CALCUTTA HIGH COURT

Maya Debi

Vs.

Rajlakshmi Debi

A.F.O.D. Nos. 83 of 1945, 145 of 1947 and 22 of 1948

(G.N. Das and Lahiri, JJ.)

02.05.1949

JUDGMENT

G.N. DAS, J.

1. These three appeals arise out of proceedings in execution of decrees for rent. In First Miscellaneous Appeal No. 83 of 1945, the appellant is Sm. Maya Debi. First Miscellaneous Appeal No. 22 of 1948 and First Miscellaneous Appeal No. 145 of 1947 arise out of the same execution proceedings. In F.M.A. 22 of 1948, the appellants are Probodh Kumar Boy and Pabitra Kumar Roy. In F.M.A. 145 of 1947, the appellants are Kshitish Chandra Roy and Shib Chandra Roy. The facts common to all these appeals may be stated now.

2. The Maharaja of Cossimbazar was the proprietor of a zemindary under which a putni was held by one Sarat Mom Debi whose interest is now represented by Maya Debi. Under the putni there were several dar-putnies. We are concerned with three of such dar-putnies in these appeals. One of the dar-putnies was held by the Midnapore Zemindary Company. A second Dar-putni was held by Satish Chandra Roy, since deceased, Kshitish Chandra Roy and Shib Chandra Roy and Suryyapada Dutta. A third dar-putni was held by the said Roys and Dutt and Bibhuti Bhusan Pal Choudhury and three others. The putni of Sarat Moni Debi was put up for sale under Regulation VIII [8] of 1819 on 17th November 1930. On that date the Midnapore Zemindary Company, one of the dar-putnidars deposited a sum of Rs. 22,974-5-3 pita and saved the putni from sale. The deposit was made under the provisions of Section 13(4), Putni Regulation (Regulation VIII [8] of 1819).

3. On an application by the Midnapore Zemindary Company, the company was put in possession of the putni on 26th November 1930. The company continued in possession till the end of Bhadra 1352 B.S. On 10th August 1945 the company gave a notice to Maya Debi the defaulting putnidar expressing their intention to relinquish possession on the expiry of the month of Bhadra 1352. The notice has been marked Ex. A and is printed in the paper book of F.M.A. 22 of 1948, the terms whereof will be adverted to hereafter. We now come to F.M.A. No. 83 of 1945, in which the appellant, as we have said, is Maya Debi.

4. The facts so far as they are relevant for the purposes of decision of this appeal are that in

regard to the dar putni held by the Roys and Dutt a decree for arrears of rent was obtained by the Midnapore Zemindary Company on 30th June 1934. In execution of that decree, the dar-putni of the Roys and Dutt was brought to sale on 9th December 1935 and was purchased by the decree-holder Midnapore Zemindary Company. In 1935, the Midnapore Zemindary Company instituted a suit for rent, being Rent suit No. 48 of 1935, claiming arrears of rent from Srabana 1341 B.S. to jaistha 1342 B.S. This suit was decreed and the company proceeded to execute the same in Rent Execution case No. 13 of 1942. The prayers made in the execution petition were a sale of other immovable properties of the judgment-debtors and in case the decretal dues were not realized thereby, the appointment of a receiver and for arrest of the persons of the judgment-debtors. In this execution proceeding an objection was raised by the Roys giving rise to miscellaneous case No. 28 of 1942. The miscellaneous case was dismissed on 29th April 1942.

5. Against the order of dismissal an appeal was taken to this Court by the Roys, being First Miscellaneous Appeal No. 125 of 1942. This appeal was allowed by this Court by its order, dated 28th July 1944. The miscellaneous sage was remanded to the trist Court for a decision on the question whether there was in fact a merger of the dar-putni held by the Roys and Dutt and secondly whether in law there could be each a merger.

6. After the case went back, the learned Subordinate Judge by his order dated 4th December 1944, held that there could be no merger in law and secondly that the merger, if any, did not take place before the amendment of the Bengal Tenancy Act by the addition of Section 168-A to the Act. The learned Subordinate Judge did not come to any finding whether in fact there was each a merger but observed that a prayer for arrest of the persons of the judgment-debtors was possible. In the result, however, the learned Subordinate Judge allowed the objection case end dismissed the execution case started by the Midnapore Zemindary Company.

