(1922) 07 CAL CK 0032

Calcutta High Court

Case No: None

Raja Jagadish Chandra Deo Dhabal Deb		APPELLANT
	Vs	
Bhubaneswar Mitra and Others		RESPONDENT

Date of Decision: July 14, 1922

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 34 Rule 14

Citation: AIR 1923 Cal 121 : 76 Ind. Cas. 241

Hon'ble Judges: Pearson, J; N.R. Chatterjea, J

Bench: Division Bench

Judgement

1. This appeal arises out of a suit upon three mortgages executed by the defendants Nos. 1 and 2 in favour of the plaintiff. The mortgages were dated the 17th July 1908 (for Rs. 5,000) 7th July 1909 (for Rs. 1,300) and 5th May 1910 (for Rs. 1,362) respectively. A nine-annas durmokarrari right in 10 Mouzahs and also a fractional share of the mokarrari right in two of the Mouzahs, and the jote mandalit right in another (11th Mouzah) were mortgaged. The defendants Nos. 3 and 4 were purchasers of some of the properties long after the mortgages.

2. The suit was originally instituted on the 15th January 1913, against the mortgagors (the defendants Nos. 1 and 2) and the transferees (the defendants Nos. 3 and 4), and was laid at Rs. 11,114-10. The defendants Nos. 1 and 2 entered appearance and filed written statements on the 9th March 1913. the preliminary judgment was passed on the 4th November 1913 and the preliminary decree on the 22nd December 1913.

3. Two days after the suit was instituted, i.e., on the 17th January 1913, an application was made for the appointment of a Receiver, and on the 5th May 1913 an order was made for the appointment of a Receiver. On the 20th June 1913 one Jugabandhu Bose was appointed Receiver. On the 16th July 1913 the plaintiff made

an application to the Court stating that Jagabandhu Das was unable to work as Receiver and that some one else should be appointed in his place. On the 24th July 1913 one Khettra Nath Pal was appointed Receiver, and on the 26th August 1913 possession of the properties was delivered to the Receiver. On the 25th July 1914 Khettra Nath was discharged from Receivership.

4. Before the institution of the suit on the mortgages, the plaintiff instituted four suits against the defendants Nos. 1 and 2, in the year 1912, three out of which were for rent in respect of the mortgaged properties. The fourth suit was for money due to plaintiff and was brought on the Small Cause Court side of the Subordinate Judge''s Court. That suit was decreed against the defendants Nos. 1 and 2. The decree was transferred to trie Munsif''s Court for execution, and in execution of the decree, a 9-anras share of dur-mokarrari interest of the 10 Mouzahs which was mortgaged was sold on the 12th July 1913 for Rs. 1,002 the ostensible purchaser being one Tinkari Bose. On the 17th March 1914 the defendants Nos. 1 and 2 applied for setting aside the sale and it was set aside by the Munsif who held that Tinkari Bose was benamidar for the plaintiff, and the price fetched at the sale was idadequate. On appeal, however, the District Judge set aside the Munsif''s judgment and confirmed the sale. On application to the High Court a Rule was issued, to set aside the order, but it was discharged on the 23rd November 1914. On the 8th August 1914 possession was delivered to Tinkari Bose. On the 7th September 1914 Tinkari Bose applied to be made a party to the mortgage-suit and he was made a party on the 14th November 1914. On the 13th October 1915 Tinkari executed a conveyance of the properties purchased by him in favour of the plaintiff.

5. In execution of one of the rent-decrees obtained by the plaintiff against the defendants Nos. 1 and 2, their mourasi interest in two of the mortgaged properties was put up to sale on the 25th May 1915 and was purchased ostensibly by Tinkari Bose.

6. In execution of another rent-decree obtained by the plaintiff the jote mandali interest of the defendants Nos. 1 and 3 in the nth Mouzah mortgaged was put up to sale and was also purchased by Tinkari Bote on the 22nd January 1915.

7. In execution of the third rent-decree the cutchari bari of the defendants Nos. 1 and 2 in the mortgaged properties was put up to sale, and was purchased by the plaintiff himself, on the 6th November 1913, who obtained possession of it on the 17th July 1914.

