Privy Council Appeal No. 71 *of* 1923.

Patna Appeal No. 46 *of* 1921.

Maharajadhiraj Sir Rameshwar Singh Bahadur - - - *Appellant*

v.

Hitendra Singh and others - - - - - *Respondents*

Same - - - - - - - - - *Appellant*

v.

Same - - - - - - - - - *Respondents*

(*Consolidated Appeals*)

FROM

THE HIGH COURT OF JUDICATURE AT PATNA.

JUDGMENT OF THE LORDS OF JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 26TH JUNE, 1924.

Present at the Hearing:

LORD SHAW.
LORD BLANESBURGH.
MR. AMEER ALI.

[*Delivered by* LORD SHAW.]

These are two consolidated appeals from one judgment and two decrees of the High Court of Judicature at Patna, dated the 31st March, 1921. They partly affirmed and partly reversed a judgment and decree dated 4th August, 1919, of the Subordinate Judge at Darbhanga.

The appellant is the Raja of Darbhanga. The respondents are members of the junior branch of the Raja's family. As such

they are in possession and enjoyment of certain babuana immoveable properties, which were the subject of a babuana grant made by the head of the family many years ago. Certain mortgages were granted to the appellant as well as to certain persons outside of the family, and there were mortgage and money decrees existing against the respondents to such an amount that it was thought expedient that a Receiver of the mortgaged properties should be appointed.

Upon the 2nd February, 1910, the judgment debtors accordingly filed a petition for the appointment of a Receiver. On the 12th of the same month the appellant, the Raja, by his application consented to the appointment. Following upon these proceedings, the Subordinate Judge of Darbhanga, on the 9th April, 1910, made an order appointing a Receiver, and, on the 14th of the month, a Receiver was appointed on six months' probation.

The terms of the appointment and its scope, together with the terms of the consent of the Raja appellant, will be presently referred to, but it is convenient to note certain subsequent dates of the proceedings. It appears from these sufficiently evident that, upon various important occasions in the history of these transactions, the Raja, having first consented to the appointment and administration by a Receiver, endeavoured to resile therefrom by various applications to the Court.

The appointment of the Receiver having been made in April, 1910, the Raja, so early as September following, applied for the discharge of the Receiver. In February, 1911, his application, having been considered, was dismissed. He appealed in April, made an affidavit in May, and upon the 7th June, 1911, the High Court made the consent decree, the purport and scope of which are now in issue.

The appellant, notwithstanding the consent decree of the 7th June, 1911, still continued to make applications to the Court substantially to destroy the administrationship of the Receiver, one of his objects being to compel sales of certain property aftermentioned. On the 25th July, 1914, he applied for the discharge of the Receiver to the Subordinate Judge. The whole case was considered, and the Subordinate Judge dismissed the application on the 6th July, 1915. No appeal was lodged against this dismissal, and the judgment became final.

On the 26th January, 1917, the Raja made a further application to the Subordinate Judge in the same sense, to discharge the Receiver and generally for the same objects as before. In April the Subordinate Judge dismissed his application, and on the 20th June, 1918, the High Court dismissed his appeal.

The ink was hardly dry on this decision of the High Court till the Raja made his present application of the 23rd July, 1918, again for the same purpose and on the same grounds. On the 4th August, 1919, the Subordinate Judge made a decree partly

allowing the Raja's claim, but upon the 31st March, 1921, the claim was dismissed by the High Court. It is this claim which has been strenuously argued at their Lordships' Bar.

Their Lordships are happy to record that, notwithstanding this protracted period of litigation at the instance of the Maharaja, for the purpose of destroying the receivership, the administration of the Receiver has proceeded steadily and to the satisfaction of the Court below, and with apparently great advantage to the interests of this family estate. The Board does not enter upon details, but, speaking generally, may observe that there is no suggestion made, or apparently possible, of any kind of mal-administration; that a scheme approved by the Court under which the accounts of the estate have been regularly submitted to and approved by the Court, has been worked out most capably; and this with, in the opinion of their Lordships, satisfactory and notable success.

