Vrajlal Jivandas Vs Venkataswami Lingaya Sayana

Court: Bombay High Court

Date of Decision: Nov. 26, 1927

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 21 Rule 72A, Order 34 Rule 4, Order 34 Rule 5, Order 34 Rule 7, Order 34 Rule 8
Transfer of Property Act, 1882 â€" Section 104

Citation: (1928) ILR (Bom) 459

Hon'ble Judges: Sir Amberson Marten, J; Blackwell, J

Bench: Division Bench

Advocate: O"Gorman, for the Appellant; Daphtary, for the Respondent

Judgement

Marten, C.J.
This is an appeal from the judgment of Mr. Justice Mirza dismissing an application by a mortgagee for a personal decree

against the mortgagor for the balance of the mortgage debt after deducting the proceeds of the sale of the mortgaged property.

2. We start with the great disadvantage that the learned Judge apparently delivered no detailed judgment, and consequently the reasons for his

order are not before us. The learned Judge is unfortunately on furlough. Otherwise this would seem to be a case where under Rule 243 he might

properly be requested to furnish for the use of the Appellate Court a note of his judgment and of his findings. The absence of a judgment is all the

more striking and embarrassing because, as far as I am aware, this is the first time on the Original Side that any Judge has purported to act on

Order XXI, Rule 72A, which, we understand, the learned Judge has acted on. I would, with all respect, suggest that if any Judge of first instance

thinks it his duty to make an innovation of great importance in the past consistent practice on the Original Side, he should at least state the reasons

which . have induced him to arrive at that conclusion.

3. The material facts are as follows. The suit was a mortgagee"s suit to enforce a mortgage. After a preliminary order of reference to the

Commissioner and a report by him, there was a decree on January 12, 1926, confirming the Commissioner"s report, which had found that a sum

of Rs. 1,49,477-7-0 was due under the mortgage on August 19, 1925, and that interest thereafter at fourteen annas per cent. from August 19,

1925, was payable under the mortgage. Accordingly, by this decree of January 12, 1926, there was the usual direction that upon payment into

Court by July 12, 1926, of the above sum, the interest being taken at monthly rests, together with the costs therein mentioned, the Plaintiffs were to

reconvey the property. But in default of the Defendants paying into Court the said principal, interest and costs by the time aforesaid, then the

Plaintiffs would be entitled to a decree absolute for sale.

4. The mortgagors did not pay the amount into Court, and, accordingly, on July 26, 1926, Mr. Justice Mirza made another order, viz., an order for

sale. The order recited that the "" Court being satisfied that the Defendants have not paid the sum directed by the said preliminary decree to be paid

doth order...that the property...be sold by the Commissioner...and the net proceeds of such sale or so much thereof as may be sufficient be applied

in or towards satisfaction of the...preliminary decree."" I draw particular attention to these words in the order that "" the net proceeds of such

sale...be applied in or towards satisfaction of the...decree."" Then the order goes on:

And this Court doth further order that the Plaintiffs be at liberty to bid at the said sale, and that in the event of their becoming the purchasers of the

said property they be at liberty to set off the amount of the purchase money against the amount due to them under the aforesaid decree.

5. Stopping there, that is an order in what I should call a common form, viz., giving the mortgagees unrestricted liberty to bid and allowing them to

set off the purchase price against the amount of their decree. Then the order went on to provide that "" the Plaintiffs are at liberty to tack to their

mortgage debt the costs of this application and of this decree.

6. Accordingly, the property was put up for sale, and the Commissioner, on January 28, 1927, made his certificate by which he certified that at the

sale the Plaintiffs were "" the highest bidders for and were, subject to confirmation by this Court, declared the purchasers of the said property at the

price or sum of Rs. 1,45,000 and that I have allowed them to set off the said sum of Rs. 1,45,000 against an equivalent part of the amount due to

them under the said preliminary decree."" That certificate came before Mr. Justice Blackwell, and by an order of February 8, 1927, the Court

confirmed the sale of the property to the Plaintiffs at or for the price of Rs. 1,45,000 and ordered the costs to be costs in the sale. Now stopping

there, I regard that as a perfectly clear and definite order of the Court that the Plaintiffs bought the property for Rs. 1,45,000 and that they were to

set off the Rs. 1,45,000 against the amount of their mortgage debt.