7. The Midnapore Zemindary Company preferred an appeal to this Court, giving rise to First Miscellaneous Appeal No. 83 of 1945. The Midnapore Zemindary Company, it appears, did not prosecute the appeal, after the company had declared its intention of surrendering possession of the putni in favor of Maya Debi. The appeal was dismissed on 14th January 1946, for non-prosecution.

8. Sometime thereafter Maya Debi made an application for restoration of the appeal. The question was heard in the presence of the learned advocates appearing on behalf of Maya Debi, the Midnapore Zemindary Company and the contesting respondents. On 11th December 1946, this Court passed an order setting aside the dismissal of the appeal for non-prosecution and restoring the appeal to file, staking out the name of the Midnapore Zemindary Company and substituting Maya Debi in its place. The question whether the interest of the decree-holder the Midnapore Zemindary Company had devolved on Maya Debi was left open for future adjudication.

9. At the hearing of the appeal, Mr. Panchanon Ghose, appearing for the respondents objectors, raised a preliminary objection that this appeal cannot be continued by Maya Debi, inasmuch as Maya Debi is not an assignee of the decree holder the Midnapore Zemindary Company either by operation of law, or by an assignment in writing. This objection has to be considered first.

10. It is true that a decree can be executed either by the decree-holder, or by an assignee of the

decree either by operation of law, or by assignment in writing. The expression assignment in writing has been the subject of judicial interpretation in several cases to which our attention has been drawn. In the case of *Matkurapur Zemindary Co. Ltd. v. Bhasaram Mondal*[1], Mukherjea, J. observed that in order that the applicant for execution should be considered as an assignee of the decree, there must be a vesting of the interest of the decree-holder by operation of a statute. The view so expressed by Mukherjea, J. was approved of in the case of *Prabashini Debi v. Basiklal Banerjee*[2] n the case of *Mahadeo Baburao Halte v. Anandarao Shankarao Deshmukh*[3], Rangnekar J., observed :

A transferee by operation of law would be a legal representative of the decree-holder, or the person in whom the interest of the decree holder has become vested under a statute, e.g., the Official Assignee of an insolvent under the Presidency Towns Insolvency Act, or the purchaser at a Court sale in execution of a decree.

11. In a still later case of the Bombay High Court, namely, the case of *G.N. Asundi v. Virappa Andaneppa*[4], a Division Bench of the Bombay High Court observed that an assignment of a decree by operation of law was confined to testamentary succession, forfeiture, insolvency and the like. The question depends on the legal position of a depositor under Section 13(4) of the Putni Regulation who has gone into possession and thereafter relinquished possession in favor of defaulting putnidars. Section 13(4), Putni Regulation provides that if an inferior talukdar who is not himself in default makes ft deposit to stay the sale of the superior tenure, out of his private funds, the deposit shall be considered as a loan made to the proprietor of the tenure preserved from sale by each means, and the taluk so preserved shall be the security to the person or persons making the advance, who shall be considered to have a lien thereupon in the same manner as if the loan had been made upon mortgage. The clause goes on to state that the depositor on his application shall be entitled to obtain possession of the tenure of the defaulter, in Order to recover the amount so advanced from any profits belonging thereto.

12. The position of the depositor has been stated by Dr. Rash Behari Ghose in his Law of Mortgages in British Indis as that of a bailiff of the mortgagor without any salary. In the case of *Shah Mukhun Lall v. Baboo Sree Keshen Singh*[5], the Judicial Committee stated that the position of a mortgagee was akin to that of an agent of the mortgagor for collection of rent.

Mr. Mukherjee, appearing for the appellants, has submitted that the position of the depositor who has gone into possession is that of a trustee, having no rights of his own but holding the putni merely for the benefit of the defaulting putnidar. He has also stated that the position of the depositor in such circumstances is that of the bolder of a lien within the meaning of Section 100, Transfer of Property Act.