In the course of the proceedings of the Court below, a view was expressed on the topic of *res judicata*, which, it was argued, was too absolute in its terms and would, it was urged, exclude the appellant too completely from all remedy open to him as a judgment creditor. Consequently—and this appeared to their Lordships to be the substance of the complaint of the appellant—the previous pronouncements were, it was argued, really to the effect that the Receiver, in his administration, was precluded from all power of selling, even if good occasion or opportunity arose, any part of the estate under mortgage, and was tied up to freeing the properties from mortgage debt out of annual income alone. If these reasons be the true reasons for the appeal, then the appeal may be at least intelligible. They will be presently dealt with. But they did not affect the substance of the difference between the parties, nor did they, in the judgment of the Board enter into the substance of the determination of the rights of parties contained in the decree of the High Court under appeal.

It is now important to determine the point and scope of the consent given by the Raja to the receivership. On the 12th February, 1910, it was in these terms :—

> " That your petitioner has no objection to the appointment of a Receiver as prayed for by the applicants, and submits that a proper and representative man be nominated for the purpose."

The Receiver was appointed accordingly. It is noticeable that the petition for the appointment, after setting out that several decrees of the Maharaja Bahadur have been executed and some of the properties attached and advertised for sale, and objections lodged, goes on to state that " if some kind of arrangement be made the amount due under all the decrees which will be considered as legally due may be made up gradually " ; and the prayer of the petition is " that a Receiver may be appointed by the Court for the entire estate of your petitioners and the legal debts may be paid gradually through the Receiver."

It was to this appointment " as prayed for by the applicants " that the appellant consented, and administration by a Receiver was accordingly begun.

It is now necessary, however, to record with precision the actual terms of the appointment, in so far as the Receiver's powers are concerned, as contained in the order of the Subordinate Judge of Darbhanga on the 14th April, 1910. These terms are as follows :—

" 1. He shall have all such powers as to bringing and defending suits and for the realisation, management, protection, preservation and improvements of the property, the collection of the rents and profits thereof, the application and disposal of such suits and property, and the execution of documents as the owners themselves have.

" 2. He shall get 2 per cent. upon his collection as his remuneration, which shall not exceed Rs. 300 per month.

" 3. He shall furnish security to the extent of Rs. 10,000 and shall duly account for what he shall receive in respect of the property.

" 4. He shall submit his accounts in court every month.

" 5. He shall pay Rs. 10 per cent. on the collection, but it will not exceed Rs. 1,200, for the maintenance of the Babu ; Rs. 250 to each of the four brothers ; Rs. 50 to each of the sons of Amarendra Babu, and Rs. 100 to the widow of Jibendra, per month.

" 6. He shall be responsible for any loss occasioned to the property by his wilful default or gross negligence."

No objection has been suggested to the effect that the Receiver has acted in any respect improperly in regard to accounts, security of payments, etc. The administration has been correct.

The real question is as to the ambit of the Receiver's powers. On the 7th June, 1911, this order was varied in these terms, and a consent order was pronounced in these terms : –

" By consent of parties the order of the Court below is varied in the manner following, namely, the Government Revenue and Cesses and other outgoings, as per scheme framed by Court and the budget of the Receiver, are to be paid first, and then the decrees which do not carry any interest, and then the decrees which carry interest. This order is made subject to the payment of allowances to the judgment-debtor. There will be no order as to the costs of this Court. The Receiver will continue as before."

Having heard full argument, the Board is of opinion that this consent order of 7th June, 1911, did not abolish or abrogate the powers contained in the decree of 14th April, 1910. These two orders must be read together. In particular, under the terms " realisation, management, protection," etc., of the properties, a power of sale is not taken away from but is still vested in the Receiver. And if, for instance, such a power of sale had been exercised in good faith and in the interests of the estate, with the sanction of the Court, such a transaction could not have been challenged as *ultra vires*.