7. That being so, the next step that took place is equally in common form, viz., a notice of motion of April 8, 1927, by which the mortgagees

applied for a personal decree for the balance of Rs. 4,477. Incidentally that comes under Order XXXIV, Rule 6, which provides that "" where the

net proceeds of any such sale are found to be insufficient to pay the amount due to the Plaintiff, if the balance is legally recoverable from the

Defendant otherwise than out of the property sold, the Court may pass a decree for such amount."" That notice of motion was dismissed by the

learned Judge with costs. As I have already said no reasons were given.

8. In support of his decision, two main points are relied on by Mr. Daphtary for the Respondents. The first is that under supplemental Rule No.

72A to Order XXI of the Code of Civil Procedure, which was passed by this High Court, in or about the year 1916 u/s 122 of the Code, leave to

bid can only be granted to a mortgagee provided the reserved price as regards him is fixed at not less than the amount due to him for principal,

interest and costs. It is further contended that that rule applies to the Original Side as well as to the Appellate Side. Secondly, it is contended that

assuming the Rule 72A to Order XXI does apply, then the mortgagor is now entitled to be put in the same position as regards a personal decree

against him as if the mortgagee had in fact bid at the sale not for Rs. 1,45,000 which he in fact did, but for the whole of the principal, interest and

costs due at that time.

9. Now, as regards the first point, viz., the applicability of Order XXI, Rule 72A, there is no doubt power for the High Court u/s 122 to alter or

modify the provisions of the Code subject to certain steps being taken, viz., first, the matter is to go before the Rule Committee, then it is to be

considered by the Judges, then the rules have to be published, and the sanction of the Governor in Council has to be obtained. As a matter of

history, after obtaining the previous consent of counsel, we have thought it proper to see how this particular rule No. 72A came into existence. On

looking at the High Court file for 1917, Compilation No. 47, Part 3, it would appear that this particular point originated from a letter written by the

Subordinate Judge of Haveli on October 15, 1913, stating that this was the rule followed in the mofussil, and as it could not now be made u/s 104

of the Transfer of Property Act, but would require to be made, if at all, under the new Code of Civil Procedure, he suggested that it should be

inserted as a part of Order XXXIV. Then it would appear that the Rule Committee recommended that the old Rule XX of the Supplementary Civil

Circulars No. 11 should be restored as Rule 72A of Order XXI of the Code. But I need hardly explain that the Civil Circulars apply only to the

Appellate Side, and have nothing whatever to do with the Original Side.

10. Then the Rule Committee in due course reported to the Judges. The rule in question was signed by the Judges on November 16, 1916. The

sanction of Government was obtained on January 15, 1917, and the rules were published on January 17, 1917. All this took place on the

Appellate Side. In the Bombay Government Gazette for January 25, 1917, at p. 206, this appears as a notification by His Majesty"s High Court of

Judicature, Appellate Side, and the notice is signed by the Registrar on the Appellate Side.

11. From that date to this, or rather I should say till the present judgment under appeal, so far as I am aware, that notification of Rule 72A was

treated as applying to the Appellate Side only and not to the Original Side. Speaking for myself, I have never even heard of it. It was framed just

before I took my seat on the Bench, and there is no question but that all sales on the Original Side by the Commissioner and under the direction of

various Original Side Judges have continued in exactly the same way after the passing of this Rule 72A as they did before. Accordingly, if the

judgment under appeal is correct, then in a large number of cases the law on the point must have been varied. Incidentally it was varied by Mr.

Justice Mirza himself when in the present case he gave the mortgagee unconditional leave to bid, whereas if Rule 72A applied he ""should have

imposed a minimum bid of principal, interest and costs.

12. But Mr. Daphtary has said, and said truly, that if there is a law, then we must apply that law whatever the result may be, and whatever the past

practice may be, and however inconvenient it may be to litigants and everybody else connected with the administration of this particular branch of

the law. But I have usually found that when an argument of that sort is advanced, there is a flaw in the argument and not in the law. I think that will

be found in the present case.

13. Now I am prepared to concede that, so far as I can test the matter at present, the requisite procedure u/s 122 of the Code for altering the rules

of the Code has been followed in this case. I am further prepared to concede that merely labelling a notification "" Appellate Side "" in the Gazette

does not necessarily prevent a new rule applying to both branches of this Court, unless the rule itself expressly says that it does not apply. But I

wish to make it perfectly clear that I am talking about an alteration of the rules u/s 122 of the Code of Civil Procedure. I am not dealing with an

alteration in the Original Side Rules of the High Court nor am I dealing with an alteration in the Civil Circulars on the Appellate Side. Totally

different considerations apply there. Let it be then that technically as it stands, this new rule would in terms apply to the Original Side as well as to

the Appellate Side. No doubt it was a slip. It has only to be pointed out for the mistake to be remedied. Still though the rule actually made may be

a blunder, we must nevertheless follow out its consequences in the present case.