[1]51 Cal 703 at p. 708 : (AIR 1924 Cal 661)
[2]59 Cal 297 : (AIR 1932 Cal 439)
[3]57 Bom 513 : (AIR 1933 Bom 367)
[4] ILR (1939) Bom 271 : (AIR 1939 Bom 221)
[5]12 M. I. A. 157 : (2 Beng LR 44 PC)

13. Mr. Ghose, appearing for the respondents, on the other hand, has submitted that the position of the depositor in such circumstances is really that of an owner for the period of his possession.

14. In our opinion, it is difficult to describe the position of the depositor either as that of a bailiff, or as an agent, or as a trustee, or the holder of a lien, or as that of an owner. The position depends on the true view one has to take of the effect of Section 13(4) of the Putni Regulation. His

position is an anomalous one and it is difficult to define it accurately by a legal concept ordinarily known to law. Mr. Mukherjee's contention that be is merely a trustee is obviously unsound, for the depositor has rights of his own which a trustee does not enjoy. He can appropriate the income of the property in his possession with a view to get repayment of the sum advanced. He can purchase the interest of the putnidar without being subject to disabilities which attach to a trustee. At the most his position may be said to be similar to that of a trustee. Mr. Mukherjee's further contention that he is the holder of a lien having no interest whatsoever in the property is negatived by the express terms of Section 13(4) of the Putni Regulation and is opposed to a series of decisions of this Court to which we shall advert presently.

15. Mr. Ghose's contention that he is the owner for the time being is also untenable, for the simple reason that the mortgagor's title is never destroyed, the depositor coming into possession for very limited purpose, namely, the purpose of realising his advances. Section 13(4) of the Regulation states that the depositor should be regarded as having advanced a loan on a mortgage. It is true that the word mortgage as used in Section 13(4) of the Regulation must have the connotation which the term bore in the year 1819. In the case of *Ramkinkar Banerjee v. Satya Gharan Srimani*[6], the Judicial Committee observed that : Up to the time of the passing of the Transfer of Property Act the rights of mortgagors and mortgagees of land in India were subject to much controversy, though in general the law of England, subject to such modification as justice, equity and good conscience required, was recognized as the law of India also. In the case of *Gopal v. Parsotam*[7], Mahmood, J. observed that the definition of a mortgage in the Transfer of Property Act has not altered the law but only formulated in clear language the notions of mortgage as understood by writers of text books on Indian mortgages. It is, therefore, futile to say that the position of the depositor is simply that of a lien holder having no interest in the property saved by the deposit or of an owner for a limited period. In the case of *Abdul Aziz v. Beharilal*[8], Fletcher, J. observed that a depositor under Section 13(4) of the Putni Regulation who enters into possession has the express right of a mortgagee in possession and is the only person who can collect rents, grant receipts and give a discharge for the rents due from the subordinate holders of the putni saved by the deposit. In the case of *Jakhomull Mekere v. Saroda prosad Dey*[9], at p. 609, Mukherji, J. stated the position of a depositor to be that of a usufructuary mortgagee. In the later case of *Ramjilan Bhadra v. Tazuddin Kaji*[10], this Court held that Section 13(4) of the Putni Regulation gave the dar-patnidar making the deposit a usufructuary mortgage of the putni in order to recover the advance from the profits of the putni. This view was assumed to be correct in the case of *Midnapur Zemindary Co. Ltd. v. Saradindu Mukhopadhaya*[11], and the rights of the depositor were worked out on the footing that Section 76, Transfer of

[6]66 I. A. 50 at p. 59: AIR 1939 PC 14
[7]5 All 121 at p. 127: (1882 A. W. N. 128 FB)
[8]41 IC 711 : (AIR 1918 Cal 466)
[9]7 CLJ 604
[10]15 C. W. N. 404: (9 I. C. 489)
[11]52 C. W. N. 724: (AIR 1948 Cal250)

Property Act was attracted.

