

## ORISSA HIGH COURT

Sarat Chandra Deb

Vs

Bichitrananda Sahu

F.A No. 4 of 1945

(Jagannadhadas and Narasimham, JJ)

01.03.1950

### JUDGMENT

#### **Narasimham, J.**

1. This is judgment debtors' appeal from a final decree dated 21-10-1944 passed by the Subordinate Judge of Cuttack in a mortgage suit. In order to appreciate the points involved in this appeal it is necessary to describe briefly the previous history of this protracted litigation.

2. Patia estate known as Killa Patia is an impartible estate in Cuttack district whose proprietor was one Raja Raghunath Deb in 1913. On 26-2-1913 he executed a simple mortgage for Rs. 1,07,000 mortgaging the entire estate in favor of one Bhaban Sahu, the predecessor-in-interest of the respondent-decree-holders. Again on 13-8-1913 he executed a second mortgage in favor of the same Bhaban Sahu for Rs. 6,000 in respect of the same property. Raja Raghunath Deb died subsequently and was succeeded by one Maian Mohan Deb who assumed the title of Raja Madhusudan Deb. Some time in 1917 the title of Madan Mohan Deb to Killa Patia was challenged by Achhutananda Deb in O. S. No. 762 of 1917 in the Court of the Subordinate Judge of Cuttack. Achhutananda lost the suit in the lower Court and filed an appeal (F. a. No. 1 of 1920) in the High Court. During the pendency of the appeal, Madan Mohan Deb died and the Secretary of State for India was substituted in his place. On 10-3-1922, however, the Secretary of State for India and Achhutananda compromised the litigation in consequence of which the estate was surrendered to Achhutananda who obtained possession in due course in the same year.

3. Sometime in 1926 Bhaban instituted a mortgage suit (O. S. No. 61 of 1926) on the basis of the second mortgage bond dated 13-8-1913 and impleaded Achhutananda (as the latter was in possession of the entire estate by virtue of his compromise with the Secretary of State of India) as the principal defendant. The suit was decreed on 23-8-1927. In 1929, however, the title of Achhutananda to Patia estate was challenged by one Krushna Chandra Deb in O. S. No. 24 of 1930 which was decreed in his favor on 25-11-1933. During the pendency of this litigation, however, Killa Patia was sold on 20-5-1931 in execution of the mortgage suit (O. S. No. 51 of 1926) of Bhaban Sahu and purchased by the Raja Bahadur of Kanika subject to the first mortgage dated 26-2-1913. The said Raja Bahadur obtained delivery of possession of Killa Patia

(excluding the palace and its appurtenances) on 4-9-32. Consequently when Krushna Chandra Deb succeeded in his litigation against Achhutananda in O. S. No. 24 of 1930 he could not obtain possession of the entire estate but only of Patia palace and its appurtenances amounting to 2.44 acres of land. The said Raja Bahadur, apart from being in the possession of the entire estate as a purchaser of the equity of redemption in mortgage suit O. S. No. 51 of 1926, also acquired further interest in the estate by virtue of two subsequent mortgages taken by him from Madan Mohan Dab as early as 1918 and 1919 and decrees obtained on the basis of those mortgages as early as 1927. In the present litigation, however, it is unnecessary to describe in detail the other interests obtained by the Raja Bahadur of Kanika in Patia estate.

4. On 6-2-1935 the respondents instituted the mortgage suit under appeal (o. S. No. 9 of 35) on the basis of the first mortgage bond for Rs. 107,000 executed by Raja Raghunath Deb on 26-2-1913. They took care to implead as defendants (i) Krushna Chandra Deb who had succeeded in his litigation against Achhutananda in 1933 (o. S. No. 24 of 1930) (ii) the Raja Bahadur of Kanika, (iii) the Raja of Madhupur who had obtained some interest in the mortgaged property by virtue of a transfer in his favor of the subsequent mortgage decrees obtained by the Raja Bahadur, and (iv) Achhutananda himself. Achhutananda and Raja of Madhupur did not contest the litigation and a preliminary decree for rs. 3,71,833-8-0 was passed by the Additional Subordinate Judge of Cuttack on 6-3-37. Against this preliminary decree an appeal was filed before the Patna High Court in F. a. No. 3 of 1938 by the Raja Bahadur of Eanika alone and it was dismissed on 28-11-1941.