8. On the 22nd August 1915 the defendants Nos. 1 and 2 sold their equity of redemption to the appellant. The appellant on the 14th February 1916 applied to be added us a party to the mortgage-suit. The application, however, was rejected on account of some formal defect on the 18th February 1916. On the 23rd February 1916 the application for being added as a party was renewed, and it was again rejected on the 31st July 1916. The appellant then moved the High Court against the

order with the result that the Court ordered that he be made a party and the objections of both parties may be heard. The main objection of the plaintiff was that the appellant did not purchase any interest in the properties so as to entitle him to redemption of the same. The appellant''s principal contentions were, first; that the purchase ostensibly made in the name of Tinkari Bose was really made by the plaintiff, Tinkari being merely his benamidar secondly, that under the circumstances the plaintiff was really a trustee for the mortgagors, and the appellant was entitled to redeem on accounts being taken between a trustee and a beneficiary; and, thirdly, that the equity of redemption having been sold at a time when the Receiver had already been appointed, and without the permission of the Court which appointed the Receiver, the sale was altogether void in law, and that even if voidable it can be avoided in the present litigation.

9. The Court below overruled all these contentions of the appellant.

10. The first question for consideration is, whether the purchase by Tinkari was benami for the plaintiff. The onus of proving benami is certainly upon the appellant.

11. The appellant relies (among other things) upon the observations in the judgment of the Munsif dated the 17th March 1914 setting aside the sale, and in the order of the High Court dated the 23rd November discharging the Rule. The Munsif held that Tinkari was "decree-holder''s man and the property was purchased in his benami," and further that Tinkari Bose is a mere benamidar which fact is not challenged by the decree-bolder or auction-purchaser." He also found that there were irregularities in the publication of the sale and the properties were sold at an inadequate price. The order of the Munsif, however, as stated above was set aside on appeal by the District Judge on the 29th May 1914. The learned. Judge did not consider the question of benami, but held that the properties were not sold at an inadequate price and the judgment-debtors had not sustained substantial loss and accordingly decreed the appeal and confirmed the sale. The High Court in discharging the Rule (granted for setting aside the order of the District Judge) observed that while the mortgage-suit was pending the decree-holcer "executed his money-decree and in execution purchased some of the mortgaged properties himself," As contended on behalf of the respondent, the order of the Munsif having been set aside by the District Judge on appeal, the appellant cannot rely upon the observations of the Munsif on the question of benami, nor can he rely upon the observation of the High Court as it was merely a statement of facts and note decision upon the question, no question of benami having been raised or considered by it. It appears that separate appeals were preferred by the plaintiffs and Tinkari against the order of the Munsif to the District Judge, but, as stated above, the judgment of the District Judge proceeded only upon the question whether substantial loss had resulted to the mortgagor by the sale. There is no reference to the question of benami in the judgment, and it dees not appear that the question of benami was raised before the Appellate Court. All that can be said is

that the fact expressly stated in the judgment of the Munsif, viz., that Tinkari was benamidar, was not challenged by him or the decree-holder (the plaintiff) before the Munsif, nor before the High Court as the statement of facts quoted above indicates.

12. The plaintiff has not examined himself. He has, however, examined Tinkari, and the latter says that he purchased the properties with his own money and was in possession until he conveyed the properties to the plaintiff. There is no evidence that the purchase-money belonging to the plaintiff, but the appellant relies upon various matters as showing the improbability of Tinkari being the real purchaser.

13. Tinkari it appears is a Pleader''s clerk, his earnings, according to his own account, are about Rs. 60 per month. He says be has some 10 bighas of lakheraj land and 32 bighas of jamai lands, but the lands are recorded in the Record of Rights in the names 14 of his brothers. He never saw the disputed Mouzah and did not make any enquiry about the condition and income of the Mouzahs before the purchase. He says he had about Rs. 1,525 at the house of Atul Babu, Pleader, whom he served as clerk. This Atul Babu has not been examined. The incumbrances on the properties amounted to Rs. 14,400. There were some costs in taking delivery of possession and a criminal case cost about Rs. 200. It is improbable that a person like Tinkari would purchase the properties at Rs. 1,002 with such heavy liabilities when, admittedly, he made no enquiries about them. The learned Subordinate Judge, however, says that he was in the habit of purchasing properties at auction-sales for selling them at a profit. But Tinkari speaks of only one such purchase--a bastu and that he subsequently sold it. It does not appear what the value of the property was.