16. The above discussion, therefore, shows that the position of the depositor is not that as contended for either by Mr. Mukherjee for the appellants, or by Mr. Ghose for the respondent. In our opinion his position is an anomalous one. He is in the position of a creditor who holds the defaulting tenure as if it was mortgaged to hire. He has an additional right to be put in possession on his applying for the same. In the latter event if be obtains possession, be can retain possession of the same and collect the profits of the tenure saved from sale including rents which were

unrealised at the time of his entering into possession and rents accrued during the subsistence of his possession and apply the same in satisfaction of the deposit made by him. He can, however, give up possession even before the advance made by him is satisfied, amicably without recourse to a suit or an order of the Collector. If he gives up possession in such circumstances, his right to collect the rents already accrued or to accrue thereafter, decretal or otherwise, ceases and all such rights which had inhered in him because of his entry into possession becomes vested in the defaulting tenure- holder who goes into possession on the depositor vacating the same. In this view, the conclusion follows that on the Midnapore Zemindary Company giving up possession by notice and on May a Debi's entry into such possession, the latter became entitled to the interest of the decree-holder, the Midnapore Zemindary Company, in the decree with which we are now concerned which was not realized by the Midnapore Zemindary Company and satisfaction whereof was not accorded by the Midnapore Zemindary Company. In our opinion, therefore, Maya Debi may be regarded as an assignee of the decree-holder by operation of law.

17. The question also arises whether Maya Debi can be regarded as an assignee of the interest of the decree holder Midnapore Zemindary Company by assignment in writing. The question really turns on the interpretation of the notice Ex. A read in the light of the facts and circumstances of the case. The notice Ex. A recited that the tenants would be informed of the fact of relinquishment of possession by the Midnapore Zemindary Company and Tahsildars would be similarly informed. The notice required Maya Debi to take all steps to realize the rents due which, in our opinion, include the rents already accrued, or which might accrue after the notice. The notice proceeds to state that if Maya Debi as desires, the company will supply Maya Debi with a list of the rents due from the tenants up to the date of relinquishment of possession by the Midnapore Zemindary Company. Basauta Kumar Mukherjee, an officer of Maya Debi has deposed that Maya Debi has realised other decrees for rents which had been obtained by the Midnapore Zemindary Company, while the company was in possession, without any objection on the part of the company. He has also deposed that a list of the unrealized decrees obtained by the Midnapore Zemindary Company was made over to Maya Debi. It is true that the list has not been produced in Court, but this was never called for from Maya Debi. It appears from the records that the Midnapore Zemindary Company was served with a notice of the intended execution by Maya Debi in the connected case. The notice was duly served, but the Midnapore Zemindary Company did not object to the execution proceeding at the instance of Maya Debi. In this appeal, as we have already pointed out, Maya Debi was substituted in place of the Midnapore Zemindary Company without any objection on the part of the latter.

18. All these facts, in our opinion, support the position that the Midnapore Zemindary Company intended to vest Maya Debi with the right of realising all arrears of rent, decretal or otherwise and Maya Debi can be regarded also as an assignee of the interest of the decree-holder by assignment in writing within the meaning of Order 21, Rule 16, Civil Procedure Code. This view, in our opinion, is supported by the decision of this Court in the case of *Ananda Mohan Roy v. Promotha Nath Ganguly*[12], In that case, there was an assignment of the property with all arrears. A decree for arrears of rent was obtained simultaneously with the execution of the deed of assignment. It was held that the decree passed to the assignee of the property under the words assignment with all arrears. A similar view has been taken in the case of *Periskatha Nadar v. Mahalingam*[13], where it has been held that anything in writing which transfers a decree and clearly shows an intention to do so, should be regarded as coming within the scope of Order 21, Rule 16, Civil Procedure Code.

19. Mr. Ghose appearing for the respondents, has relied strongly on two decisions of this Court, namely, the case of *Mathurapore Zemindary Co. Ltd. v. Bhasaram Mondal*[14], and the case of *Prabashini Debi v. Rasiklal Banerjee*[15], In both these cases, the assignment preceded the passing of the decree for arrears of rent. As such they do not apply to the facts of the present case.

20. On these grounds we hold that Maya Debi is entitled to execute the decrees for arrears of rent obtained by the Midnapore Zemindary Company prior to its relinquishment of possession in favor of Maya Debi, the decree remaining unrealised at the date of such relinquishment. The preliminary objection of Mr. Ghose must, therefore, be overruled.