But the proposition of the appellant is a very different one. It is not that the power to sell may be exercised, but that, although even contrary to the Receiver's own ideas of prudence or advantage, it *must* be exercised ; and that, if it is not exercised at once or promptly, then the basis of the receivership has gone and it ought to be declared at an end. It is further suggested that it was only upon such a footing that the appellant consented to the receivership being set up.

This last contention may be disposed of at once. Fortunately, in the course of the proceedings, which culminated in the consent order in June, 1911, the Raja filed an affidavit. The Raja's understanding of the circumstances is made fairly clear by a petition for revision presented by him on 3rd April, 1911. His understanding of the position is thus narrated :—

> "3. That on the 2nd February, 1910, the debtors applied to the Subordinate Judge that a Receiver might be appointed over their attached properties and that such Receiver, instead of selling the properties, might manage them and from the rents and profits after deduction of management expenses and after payment of some small allowances to the debtors for their maintenance, might pay up the decree debts according to the decrees."

It seems in these circumstances vain to deny that, in consenting to the Receivership, and being a party to the consent order as to administration, the scheme of the latter, a scheme which has throughout received the sanction and approval of the Court, was substantially this: (1) The property under the babuana grant was, if possible, to be held together; (2) allowances were to be made from the revenue year by year to the babuana holders; (3) the outside creditors should, from the revenue, be paid off and their decrees extinguished; and (4) lastly, with regard to the appellant's decrees, which amounted to very large sums and which were of two kinds, namely, decrees not bearing interest (amounting to between 8 and 9 lakhs of rupees), and decrees, bearing interest, the balance and revenue should be applied first to the extinction of the former, and that thereafter the interest-bearing decrees were to be extinguished. It is, in the opinion of the Board, quite clear that this scheme of administration would take a good many years to complete, that this was perfectly well known to the Maharajah, and that the throwing of large blocks of property on to the market was not the mode of administration which was desired, but that the gradual extinction of debt out of revenue was, if it proved feasible, to be preferred.

This scheme has worked well: (1) Allowances of considerable amounts suitable to the station of the members of this important family have been made; (2) the debts of all the mortgage holders other than the appellant—that is to say, of all the outside creditors, have been entirely wiped off; (3) with regard to the debts due to the appellant, the Receiver has addressed himself with vigour to the extinction of these in priority to the interest-bearing debts. (4) It appears also to be an admitted fact that, when the suit was brought on the 26th January, 1917, the management of the Receiver from his appointment in 1910 till the end of 1916 had been so successful as to pay off over 4 lakhs of rupees; while (5) from one of the statements lodged in the case, it is further apparent that in the next two years a sum of nearly $1\frac{1}{2}$ lakhs has been paid off. This statement, without entering upon details, appears to represent the financial results with general accuracy.

The Board express no surprise at the reluctance of the High Court to interfere with an administration of this character: and, apart from the law of the case, which will be presently referred to,

at their having arrived at a conclusion that to abolish the receivership and to permit the appellant to bring the properties to sale under execution, would probably accomplish the destruction of the babuana grants as such and the defeat of the object for which the consent order was obtained. The Board, further, sees no reason to throw doubt upon the opinion of the Receiver that acceleration in freeing the properties from debts will progressively be made.

Enough has been said to indicate that, in the view of their Lordships, no case has been made out for either permitting the appellant as execution creditor to proceed with the sale of the babuana properties under his decrees, nor for imposing the duty of immediate realisation of these properties upon the Receiver.

It may seem, accordingly, unnecessary to deal with the protracted argument that was presented on the doctrine of *res judicata*. Their Lordships are in substantial agreement with the following passage in the opinion of Das J. when delivering the judgment of the High Court of 31st March, 1921 :—

> " The present application is an application by the decree-holder for an order that ' he may be allowed to proceed with the sale of the properties mortgaged in execution of his mortgage decree and with the execution of his decrees generally ' and for the discharge of the Receiver. That was identically his application which resulted in the consent order on the 7th June 1911. That, again, was his application which resulted in the order passed on the 6th July, 1916. I do not for a moment doubt that the consent order or the order passed by the Court on the 6th July, 1916, will not stand in the way of the decree-holder, if the judgment debtors depart from the terms of the consent order ; but there is no suggestion that the terms of the consent order are not scrupulously adhered to. The only suggestion is that it will take many years, under the present scheme, to satisfy the decree held by the decree-holder. That argument, in my view, is not admissible, since the decree-holder must presumably have taken that argument into consideration when he first consented to the appointment of the Receiver, and then to the order passed on the 7th June, 1911."