15. The properties purchased by Tinkari at the sale held in execution of the Small Cause Court decree, as well as at the sales held in execution of the rent-decrees, were all sold by him to the plaintiff for Rs. 1,101. by a kobala, dated the 13th October 1915. There is an endorsement of payment of the consideration on the kobala by the Sub-Registrar. It is to be observed that in the conveyance it is stated "you shall be entitled to take from my Tehsildar Parbati Charan Bose the balance of the tehbil in his hands." The amount of cash money in the hands of the Tehsildar is not stated. Such a provision is extraordinary and is only consistent with the document being a release by a benamidar in favour of the real owner. Tinkari admits that there was no account of arrears due from the mahal before the sale to the plaintiff, and the price was settled by making a rough account of income and expenditure and he does not remember if he saw that account.

16. One Kunjo Patnaik who took delivery of possession is said to have been in the service of Tinkari. Kunjo is admittedly now a clerk of Tinkari Babu, Pleader, so not the plaintiff. Tinkari says that Kunjo was in his service for about a month after delivery of possession of the properties. The delivery of possession took place on the 8th August 1914. The appellant has produced two post-cards which go to show that Kunjo was acting alter september 1914 and up to the time when Tinkari executed the conveyance to the plaintiff. The first postcard (Exhibit 13) is dated the

15th November 1914 written by Kunjo to Baloram Mahto, admittedly a servant of the plaintiff and in charge of the cutchery bari after plaintiffs'' purchase of the cutchery. In that post-card Kunjo wrote as follows: "Do not be anxious tor your salary and fooding charges. Defray these expenses from your pocket now. I shall go there as soon as I can and on my arrival there I snail pay your salary and other dues. The second post-card (Exhibit B1) is dated 6th December 1914, and is also written by Kunjo to Baloram. It advises the remittance of Rs. 2 by money-order for fooding charges of Bolaram and then states: "You should guard the rule and timber and make enquiries a any one commits the it. Tell Tarak Babu (the defendant No 1) not to out paddy from the nij jote lands of Jadra, and (sic)une cuts(sic)lurcioiy, make two or three persons witnesses, a criminal case shall nave to be instituted against them. Tarak Babu is defeated m the High Court so he has no title to the village."

17. There is another post-card dated the 25th October purporting to be written by Jhareswar Sen to Kunjo, in which it was stated that master had gone to Calcutta, and requested Kunjo to keep the house and the timber and fuel in the charge of Baku (Baloram) Monta, give directions if anything "untoward" happened, and also directions about some block of stones for constructing a granary. The Court below says that the genuineness of the post-cards has not been satisfactorily proved and even it genuine _they do not go to prove much tor the defendant. Jhareswar denies that the post-card, Eixhibit B2, was written by him, but the defendant Tarak says that it is in the handwriting of Jhareswar, and Exhibits B & B1 are in the handwriting of Kunjo. There is nothing suspicious about the appearance of these post-cards, and the contents such as are likely to be written to the person addressed. Kunjo who is in the service of plaintiff''s son has not been examined, it, as Tinkari says, Kunjo was in his service only for about a month after the 6th August 1914, it is difficult to see why he was writing letters to Baloram about his salary and about the mahal in November or December 1914, nor again why Kunjo should write letters about the payment of salary of Baloram or ask him to look after the affairs of the mahal bearing in mind the fact that Baloram was the plaintiff''s servant and in charge of only the cutchery bari which alone had been purchased by the plaintiff at that time.

18. These post-cards indicate that at the time when they were written the plaintiff was the owner ci the properties (which was long before the conveyance by Tinkari to the plaintiff), and that Kunjo, Baloram and Jhareswar were all agents for and acting tor the plaintiff,

19. The defendant No. 1, Tarak, says that he came to the plaintiff at Midnapur for compromise when the appeal in the case for setting aside the sale was pending before the District Judge, and that the plaintiff at that time had agreed to give up the properties if the mortgage-debt and also the decretal debt (under the Small Cause Court decree) were paid to him. It is said that Tarak came with one Anukul Babu to see the plaintiff in the connection. This Anukul Babu has not been examined. But the plaintiff has not come forward to deny the facts stated by Tarak.