14. Now one answer appears to me to be this. We have our own Original Side Rules dealing with sales by the Commissioner in pursuance of the

orders of the Court. They are a long and elaborate set of rules, viz., from Rule 393 down to Rule 490. Further, dealing expressly with mortgages,

the High Court has made certain rules under the Transfer of Property Act which are set out in Rules 541 to 555 of the Original Side Rules. Rule

554 runs as follows:

Rules relating to sales by the Commissioner for taking accounts so far as they are applicable shall apply to all sales by the Court under Order

XXXIV, Rules 4 and 5 or 7 and 8 of Code of Civil Procedure.

15. In the present case we are dealing with a sale by an order of the Court under Order XXXIV, Rule 5, of the Code of Civil Procedure.

16. The Rules thus framed by the High Court under the Transfer of Property Act come u/s 104 which provides that:

The High Court may from time to time make Rules consistent with this Act for carrying out, in itself and in the Courts, of Civil Judicature subject to

its superintendence, the provisiops contained in this chapter.

17. The Chapter in question, viz., Chapter IV, deals with mortgages of immoveable property.

18. Now when one comes to see those Rules, they, to my mind, are inconsistent with the view that the Commissioner or the Court is restricted in

giving leave to bid to a bid for not less than the principal, interest and costs. Rule 395 provides generally that "" at the time appointed for considering

the matter of the said decree...the Commissioner shall proceed to regulate as far as may be, the manner of its execution, and shall give such

directions as may be necessary.

Then Rule 418 provides that:

Unless otherwise ordered every such sale shall be by or with the approbation of the Commissioner, and shall be made by public auction.

Rule 419 provides that:

Every such sale shall be to the best purchaser that can be got for the same, provided the Commissioner shall consider that a sufficient sum has been

offered.

19. How this will exactly work in with Rule 72A I do not quite follow. The mortgagee might be the best purchaser but yet be below the amount of

his principal, interest and costs. Then Rule 420 gives the carriage of the general proceedings to the mortgagee if he is the Plaintiff, apart from any

special order. Rule 426 refers to the conditions of sale, and states that "" if a reserved bidding be fixed, the fact of a reserved bidding having been

fixed, but not the amount, shall be stated in the conditions."" If, however, the judgment under appeal is correct, then presumably one would have to

provide for two reserved bids being fixed, viz., one for ordinary purchasers and another one for the mortgagee.

20. Then Rule 428 provides that--When a sale is ordered at the instance of a subsequent incumbrancer or of a mortgagor, or when a party having

the carriage of the proceedings has obtained leave to bid, reserved bidding shall be fixed by the Commissioner, unless dispensed with by the

proper parties. The Commissioner may also in any other case, in which it may be deemed necessary or desirable, fix a reserved bidding.

21. That Rule, again, to my mind, gives the Commissioner a complete discretion. There is nothing here to suggest that he is fettered to a particular

minimum sum where a person having the carriage of the proceedings is, for instance, a mortgagee. Then Rule 446 provides that no sale shall

become absolute until it has been confirmed by the Court.

Rule 468 is an important Rule. It provides:

Any party to the suit may apply for leave to bid at the sale. Such leave if not contained in the decree or order directing the sale, may be obtained

on summons; but the costs of a separate application, unless otherwise ordered, shall be borne and paid by the applicant.

22. There, again, there is no restriction put where the party in question is a mortgagee. It will further be observed that Rule 72A applies apparently

to any mortgagee, whether he is the first mortgagee, or a subsequent incumbrancer, or whether he is a Plaintiff or whether he is a Defendant.

Therefore, if you had a case where there were three or four different mortgagees, then I take it you would have something like four or five reserved

prices, viz., one for an ordinary purchaser, and one for each of the several mortgagees according to their respective mortgage debts.

Rule 470, however, does not contemplate anything! of the sort. It provides:

An incumbrancer, not a party to the suit, may, at any time before the sale, apply...to be made a party.