It was strongly urged that a rigorous construction must be given to the provisions of the Civil Procedure Code and that the language of Section XI of the Code of 1908 could not be applied to the present suit as it did not fall within the statutory words, " Any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties . . . . . and has been heard and finally decided by such Court." It seems extremely doubtful whether there is any distinction whatsoever between the present and the former suits. But, in the construction of this section, as was the case also in the construction of Section 13 of the Code of Civil Procedure of 1877, it has been long recognised that the principle laid down by Sir Barnes Peacock in *Ram Kirpul Shukul* v. *Mussumat Rup Kuari* (11 I.A. 37) is correct, when the learned Judge said :—

> " The question, if the term ' *res judicata* ' was intended, as it doubtless was, and was understood by the Full Bench, to refer to a matter decided by a Court of competent jurisdiction in a former suit, was irrelevant and inapplicable to the case. The matter decided by Mr. Probyn was not

> decided in a former suit, but in a proceeding of which the application in which the orders reversed by the High Court were made was merely a continuation. It was as binding between the parties and those claiming under them as an interlocutory judgment in a suit is binding upon the parties in every proceeding in that suit, or as a final judgment in a suit is binding upon them in carrying the judgment into execution. The binding force of such a judgment depends not upon Section 13, Act X of 1877, but upon general principles of law. If it were not binding there would be no end to litigation."

And recently before this Board in *Hook* v. *Administrator-General of Bengal* (48 I.A. 187) that rule was re-affirmed.

There can be no real doubt that, in the course of the judgment in this case, two radical issues were definitely settled. First, that extinction of debt was part of the scheme which was to be gradually operative, and, secondly, that the appellant, under the consent order, was bound to this gradual procedure. Their Lordships accordingly assent to the judgment of the High Court in the passage above cited. That pronouncement, in their Lordships' opinion, was not made nor must it be taken in a sense which absolutely precludes, should proper occasion arise, a sale of the mortgaged properties by the Receiver. If the pronouncement has such a meaning or effect, then, in the opinion of the Board, it is erroneous.

Upon the topic of consent orders their Lordships think that the principle to be applied is as follows :—

Where a consent order is obtained it always remains open to challenge administration thereunder which is of such a character as either amounts to malfeasance, and accordingly releases the consenter, or, secondly, has been proved by experience to be in substance so protracted and imperfect as to be futile.

In the view of the Board both malfeasance and futility are negatived in the present case. It is unhappily true that, notwithstanding the sensible rule laid down by Sir Barnes Peacock as to interlocutory orders, there has not, in this case, been the end of litigation such as he might have forecast. Probably, however, that end may now be in view and the Receiver may be left to work out the salvation of the property.

Their Lordships, however, take the opportunity of again referring to the subject of realisation by sale in the present case of any of the properties under mortgage. Such a realisation is not, in the opinion of the Board, *ultra vires*, but *intra vires* of the Receiver. He may decline, as he has done in the past, to put the properties to sale, and it is for him to consider carefully the result of putting blocks of property on the market. But if, in his view, a sale would be, in certain conjunctures of circumstances, of advantage, then he might, with the necessary sanction, well exercise his power of sale accordingly.

Their Lordships will humbly advise His Majesty that the appeals should be disallowed with costs.

In the Privy Council.

MAHARAJADHIRAJ SIR RAMESHWAR SINGH BAHADUR

v.

HITENDRA SINGH AND OTHERS.

SAME

v.

SAME.

(*Consolidated Appeals.*)

DELIVERED BY LORD SHAW.

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