20. Then, again, the defendant examined some witnesses to show that there was some dispute as to the rents payable (about kists and interests) and also a bout rent-receipts being granted in the name of Tinkari, that they came to the plaintiff for settlement and that plaintiff gave certain orders in that connection. This is said to have taken place before the plaintiff''s purchase from Tinkari. The Court below has disbelieved the evidence of these witnesses. The witnesses are tenants of the mahal, and the appellant has got a 7-annas share in the Mouzahs. The same thing, however, may be said of the witnesses for the plaintiff who denied that there was any such dispute as the plaintiff is the owner of a 9-annas share of the Mouzah. However that may be, the witnesses for the defendant were examined from the 4th to the 9th December when all those statements were made. The plaintiff''s witnesses were examined on the 10th and 11th December and yet the plaintiff did not come forward to deny them. An explanation Is attempted in this Court, viz., that the plaintiff''s daughter was seriously ill at Calcutta and he had to come away. But assuming that was true, there was no application for adjournment of the case, not any application for examination by Commission. There is no doubt that the onus of proving benami was upon the defendant, but after the definite statements made by the defendants'' witnesses as to the plaintiff''s dealings with the property indicating that he was the owner of the property, the plaintiff, we think, ought to have examined himself and denied those statements on oath. There is also no explanation why Kunjo who, as stated above, is the clerk of the plaintiff''s son was not examined by the plaintiff. We do not think the Court below was right in rejecting the evidence of the plaintiff in the manner it has done.

22. As to the alleged admission made by the plaintiff that Tinkari was Ms benamidar, a nd that the tenants should accept dakhilas in his name, it looks at first sight, as improbable, because the real owner, if he wants to retain the benami character, is not likely to give out that he is the real owner. But if, what the defendant No. 1 Tarak and the witnesses state, viz., that they came to the plaintiff for settlement be true, the very fact that they came to the plaintiff for that purpose before he purchased the property from Tinkari would indicate that the persons concerned knew that Tinkari was the benamidar and plaintiff was the real owner. It is also suggested on behalf of the appellant that the interviews spoken to by Tarak and other witnesses took place after the proceeding for setting aside the sate had been disposed of by the Munsif, and in which the fact that Tinkari was the benamidar for the plaintiff was not challenged by Tinkari or by the plaintiff. There is some force in this suggestion.

23. It is true that the dakhllas were granted to tenants in the name of Tinkari, and Tinkari was sued for rent by the landlords to some of which the appellant (as a co-owner of the mahal) was a party. But if the purchase by Tinkari was benami for the plaintiff, the papers would stand in the name of the benamidar in order to keep up the benami character of the transaction as is usual in such cases. The landlords sued the person who was the ostensible purchaser and there is nothing to show that they were aware that Tinkari was not the real owner. Besides, they had no

Interest in raising a dispute as to who was the real purchaser, as they would get decree for rent whether it was brought against the benamidar or the real purchaser. The claim for rent prior to the date of purchase appears to have been contested by Tinkari and the decree directed that he would not be liable for the period prior to his purchase. But any defence necessary to be set up on behalf of the purchaser would be set up in the name of Tinkari as ostensible purchaser. It appears that one Ramkalpo Ganguli bid at the sale up to Rs. 1,000, and Tinkari bid up to Rs. 1,002. This Ramkalpo appears to have been the am-mukhtear of the appellant''s estate at the time of the sale, though he was dismissed subsequently. The appellant again expressed his willingness to purchase the properties a little before proceedings were taken for setting aside the sale. All these facts, however, are consistent with Tinkari being a benamidar and they only go to show that the appellant was desirous of purchasing the properties, as he has a 7-annas share in the properties and he did, as a matter of fact, purchase the equity of redemption from the mortgagors on the 22nd August 1915.

24. The opinion of the Trial Court upon the question of credibility of witnesses is certainly entitled to great weight, and the question of benami is not to be decided upon suspicion. But the learned Subordinate Judge has not, we think, given due weight to the circumstantial evidence and the probabilities of the case pointed out above in considering the evidence of the witnesses and the inference arising from the absence of the plaintiff and Kunjo from the witness-box. On the whole, we are of opinion that it was the plaintiff and not Tinkari who was the real purchaser.

25. The next question is, whether the plaintiff having purchased the property in execution of a money-decree was a trustee for the mortgagors.

26. Section 99 of the Transfer of Property Act provided that where a mortgagee in execution of a decree for the satisfaction of any claim whether arising under the mortgage or not attaches the mortgaged property he shall not be entitled to bring such property to sale otherwise than by instituting a suit u/s 67. The Pull Bench in the case of Ashulosh Sikdar v. Behari Lal 35 C. 61PC : 6 C.L.J. 320 : 11 C.W.N. 1011 (F.B.), held that a sale held in contravention of the provisions of Section 99 of the Transfer of Property Act is not a nullity, but an irregular sale liable to be avoided merely on the proof that the terms of the section had been contravened. Under Order XXXTV, Rule 14, however, the rule is confined only to claims arising under the mortgage. Here the sale took place an the 12th July 1913, (after Order XXXIV, Rule 14 was enacted) in execution of a decree for money upon a claim not arising under the mortgage. But the learned Pleader for the appellant relies upon the principle of equity enunciated by Macpherson, J., in Kamini Debi v. Ramlochan Sirkar 5 B.L.R. 450, and recognised by the Judicial Committee in the case of Khiarajmal v. Daim 32 C. 296 : 32 I.A. 23 : 9 C.W.N. 201 : A.L.J. 71PC : 7 Bom. L.R. 1 : 1 C.L.J. 584 : 8 Sar P.C.J. 734 (P.C.). In the former case, Macpherson, J., held that the mortgagee cannot properly in execution of a simple decree for money, the re-payment of which is