And then "" such order shall be made thereon, and in protection of his rights and as to the costs as to the Judge shall seem fit.

23. Similarly, if one turns to Rule 469, that provides for a case where a party to the suit not having the conduct of the proceedings has not obtained

previous leave to bid, but is nevertheless accepted as the purchaser. That is not confined to the case of a mortgagee-Plaintiff. It might be the case

of a mortgagee-Defendant. But there again the Rule says:

In every such case the sale shall not be confirmed without an order obtained on notice.

Then Rule 484 provides:

The decision of the Commissioner on any matters mentioned in the foregoing Rules shall be subject to appeal to the sitting Judge in Chambers.

24. I do not think I need refer to the other remaining Rules. To my mind, taken as a whole, they are entirely inconsistent with the notion that the

Court or the Commissioner is fettered in fixing a reserve price by Rule 72A of Order XXI, Code of Civil Procedure. I will again repeat that Rule

554 contemplates that the Original Side Rules I have just referred to apply to sales in a mortgagee''s suit under Order XXXIV, Rule 5, such as we

have here.

25. The subject was touched on in the Special Bench case of Hatimbhai Hassanally Vs. Framroz Eduljee Dinshaw, . where it was argued that

under the CPC on a sale in a mortgagee''s suit you do not have a conveyance, and that all you have is an order confirming the sale, and that

concludes the matter. It was there urged that that is the practice in the mofussil, and that if the practice on the Original Side is different or the Rules

on the Original Side are to the contrary, then the Code must prevail. I think that in the opinion of the majority of the Special Bench, that contention

was erroneous. I may refer to what was stated in my judgment in paragraphs 28 and 29 at p. 532. There I said:

28. It has been pointed out by my brother Fawcett that Order XXXIV, Rule 5, merely directs that the Court is to pass a decree that the

mortgaged property, or a sufficient part thereof, be sold, and that Order XXI, Rule 92, provides that '' the Court shall make an order confirming

the sale, and thereupon the sale shall become absolute.'' He further states that the practice in the mofussil Courts is to be content with the order

confirming the sale and not to require any conveyance. But, however that may be, the Rules on the Original Side are quite clear in that respect.

They set out in detail the procedure to be adopted by the Commissioner or Master in Equity for carrying out an order for sale. (See Rules 417-

490.) Rule 460 expressly gives the Court purchaser a right to a conveyance, which by Rule 463 has to be settled by the Commissioner if the

parties disagree. Rule 465 provides for enforcing the execution of such a conveyance. The foregoing Rules relating to sales by the Commissioner

are expressly made applicable to sales by the Court under Order XXXIV, Rule 5; and Rule 552 gives the right to a purchaser to obtain a

certificate of sale and also at his own costs, a conveyance from the mortgagor. Further, the form of ordinary conditions of sale set out at page 326

of the Rules provides in Condition 8 for the execution of a conveyance to the purchaser.

29. It was not even suggested at the Bar that these Rules are ultra vires. Section 104 of the Transfer of Property Act gives express power to the

High Court to frame Rules for carrying out the provisions contained in Chapter IV relating to mortgages. Our Rules 541-555 are framed

thereunder. Further, under Clause 37 of the Letters Patent of 1865, this Court has power to make Rules and orders for the purpose of regulating

all proceedings in civil cases which may be brought before the Court, provided that the Court shall be guided in making such Rules and orders as

far as possible by the provisions of the Code of Civil Procedure.

26. Then in that particular case I held that the Original Side Rules in question were in no way inconsistent with Order XXXIV, Rule 5, or Order

XXI, Rule 92. They were mere machinery for making effective the order of the Court. In fact they run on the same general lines as the Rules

prevailing under the English Chancery practice.

27. I may recall the fact, as pointed out by my brother Blackwell, that u/s 129 of the CPC the High Court has also power to make such

Rules not inconsistent with the Letters Patent establishing it to regulate its own procedure in the exercise of its original civil jurisdiction as it shall

think fit, and nothing herein contained shall affect the validity of any such Rules, in force at the commencement of this Code.