21. Coming to the merits of the case we are not inclined to accept the argument put forward on behalf of the appellants that there was no merger in law. There is no evidence on the record to show that the deposit of the Midnapore Zemindary Company has been satisfied. The Midnapore Zemindary Company has, therefore, a mortgage so far as the interest of the putnidar Maya Debi is concerned. In order to constitute merger within Section 111(d), Transfer of Property Act, the interest of the lessor and the leases in the whole of the property should become vested at the same time in one person in the same right ; that is to say, there must be a union of the entire interest of the lessor and the lessee or as is said, the landlord's interest must sink in the reversion.

22. In the present case, the acquisition of the dar-putni of the Boys and Dutt by the Midnapore Zemindary Company did not have the effect of extinguishing the darpatni so purchased. The dar-putni would not be an accession ipso jure so far as the mortgagor is concerned. The combined effect of Section 90, Trusts Act and Section 63, Transfer of Property Act, is that till the redemption of the security, the accession, that is, the purchased property, does not become the absolute property of the mortgagor. There is, therefore, an intervening state in the Midnapore Zemindary Company, that is the depositor, under Section 13(4) of the Regulation which prevents the union of the interest of the lessee with that of the lessor. There cannot, therefore, be a merger in the eye of law. The learned Subordinate Judge, in our opinion, was right in the view he took of the matter. In this view, Section 168A, Bengal Tenancy Act, precludes Maya Debi from

[12]25 C. W. N. 863 : (AIR 1921 Cal 74) [14]51 Cal 703 : (AIR 1924 Cal 661)

[13] AIR 1936 Mad 543 at p. 545 : (166 I. C. 922) [15]59 Cal 297 : (AIR 1932 Cal 439)

proceeding against the other properties of the judgment-debtors by attachment and sale thereof. It only remains for us to consider the prayer for arrest of the persons of the judgment-debtors. In so far as Probodh Kumar Roy and Pabitra Kumar Roy are concerned, they are not the original judgment-debtors, but they have been substituted in place of their father Satish Chandra Roy. Mr. Mukherjee for the appellants contends that they are under a pious obligation to repay the debts of their father. This is true but only in a limited sense. A Hindu son is under no pious obligation to pay the debts of his father out of his personal assets. No personal execution can be levied as against a Hindu son on the strength of a pious obligation on the part of the son to repay the father's debt. This was so held in the case of *Bissessor Ram v. Rama Kanta Dubey*[16], Moreover, this point was not raised in the Court below. The only prayer, therefore, which may be granted so far as Maya Debi is concerned is the prayer for the arrest of the persons of Kahitish Chandra Roy and Sib Chandra Roy, two of the judgment-debtors. The learned Subordinate Judge seemed to be inclined to the view that such arrest was possible. The learned Subordinate Judge, however, did not consider whether the prayer was admissible in the view of the provisions of Section 51, Civil Procedure Code. This last point, therefore, requires further investigation.

23. In the result, this appeal is allowed in part, the order of the Subordinate Judge is varied and this case remitted to the Subordinate Judge for a decision as to whether the prayer for arrest of the persons of Kshitish Chandra Roy and Sib Chandra Roy can be allowed in the facts and circumstances of the present case. If necessary, he may take further evidence on this point.

24. This appeal is allowed with costs, hearing-fee being assessed at two gold mohurs to be paid by Kshitish Chandra Roy and Sib Chandra Roy.

25. We shall now deal with F.M.A. No. 22 of 1948 and F.M.A. No. 145 of 1947. A few further facts have got to be stated in order to dispose of these appeals which are at the instance of the judgment-debtors.