secured by a mortgage, attach and sell the mortgagor''s equity of redemption in the property mortgaged, but if he does so, and purchases it himself, he becomes a trustee for the mortgagor, against whom he cannot acquire an irredeemable title. This case came up for consideration before the Judicial Committee in Mahabir Pershad v. Macnaghten 16 C. 682 : 16 I.A. 107 : 13 Ind. Jur. 133PC : 5 Sar. P.C.J. 345 : 8 Ind. Dec. (N.S.) 451 (P.C.), where their Lordships observed that it was probable that in the case of Kamini Debi v. Ramlochan Sirkar 5 B.L.R. 450, the mortgagee had not obtained leave from the Court to purchase, and that leave to bid puts an end to the disability of the mortgagee, and puts him in the same position as any independent purchaser. See also Mahomed Mira Ravuthar v. Savvasi Vijaya Raghunadha 27 I.A. 17 23 M. 227 : 4 C.W.N. 228 : 2 Bom L.R. 640 : 10 M.L.J. 1 : 7 Sar. P.C.J 661 : 8 Ind. Dec. (N.S.) 561 (P.C). The learned Pleader sought to distinguish Mahabir Pershad''s case 16 C. 682 PC: 16 I.A. 107 PC: 13 Ind. Jur. 133 PC : 5 Sar. P.C.J. 345 : 8 Ind. Dec. (N.S.) 451 (P.C.), on the ground that there the mortgaged property itself was sold, and not merely, the equity of redemption. This distinction was also sought to be drawn by the High Court in that case. But their Lordships after referring to the argument of Mr. Doyne based upon the decision of Macpherson, J. in Kamini Debi''s case 5 B.L.R. 450, that "the respondents must beheld to have purchased as trustees for the appellants," observed, "the same argument, which is not raised in the pleadings, seems to have, been addressed to the High Court, who, in their judgment, distinguish between that case and the present, on the ground that in the former the mortgagee did not purchase the mortgaged property, but the mortgagor''s equity of redemption. Their Lordships cannot regard that explanation as satis-factery. It appears to them to be probable that, in the case referred to, the mortgagee had not obtained leave from the Court to purchase. The report dbes not state that he had: and the reasoning of the learned Judge, and the mass of authorities by which he supports it, have a direct bearing upon the case of a mortgagee purchasing without leave, and in that view of the facts his reasoning is intelligible and logical. Leave to bid puts an end to the disability of the mortgagee, and puts him in the same position as any independent purchaser. If t].e decision of Macpherson, J., proceeded on the footing that the mortgagee had obtained leave, their Lordships are not prepared to assent to it. On that footing it appears to them that purchase of the equity of. redemption by the mortgagee at a judicial sale would have the same effect against the mortgagor as the purchaser of the mortgaged property." Much reliance is placed on the case of Khlarajmal v. Daim 32 C. 296 : 32 I.A. 23 : 9 C.W.N. 201 : A.L.J. 71 : 7 Bom. L.R. 1 : 1 C.L.J. 584 : 8 Sar P.C.J. 734 (P.C.), where Lord Davey observed:--"Their Lordships throw no doubt on the principle, which has been acted on in many cases in India, that a mortgagee cannot, by obtaining a money-decree for the mortgage-debt, and taking the equity of redemption in execution, relieve himself of his obligations as mortgagee, or deprive the mortgagor of his right to redeem on accounts taken, and with the other safegards usual in a suit on the mortgage." It is tob noted that these observations of their Lordships had reference to the case of a purchase by the mortgagee in execution of a money decree for the

mortgage-debt. Referring to the fact that the lower Court had made a decree for redemption of the whole estate on the ground that "the mortgagees could not acquire the equity of redemption directly or indirectly by purchase at a Court sale except by a suit brought on the mortgage, on account taken and time specially allowed for redemption" it was observed: "Their Lordships cannot concur in this view, which they think is based on a misapplication of a sound principle of equity" and then, after stating that their Lordships throw no doubt on the principle which had been acted on in many cases in India, (quoted above) bserved :"But...in Suit No. 160 of 1878 the debt sued for was not the mortgage-debt. The creditors were different, and the debtors were different, and the debt does not appear from the plaint to have been secured by a mortgage." It appears, therefore, that the principle which had been acted upon in many cases in India in their lordships'' opinion was not applicable to cases where the debt was not the mortgage-debt.