28. In the present case we have Rules made under the Transfer of Property Act, and they embody the Rules applicable on the Original Side. I may

also observe that these particular Rules under the Transfer of Property Act were in force prior to the coming into operation of this Rule 72A of

Order XXI. It was contended before us that the Rules can be reconciled, and that the Original Side Rules must be read as if Rule 72A was read

into them, and this although Rule 72A was not even passed at the date when the Original Side Rules came into operation. As I have already

indicated, on looking through our Rules on the Original Side as a whole, I think they are inconsistent with Rule 72A. I would further hold that as the

Original Side Rules are specially framed under the Transfer of Property Act to deal with cases arising on the Original Side, then if and in so far as

they are inconsistent, they should prevail over the very general terms of the Code of Civil Procedure, which would apply to the mofussil, and which

regulate the proceedings in the mofussil, quite apart from the proceedings on the Original Side.

29. Consequently, I would hold that in any event the learned Judge was wrong in finding that he was bound by Rule 72A in the present case, and

not by the existing Original Side Rules on the subject.

30. This brings me to the second point. Even if Rule 72A did apply, I am entirely unable to see how on the facts of the present case the judgment

of the learned Judge can be supported. Whatever Rule 72A may say, the order which Mr. Justice Mirza made on July 26, 1926, was quite

specific. It gave general liberty to the mortgagees to bid, and it gave liberty to set off the amount of their purchase money against the amount due to

them under the decree. Then came the certificate of sale, which, under our Rules, is binding on the parties unless varied. In fact so far from being

varied, it was confirmed by the Court that the mortgagees were the purchasers at a particular sum, viz., Rs. 1,45,000, and not at the amount of

principal, interest and costs, and that they bought the property at that sum of Rs. 1,45,000 and no other. That was the sale that was confirmed, and

there was never any application to vary the Commissioner''s report as there should have been under the Original Side Rules. Nor for the matter of

that to vary or set aside the order of February 8, 1927, confirming the sale.

31. To my mind then the matter is perfectly clear. The property has been sold for Rs. 1,45,000 and this sum is less than what has already been

found due by the decree of January 12, 1926, which has not been appealed against. It follows that the mortgagee must pay the balance. Speaking

for myself, I am utterly unable to follow, or at any rate to adopt, the argument presented to us for the mortgagor, that although it is now too late for

him to upset the sale itself, yet we must assume, having regard to Rule 72A, that the mortgagee bought at a price at which in fact he never did buy,

and that he must be taken to buy at this hypothetical price which, as I have already said, is not the fact, and that consequently there is now no

balance owing from the mortgagor. But for the fact that the argument appears to have found favour with the learned trial Judge, I would describe it

as a hopeless argument.

32. Under these circumstances, I would hold that the Respondents have failed on the second point as well as on the first. I would, accordingly,

allow this appeal and set aside the order of Mr. Justice Mirza under appeal, and pass an order in terms of the notice of motion of April 8, 1927,

together with such subsequent interest as may be due thereunder to the Appellants. The Respondents will pay the costs of the notice of motion

throughout including the costs of this appeal.

Blackwell, J.

33. I am of the same opinion, and have nothing to add.

On November 14, 1927, the appeal was again set down before the Appeal Court for speaking to the minutes of the decree as to costs but the

Court gave time to counsel to look up authorities. It was then heard on November 28.

Marten, C.J.

34. This is an application by the successful Appellants-Plaintiffs, who are mortgagees, to vary the minutes of our order of September 5, 1927, as

regards costs. The actual order that was made in our judgment was this:

I would accordingly allow this appeal, and set aaide the order of Mr. Justice Mirza under appeal, and pass an order in terms of the notice of

motion of April 8, 1927, together with such subsequent interest as may be due thereunder to the Appellants. The Respondents will pay the costs of

the notice of motion throughout including the costs of this appeal.

35. Now, if the notice of motion of April 8 be looked at, it will be seen that it asks that the balance in question should be payable out of the estate

of the deceased come to the hands of the Defendants. It also asks separately for the costs of "" this application and the order to be made thereon.

Stopping there that was the order that this Court made. In drawing up the order, however, in the office there has been a direction added that the

costs in question are only to come out of the estate of the deceased. The Appellants object to that, and that is the point we have to determine. The

case came before us a fortnight ago, but neither counsel then appeared to be in a position to argue the points of law that arise on this application,

and we, accordingly, adjourned it. To-day no authorities have been cited to us on the main point by counsel for the Appellants, but Mr. Dalvi for

the Respondents has been good enough to refer us to certain passages in Halsbury''s Laws of England, Vol. XXI, which state what we believe to

be the accurate practice in England and also in Bombay on the point. One proposition is that unless there is an express condition in the mortgage as

to payment of costs,--and in the present case there is none--then in the absence of special circumstances those costs are merely added to the

mortgage security and are not payable by the mortgagor personally. Thus in paragraph 525 it is stated:

36. In a foreclosure action the coats of the mortgagee are not, in the absence of special circumstances, payable by the mortgagor personally; the

mortgagee adds them to his debt, and the mortgagor only pays them if he redeems. And the mortgagee is not liable in general to pay the costs of

any other party to the action.