26. In 1933, the Midnapore Zemindary Company instituted a suit for dar-putni rent, being Rent Suit No. 38 of 1933 against the Roys, Pal Choudhurys and Dutt. This suit was decreed and in execution of that decree the dar-putni of the Roys, Pal Choudhurys and Dutt was sold on 8th July 1936, and purchased by the Midnapore Zemindary Company. Thereafter in 1935, a suit for rent being Rent Suit No. 46 of 1935 was instituted by the Midnapore Zemindary Company against the said Roys, Pal Choudhurys and Dutt for the Jaistha kist of 1340 B.S. to 1342 B.S. This suit was decreed on 23rd December 1935. The present execution case, which is Rent Execution case No. 91 of 1946, was instituted by Maya Debi claiming to be the representative of the Midnapore Zemindary Company which had obtained the decree for arrears of rent as already stated. Notice of the execution of this decree under Order 21, Rule 16, Civil Procedure Code , wan served on the Midnapore Zemindary Company, as also on the judgment-debtors. The Midnapore Zemindary Company did not object to the execution proceeding at the instance of Maya Debi. One set of objection was raised on behalf of Probodh Kumar Roy and Pabitra Kumar Roy eons of Satish Chandra Roy, since deceased, giving rise to Miscellaneous Case No. 13 of 1947. The principal objections to the execution were firstly that Maya

[16]13 Pat 7 : (AIR 1934 Pat187)

Debi had no right to execute the decree and secondly that the prayer for the appointment of a receiver which was made by Maya Debi in respect of a tenancy of Rs. 400 was not tenable, inasmuch as by a deed of gift, dated 7th February 1933, Satish Chandra Roy, Kshitish Chandra Roy and Sib Chandra Roy had made a gift of the tenancy in favor of Probodh Kumar Roy and Pabitra Kumar Roy and they are the owners of the said jama and no receiver can be appointed in respect thereof in execution of a decree obtained not against them but against their father Satish Chandra Roy and their uncles Kshitish Chandra Roy and Sib Chandra Roy.

27. The learned Subordinate Judge rejected these objections and allowed execution to proceed by his order which is now under appeal. Against this order, First Miscellaneous Appeal No. 22 of 1948 has been filed by Probodh Kumar Roy and Pabitra Kumar Roy.

28. Another set of objections was taken by Kshitish Chandra Roy and Sib Chandra Roy, giving rise to Miscellaneous case No. 72 of 1947 where the objection was raised to Maya Debi having the right to execute the decree as representative of the decree-holder the Midnapore Zemindary Company. This objection was overruled by the learned Subordinate Judge by his order dated 13th August 1947, and against that order Kshitish Chandra Roy and Sib Chandra Roy have preferred First Miscellaneous Appeal No. 145 of 1947.

29. We shall now take up F.M.A. No. 22 of 1948. Mr. Ben, appearing for the appellants, has contested the view of the Subordinate Judge that Maya Debi cannot be regarded as a representative of the decree-holder Midnapore Zemindary Company. For reasons already given in our judgment in F.M.A. No. 83 of 1945, this contention must be overruled.

30. Mr. Sen further contended that the lower Court was wrong in making an order for the appointment of a Receiver in regard to the tenancy of Rs. 400 on a finding that Probodh Kumar Roy and Pabitra Kumar Roy were the benamdars of the donors namely, their father Satish Chandra Roy and their uncles Kshitish Chandra Roy and Sib Chandra Roy.