27. In Martand Balkrishna Bhat v. Dhondo Damodar 22 B. 624 : 11 Ind. Dec. (N.S.) 998, where the mortgagee in execution of a money-decree attached the mortgaged property, and without notifying or disclosing his mortgage lien caused the properties to be sold, and without obtaining leave from Court to bid at the sale, purchased some of the properties benami at an under-value, it was held that the sale was rendered nugatory not by the provisions of Section 294 (though permission to bid granted under that section might have validated the purchase) but by the impossibility of a mortgagee by such sales and purchases freeing himself from the liability to be redeemed. The learned Judges referred among other cases to Bhuggobutty Dossee v. Shamachurn Bose 1 C 337 : 1 Ind. Dec. (N.S.) 212, and Kamini Debi v. Ramlochan Sirkar 5 B.L.R. 450. but did not refer to Mahabir Pershad v. Macnaghten 16 C. 682 : 16 I.A. 107 : 13 Ind. Jur PC. 133 : 5 Sar. P.C.J. 345 : 8 Ind. Dec. (N.S.) 451 (P.C.) nor does it appear to have been cited in argument.

28. In the case of Mayan Pathuti v. Pakuran 22 M. 347 : 9 M.L.J. 98 : 8 Ind. Dec. (N.S.) 247, the question for decision was whether a sale in contravention of Section 99 of the Transfer of Property Act was void or merely voidable and it was held that it was the latter. There is an observation however, that "notwithstanding the confirmation, it may be that the sale in question cannot affect that right of the appellants owing to the impossibility of the respondent, as the mortgagee, freeing himself by such a sale and purchase from the liability to be redeemed, Martand Balkrishna Bhat v. Dhondo Damcdr 22 B. 624 : 11 Ind. Dec. (N.S.) 998." In that case the sale was in contravention of the provisions of Section 99 of the Transfer of Property Act.

29. In a later case, Dharanikota Venkayya v. Budharazu Surayya Garu 30 M. 362 PC: 17 M.L.J. 325, the Madras High Court declined to follow the decisions in Kamini Debi v. Ramlochan Sirkar 5 B.L.R. 450, and Martand Balkrishna Bhat v. Dhondo Damodar 22 B. 624 : 11 Ind. Dec. (N.S.) 998. In the case of Muhammad Abdul Rashid Khan v. Dilsukh Rai 27 A. 517 PC : 2 A.L.J. 210 : A.W.N. (1905) 80, where the equity of redemption was not sold in execution of a money-decree obtained for the