37. And at p. 231, paragraph 422, it is stated:

The contract between mortgagor and mortgagee, as interpreted by the-Court, makes the mortgaged property a security for the costs properly

incident to a suit for foreclosure or redemption.

38. As to this in Ex parte Fewings (1883) 25 Ch. D. 338. Cotton L. J. says (p. 352):

No doubt, if the debtor, in his character of mortgagor, claimed to redeem the mortgage, the Court would not grant him that which originally was an

indulgence, a departure from the strict tenor of his legal right, without imposing upon him the condition of paying the mortgagee, not only the debt

which he had contracted to pay by his covenant, but any expenses which had been properly incurred by the mortgagee in her position as such. But

that is an entirely different thing from saying that an action of debt could be maintained by the mortgagee against the mortgagor for those expenses.

It is said that the mortgagee''s right in a redemption action is founded on an implied contract by the mortgagor to pay these costs, but I am of

opinion there is no such contract, but as a condition of redemption that a Court of Equity imposes on the mortgagor the terms of paying all costs

properly incurred by the mortgagee for the purpose of protecting the estate or himself as mortgagee.

39. On the other hand it is pointed out in paragraph 425 in Halsbury, Vol. XXI:

But a mortgagor or subsequent incumbrancer, who raises an untenable defence, must pay personally any coats so occasioned for which the

mortgagee''s security is insufficient, and a redemption action, if the mortgagor fails to redeem, is dismissed with costs to be paid by him personally.

40. Now, what are the facts of the present case? The mortgagee sued to enforce his security. The property was sold. The purchase price was

insufficient to pay even the principal and interest quite apart from costs. Accordingly, the mortgagee took out a notice of motion asking for payment

of the difference between the amount due to him for principal and interest and the amount realised by the sale of the mortgaged property. He

served that notice of motion on the Defendant. And the latter chose to appear and to contend that no such order could be made, because under

the CPC the minimum reserve price should have been principal, interest and costs. This contention was in the teeth of the past practice on the

Original Side under the Original Side Rules. It was also in the teeth of an order which the learned Judge had made in this very suit giving the

Plaintiffs leave to bid at the auction and set off their principal and interest against the purchase price. However, the learned Judge decided the

matter in favour of the Defendants and dismissed the motion. On appeal that decision was reversed in the way I have already mentioned.

41. In our opinion this is a case where the mortgagor has chosen to raise an untenable defence. What he is really asking us to do is this, that

although if he had succeeded in the motion the mortgagee would have had to pay his costs, yet if, on the other hand, the mortgagee succeeds the

latter has to bear his own costs, for there is no fund now out of which he can be paid. In other words, the mortgagor contends that he can carry on

this litigation at the expense of the mortgagee. In our . opinion that is not the law, nor the proper practice. Accordingly, in our judgment this is a

case where, supposing the mortgagor was alive, it would be proper to direct him to pay the costs of the motion and also of the appeal.

42. Does it make then any difference that the mortgagor is dead, and is now represented by his legal representatives? In our opinion it does not.

We are not dealing here with an administration suit. We are dealing with a hostile claim as between an estate and an outside mortgagee. That being

so, if the executors choose to defend this suit in this manner, they must incur the ordinary liabilities of a litigant as to costs. If in fact their testator''s

estate is insolvent, which I do not know, or if they fully administer the estate then it might have been proper by appropriate pleas to put that

defence forward so that the judgment might go in an appropriate form. As far as I can see they have not done that here. That being so, the present

order must go against them personally. Whether they have an indemnity against their own beneficiaries or against the assets of the estate which they

are representing is an entirely different matter with which we are not concerned on the present application.

43. The result will be that the present application will succeed; and the words added in the draft decree for payment of the costs out of the estate

must be struck out.

44. As regards the costs of the present application, we think that the Respondents, the representatives of the mortgagor, must pay these apart from

the costs of the previous hearing of this application before us. On that day neither counsel was in a position to proceed. Accordingly, as regards

the costs of that day we will let each party bear their own costs.