31. The learned Subordinate Judge finds against the appellants principally on the ground that the donors were heavily in debts and that some of them had transferred their homesteads in favor of their wives. He also commented on the fact that no evidence was led on behalf of the dones that the rents were paid by the dones themselves and the payment was not made in their names on behalf of the donors. In our opinion, the learned Subordinate Judge has approached this question from an entirely wrong stand point. The question of proving that a transaction is benami rests on the person who agrees against the tenor of the deed. It is also well established that no conclusion as regards the benami character of a transaction can be founded on suspicion. In this case, the evidence indicates, and the Subordinate Judge also accepts this evidence as genuine, that the names of the done were mutated in the land-lord's sheristha, and that rents were paid by the dones to Midnapore Zemindary Company and Maya Debi. Prima facie, it must be assumed that the payment was made by the donees on their own behalf unless it was established that the persons whose names appear as payers in the rent receipts produced, are really agents acting on behalf of the donors. No attempt was made by Maya Debi to show that the persons who are said to have made the payments, did make the payments as agents of the donors. In the second place, the learned Subordinate Judge overlooks the statement in a plaint EX. 5 filed by the Midnapore Zemindary Company claiming sent for the period Ashar 1344 to pous 1346 B.S. against the donees alone, namely, Probodh Kumar Roy and Pabitra Kumar Roy. In para. 2 of the plaint, it is expressly recited that the donees are in ownership and possession of the property in question, which is the property in respect of which the present application for appointment of receiver has been made. The suit for rent was decreed ex parts in favor of the Midnapore Zemindary Company on the 13th August 1940. The decree is EX. 6. It also appears from Ex. 2 series that for a very long time rent was received by the Midnapore Zemindary Company from Probodh Kumar Roy and Pabitra Kumar Roy, the donees. The period covered by these receipts spread over the years 1343 to 1350. Exhibit 2z(7) dated 14th Chaitra 1352 B.S. shows that Maya Debi herself realised rent from Probodh Kumar Roy and Pabitra Kumar Roy the donees. The persons making the payment are stated to be Khudiram Dutt and Shyam Madhab Roy and they purport to make the payments on behalf of the donees. There is no evidence that these persons acted on behalf of the donors. Mr. Sen has also referred to an application before a Debt Settlement Board by Satish Chandra Roy filed on 28th September 1940. In this application for settlement of debt, EX. 3, the Midnapore Zamindary Company was stated to be one of the creditors. In the schedule of properties annexed to the application, the property covered by the deed of gift was not mentioned. Neither the Midnapore Zemindary Company, nor the other creditors who were parties to the Debt Settlement proceedings objected to the non inclusion of the property which was donated by Satish Chandra Roy and his brother Kshitish Chandra Roy and Sib Chandra Roy. The debts were settled on the basis of amicable settlements as would appear from the order sheet. It

would further appear that the Midnapore Zemindary Company itself filed an application for settlement of debt. In that application also, the Midnapore Zemindary Company did not mention the disputed property to be a property belonging to Satish Chandra Roy. In this state of the evidence, the conclusion follows that the deed of gift executed by Satish Chandra Roy, Kahitish Chandra Roy and Sib Chandra Roy in favor of the appellants Probodh Kumar Roy and Pabitra Kumar Roy is not a benami transaction. The fact that the donors had debts at the time of the gift is not conclusive to show that the gift was a benami transaction. It was accepted as a valid gift by the Midnapore Zemindary Company, as also by the respondent Maya Debi herself.

32. In these circumstances, the view taken by the learned Subordinate Judge cannot be sustained and it must be held that no receiver can be appointed in respect of the property covered by the deed of gift. We have already dealt with the contention raised by Mr. Mukherjee that Probodh Kumar Roy and Pabitra Kumar Roy were under a pious obligation to pay their father's debt and as such an equitable execution can be levied against their personal property. For reasons given in F.M.A. 83 of 1945, this contention cannot be given effect to. F.M.A. 22 of 1948 must, therefore, be allowed. The order of the Subordinate Judge is set aside so far as the appellants are concerned and the execution case dismissed as against them. The result of our order is that the receiver automatically stands discharged. He will now pass his accounts before the Subordinate Judge.

33. In the circumstances of this case, we direct that in this appeal the parties will bear their own costs in this Court and the Court below.

34. It remains for us to deal with F.M.A. 145 of 1947 in which the appellants ace Kahitish Chandra Roy and Sib Chandra Roy. For reasons already given in the other two appeals which we have disposed of, the only prayer which the decree-holder is entitled to make against them is the prayer for the arrest of the persons of these judgment-debtors. For the reasons given in F.M.A. No. 83 of 1945, the order made by the Subordinate Judge in this case must be varied and this case remitted to the Subordinate Judge for an adjudication whether in the fasts and circumstances of this case the prayer for arrest of the persons of the judgment-debtors should be entertained or not. In this case also, we direct the Subordinate Judge to take such additional evidence as the parties may choose to adduce and thereafter dispose of the objection raised by Kahitish Chandra Roy and Sib Chandra Roy.

35. In this appeal also, we direct the parties to bear their own costs.

Lahiri, J.

36. I agree.

Order accordingly.