mortgage-debt, Stanley, C.J., and Burkitt, J., observed: "Independently of the provisions contained in Section 99 of the Transfer of Property Act, we are not prepared to bold that a mortgagee is precluded by law from purchasing the equity of redemption and freeing himself from his liability to be redeemed, provided that the purchase is carried out in complete good faith, and no advantage is taken by him of his positionas mortgagee. We are not aware of any principle upon which such a sale can be impeached merely on the ground that the purchaser was a mortgagee of the purchased property." In a later case Lal Bahadur Singh v. Abharan Singh 27 Ind. Cas. 795 : 37 A. 165 : 13 A.L.J. 138, a Full Bench of the Allahabad High Court were of opinion that if a mortgagee brings the mortgaged property to sale in contravention of the previsions of Section 99 of the. Transfer of Property Act, such sale is not void,but merely voidable. Richards, C.J., observed: "It seems to me that if the equity of redemption is sold in execution of a decree and purchased either by a third party, or by a mortgagee with the leave of the Court, the equity of redemption is transferred from those persons who previously held it to the purchaser and that the result is that if that sale is neither void nor set aside, there is no longer a right to redeem left in the previous owners of the equity of redemption." The question in these cases was, whether a sale in contravention of Section 99 of the Transfer of Property Act is a nullity--a question which was settled in our Court by the decision of the Bull Beach in Ashntosh Sikdar v. Behari Lal 35 C. 61 : 6 C.L.J. 320 : 11 C.W.N. 1011 (F.B.). But in Pancham Lal Chowdhury v. Kishun Pershad Misser 6 Ind. Cas. 47 : 12 C.L.J. 57 : 14 C.W.N. 579. Woodroffe and Caspersz, J., observed that it was a well-established principle that a purchase by the mortgagee of the equity of redemption constitutes him a trustee for the mortgagor, that he does not (unless there has been a release of the equity of redemption or other circumstance which in law would bar his right to redeem) acquire an irredeemable title, and that the mortgagor is under no necessity to have the sale set aside first in order to be entitled to redeem the property. But in that case, although the property was sold in execution of a money-decree, (on a roka) it was governed by the provisions of Section 99 of the Transfer of Property Act which was then in force. On the other hand, Mookerjee and Beachcroft, JJ., in the case of Bharat Ramanuj Das v. Ishan Chandra Haldar 43 Ind. Cas. 212 : 27 C.L.J. 431, held that a mortgagee can purchase an equity of redemption at a sale held in execution of a money-decree obtained by a stranger against the mortgagor and that he does not hold the equity of redemption as a trustee for the mortgagor and for his benefit. The learned Judges dissented from the case of Erusappa Mudaliar v. Commercial and Land Mortgage Bank, Limited 23 M. 377 : 10 M.L.J. 91 : 8 Ind. Dec. (N.S.) 665, and distinguished the case of Pancham Lal Chowdhury v. Kishun Pershad Misser 6 Ind. Cas. 47 : 12 C.L.J. 57 : 14 C.W.N. 579, on the ground that it was a case of a pur chase by the mortgagee in contravention of the provisions of Section 99 of the Transfer of Property Act. The case of Pancham Lal Chowdhury v. Kishun Pershad Misser. 6 Ind. Cas. 47 : 12 C.L.J. 57 : 14 C.W.N. 579, came up for consideration before the Bull Bench in Uttam Chandra Daw v. Raj Krishna Dalal 55 Ind. Cas. 157 : 47 C. 377 : 31 C.L.J. 98 : 24 C.W.N.

229 (F.B.). It is contended for the appellant that the principle of equity was recognized in that case, but could not be given effect to having regard to the form in which the suit was laid. The equity of redemption in that case was sold in execution of a decree upon a claim not arising under the mortgage, but the principle of equity was considered on the assumption that the sale was held in execution of a decree arising under the mortgage. One of the learned Judges (Mookerjee, J.,) expressed his opinion that there was no such equity. The other Judges did not express any definite opinion as the suit was not one framed for enforcing the trust; if any, nor brought within the period of limitation prescribed for such a suit. It cannot, therefore, be said that the Full Bench decided the point raised before us.

30. But the principle of equity enunciated by Macpherson, J., in Kamini Debi v. Ramlochan Sirkar 5 B.L.R. 450, was with reference to a simple decree for money the re-payment of which is secured by a mortgage. In the case of Khiarajmal v. Daim 32 C. 296 : 32 I.A. 23 : 9 C.W.N. 201 : A.L.J. 71 : 7 Bom. L.R. 1 : 1 C.L.J. 584 : 8 Sar. P.C.J. 734 (P.C.), also, Lord Davey referred to the principle of equity as applicable to cases where the equity of redemption is sought to be taken in execution of a money-decree for the mortgage-debt. In the other cases cited above there was either a contravention of the provisions of Section 99 of the Transfer of Property Act (in cases decided before Order XXXIV, Rule 14, was enacted) or no leave to bid was obtained by the mortgagee.

31. It is unnecessary to consider in the present case whether the principle of equity is applicable to-such cases. In the present case the equity of redemption was sold in execution of a decree for money upon a claim quite independent of the mortgage. The leave of the Court was obtained by the mortgagee to bid at the sale. The judgment-debtors applied for setting aside the sale but the application was dismissed by the Appellate Court, and the sale was confirmed. the equity of redemption passed to the purchaser, and no right was left in the mortgagors which they could transfer to the appellant. The appellant in these circumstances cannot contend that the purchaser held the property as trustee for the mortgagors assuming that the appellant as a defendant can set up the trust as an answer to the suit without bringing a suit to enforce the trust, if any.

32. We are accordingly of opinion that the second contention must be overruled.

33. The third contention is, that the sale having been held at a time when a Receiver was appointed, without the permission of the Court which appointed the Receiver, the sale is void, at any rate is voidable and can be declared invalid in the present suit.

