advocate General has rightly submitted that the

respondent has impliedly accepted the position that it defaulted in repaying the loan and when the respondent says that it repudiates the contract the respondent has to refund the amount which the respondent took as loan with interest thereon. After all money had been taken by the respondent; the amount of loan taken by respondent was not disputed. The interest was agreed upon, the insurance premium was also payable. Therefore, with regard to the claim of the petitioner in this application there is no dispute.

50. Mr. Mukherjee raised the point that the City Civil Court has exclusive jurisdiction to entertain and try this application and this Court has no jurisdiction to try this application. He relied on Section 32, Sub-section (11) of the said Act and referred to a decision by S. Datta J. reported in *Monika Das Gupta Vs. Promode Kumar Roy*, . I do not accept the contention of Mr. Mukherjee, Section 32 Sub-section (11) does not say that the City Civil Court will have exclusive jurisdiction but states "in the presidency Town where there is City Civil Court having jurisdiction. by a Judge of that Court and in the absence of such Court by the High Court. The words "in the absence of such Court" mean in the absence of such Court having jurisdiction in the matter. The City Civil Court has no jurisdiction to entertain and try suits and proceedings of Civil nature exceeding Rs. 50,000/- in value. Here the value of the claims in the proceeding exceeds much more than Rs. 50,000/- and, therefore, u/s 32, Sub-section (11) this proceeding has been duly instituted in the High Court. The Judgment of S. Datta. J. in *Monika Das Gupta Vs. Promode Kumar Roy*, does not apply, because in that case the learned Judge was interpreting Section 19 and Section 3(b) of the Hindu Marriage Act, 1956 which are worded differently. I do not think interpretation of certain sections of Hindu Marriage Act 1955 where languages are different will apply in the instant case. I agree with the learned Advocate General that this Court has jurisdiction to entertain and try this application.

51. The only question which now requires consideration is. the point raised by Mr. Mukherjee. namely, whether the notice u/s 32(4) of the said Act is a proper notice and whether the petitioner can ask for ad interim order for appointment of receivers to be made absolute in this application?

52. With regard to this part of the case, I think there is much substance in the argument of Mr. Mukherjee. This is a special statute under which special rights have been conferred and the provisions of the special statute must be strictly complied with. If special statute gives a special power only that power can be exercised.

53. The authorities cited by Mr. Mukherjee and particularly the decision of the Privy Council in 67 Ind App 222 = (AIR 1940 PC 105) has enunciated the law very clearly on this point.

54. With regard to the several orders passed by the Learned Judges of this Court appointing ad interim receivers in an application u/s 31 of the said Act. which is referred to by the Learned Advocate General, it does not appear that any

judgment has been delivered or that there in any "decision" in any of the said matters. It also does not appear whether this point has been argued fully before the learned Judges. It may be that the petitioner might have referred to AIR 1942 Mad 396 where it was held that the appointment of the receiver is in itself a form of attachment. It does not appear that the Division Bench decisions of this Court reported in (1959) 63 Cal WN 869. (Nirmala Sundari Dassi v. Mrinalini) and (1963) 67 Cal WN 498 (Cooch Behar Bank v. Jatindra Nath Ghose). where it was held that the appointment of the receiver is not an order of attachment, was brought to the notice of the Court when the aforesaid orders were passed. Even in the Patna case cited by the Learned Advocate General although it was held that the Court has power to appoint Receiver having regard to Section 141 of the Code of Civil Procedure, still the Court did not appoint receiver under the facts of that case, which are similar to the facts of this case.

55. In view of the above matter, I think I shall follow the principle laid down in Mask & Company's case reported in 67 Ind App 222 = (AIR 1940 PC 105). I am also bound to follow the decision reported in (1959) 63 Cal WN 689 where Bachawat, and Renupada Mukherjee, JJ. had taken the view that "an order for appointment of receiver is not an order of attachment". I should mention that there is another Division Bench case of the Calcutta High Court reported in (1963) 67 Cal WN 498 by Lahiri, C. J. and Bachawat. J. also to the same effect.

56. In the premises. I accept the preliminary point argued by Mr. I. P. Mukherjee. In my view, Mr. Mukherjee has rightly contended that assuming the Court has power to appoint receiver the Court should not have appointed receiver at the interim stage under the facts of this case. In my view, u/s 32 of the said Act. ad interim Receiver cannot be appointed but only ad interim" attachment and ad-interim order of in-junction could be passed. In case of attachment, there is a prohibitory order to sell or dispose of certain properties, but running of business with the hypothecated or mortgaged properties may not be interfered with. In case of appointment of receiver possession is taken by the receiver and running of business would be interfered with or" stopped. In my view, therefore, the notice served on the respondent in this case is not a notice which is contemplated u/s 32 Sub-section (4) of the said Act.

57. In view of the above matter the question is what should be done under the facts and circumstances of this case?

58. On the facts of this case in my view there is no defence to the claim of the petitioner, but the notice served on the respondent is not a proper notice, under the provisions of the said Act.

59. Learned Advocate General appreciated this point and at the reply stage, he submitted that when the Court passed an order in February 18, 1972 by appointment of joint receivers and by issuing notice in that form, although the same was done at the instance of the petitioner, but still the order was Court's order. The order may not be strictly according to the statute. But this does not

mean that the order is without jurisdiction. If a Court passes an order which is not correct, the Court can always recall or vary the order and pass such other order which is contemplated by the statute and the learned Advocate General asked me to do the same under the facts of this case.

60. If I accept the contention of the Learned Advocate General, then. I will have to pass another order attaching the properties of the respondent which are secured for payment of the loan made by the petitioner and issue another notice to show cause why the ad interim order of attachment should not be made absolute. The prayers in the petition have been made in conformity with Sections 31 and 32 of the said Act and there is no reason why I shall not issue such notice as contemplated u/s 32 of the said Act. if it is so necessary. If such a notice is issued what cause Mr. Mukherjee's client will show on the merits of the case? The amount of the claim is admitted. The loan could not be repaid, and the provisions of Sections 31 and 32 are clearly applicable.

61. If I issue another notice in terms of Section 32 there will be another hearing of the application over again.

62. In the premises, without issuing any further notice, I shall treat the notice issued by Ghose. J. as notice of attachment u/s 32. Sub-section (4) and allow costs of this application to Mr. Mukherjee's client. I think justice will be done if I follow this course.

63. In the result, there will be order for sale in terms of prayer (a) of the petition. I direct the Registrar. Original Side, to sell the properties mortgaged, hypothecated and charged or substantial portion of the same and out of the sale proceeds the petitioner is entitled to payment of the sum of Rupees 6,82,854.09 as claimed in the petition with interest thereon at 6% per annum from the date of the filing of the petition till the date of payment. The petitioner however will pay the costs of the application to the respondent. The joint receivers appointed at the instance of the petitioner will be discharged and the remuneration of the joint receivers assessed at 30 G. Ms. each, to be paid by the petitioner at whose instance the joint Receivers were appointed. The sale of the mortgaged and/or charged properties to be made by the Registrar. Original Side of this Court as provided under the Rules of this Court.

Certified for two counsel.

64. There will be stay of operation of the order for four weeks.