34. As stated above, an application for appointment of Receiver was made on the 17th January 1913 and an order was made for the appointment on the 5th May 1913,. On the 20th June 1913 an order was made for appointing Jagabandhu Bosea Receiver and for removal of defendants Nos. 1 and 2 from possession and delivery

of possesion to the Receiver. The plaintiff on the 16th July 1913 put in a petition to the Court stating that Jagabandhu was unable to work and prayed that one Khetra might be appointed Receiver. Khetra was appointed Receiver on the 24th July 1913, and the Nazir was directed to deliver possession to Khetra by removal of the defendants Nos. 1 and 2 from posession. But the sale had taken place on the 21st July 1913 before Khetra was appointed. It is contended, however, that the order for appointment of Jagabandhu as Receiver was made before the sale (on the 5th May 1913) and khetra. was appointed in his place, that the legal effect of the appointment was to vest the estate in the Receiver and the legal possession must be taken to have been with the Receiver, though no actual possession was taken until Khetra was appointed on the 24th July 1913.

35. As there was no order for security being given by the Receiver, the order for appointment had the effect of vesting the estate in the Receiver as between the parties to the suit, i.e., as between the mortgagor and the mortgagee. But in the first place, the plaintiff, though he was the mortgagee, obtained the decree in the Small Cause Court not as a mortgagee, but as an ordinary creditor, and as such stood in the same position as a stranger to the suit. Now the rule that "the possession of a Receiver may not be disturbed with out leave, does not apply, so far at least as third persons are concerned, until a, Receiver has been actually appointed and is in actual possession. It is not en ugh that an order has been made directing the appointment of Receiver. Until the appointment has been perfected and the Receiver is actually in possession a creditor is not debarred from proceeding to execution. The order appointing a Receiver is for the benefit of the parties to the action. It does not affect third persons until the appointment is completed and perfected. An execution creditor may, therefore, seize chattels after an order has been made appointing a Receiver on his giving security but before the security has been given or possession taken." (See Kerr on Receivers, 7th Edition195-196. Kanju Lal Jalan v. Mdnoo Bibi 51 Ind. Cas. 394 : 29 C.L.J. 424 : 23 C.W.N. 952. In the next place, the sale held without the leave of the Court which appointed the Receiver was not void, but was only voidable. Reference was made to High on Receivers. 4th Edition, page 167, where it is stated: "Even though an execution has been levied upon the property before the appointment of the Receiver, it is held that there cannot be a lawful sale under such execution without leave of the Court appointing the Receiver...and the sale under execution of the equity of redemption of premises which are in the possession of a Receiver pending a foreclosure suit is void and no title there under passes to the purchaser." The property in the cases referred to in the above passage, however, was in the actual possession of the Receiver. In our Court, moreover, sales of properties in the possession of the Receiver without leave of the Court which appointed the Receiver have not been treated as void, but as voidable. In the case of Levenia Ashton v. Madhabmoni Dasi 5 Ind. Cas. 390 : 11 C.L.J. 489 at p. 494 : 14 C.W.N.560, it was observed: "A purchaser of such property (in the hands of a Receiver) at an execution sale buys at his peril, and the sale may be

cancelled upon an appropriate application to the Execution Court", and in Kamlal'' Jalan v. Manoo Bibi 51 Ind.Cas. 394 : 29 C.L.J. 424 : 23 C.W.N. 952, the learned Judges said: "It is further clear that the sale held at the instance of the Maharaja was, at the worst, only voidable...in other words, when property is in the custody of a Receiver appointed by a Court, a sale under an execution issued by another Court may be avoided by an appropriate process. In the case before us, however, ho steps have ever beer taken, either by the Receiver or by the beneficiaries for cancellation of the execution sale in which the Maharaja became the purchaser."

36. In the present case it appears from the judgment of the High Court discharging the Rule obtained by the defendants nos. 1 and 2 in the proceedings for setting aside the sale, that the sale was sought to he set aside on two grounds, one of which was that the sale was held without taking the permission of the Court which appointed the Receiver. But although the question was raised it was abandoned, and the mortgagors having abandoned the point, their assignee, the appellant, cannot be allowed to raise it again by way of defence to a suit. We are accordingly of opinion that this contention also should be overruled.

37. Although we are of opinion that the plaintiff purchased the property in the benanai of Tinkari, the appeal must fail on our findings upon the other two points.

38. The result is that the appeal must be dismissed but we diret that each party do bear his own costs in both Courts.