5. In the meantime the decree-holders moved the Court for making the preliminary decree final. In 1941, however, three persons, namely, Nakshyatramalini Debi Chandramani Patama. hadei and Sachidananda Narayan Dab claiming to be heirs of Krushna Chandra Deb filed applications before the learned Subordinate Judge for reducing the decretal amount under Section 10 (1), Orissa Money-lenders Act, 1939 which embodies the well-known rule of Damdupat. They urged that as the original mortgage of 1913 was for Rs. 107,000 the decree holders were not in any case entitled to get more than the same amount as interest in view of Section 10, Orissa Money-lenders Act and consequently the decretal amount should be scaled down to Rs. 2,14,000. This application was rejected by the Subordinate Judge of Cuttack by an order dated 5-2-1942. Appeals were taken against that order to the Patna High Court (Misc. Apps. Nos. 12, 13 and 14 of 1942) but they were rejected as not maintainable and a prayer to treat those appeals as appeals against a final decree was rejected. After committing minor errors the Subordinate Judge made the decree final by his order dated 24-10-42 and the present appeal is against that final decree.

6. It will be noticed that at the time of passing the preliminary decree the only two contesting defendants were (i) Krushna Chandra Deb and (ii) the Raja Bahadur of Kanika. The appeal against the preliminary decree was taken up by the Raja Bahadur only. The present appeal against the final decree has, however, been filed by the three rival heirs of Krushna Chandra Deb and the Raja Bahadur of Kanika has receded into the background. The only point for decision in this appeal is whether the appellants are entitled to any relief under Section 10 (1), Orissa Money-lenders Act. The said Act came into force on the 30th June, nearly two years after the passing of the preliminary mortgage decree. The Raja Bahadur of Kanika could not obviously claim any benefit under the Orissa Money-lenders Act because the definition of the expression 'loan' in Section 2 (i) (3), expressly excludes any amount that is payable under a mortgage by the purchaser at a sale of the whole of the property subject to a mortgage. The Raja Bahadur's

purchase of the mortgaged property in execution of the O. S. No. 51 of 1926 was made on 20-5-1931 and in the sale it was expressly stated that the purchase was subject to the first mortgage of 26-2-1913. Consequently, the amount payable by him to the decreeholders will not be a 'loan' within the meaning of the Orissa Money-lenders Act and he is not entitled to any relief under that Act. This is the main reason why he has chosen to remain in the background in the present litigation.

7. Though in form this is an appeal against the final decree dated 24-10-1944, in substance it is an appeal against the order of the Subordinate Judge dated 5-2-1942 rejecting the appellant's petition for relief under Section 10 (1) Orissa Money-lenders Act. The learned Subordinate Judge rejected their petitions for two reasons; (i) the appellants have no subsisting interest in the estate known as Killa Patia because the said estate was adequately represented by Achhutananda in mortgage suit No. 51 of 1926 and Achhutananda's interest had been purchased by the Raja Bahadur of Kanika on 20-5-1931. Krushna Chandra's success in O. S. No. 24 of 1930 against Achhutananda gave him possession of only 2.44 acres of land containing the Patia palace and its appurtenances but that did not give him any claim to the impartible estate. The present mortgage suit under appeal is confined to the impartible estate of Patia and the appellants have no interest in the same; and (ii) in any case sub-section (1) of Section 10, Orissa Moneylenders Act, will not be applicable to a preliminary decree passed prior to the coming into force of that Act. For this view he relied on *Chandrawati Debi v. Nandkishoreprasad*<sup>1</sup>,

8. Both the reasons, given by the learned Subordinate Judge were assailed before us very strongly and lengthy arguments were advanced on the question as to whether Krushna Chandra Deb or his heirs had any subsisting interest in the mortgaged property. A decision on this question depends on whether Achhutananda effectively represented the mortgaged property in mortgage suit No. 51 of 1926 so as to bind Krushna Chandra also notwithstanding the fact that the latter was not a party to that litigation. The learned lower Court, however, held against Krushna Chandra relying on *Sanna, Govappa v. Rodda Sanna Govappa*, A. I. R. (16) 1929 Mad. 482 : (120 I. C. 65) mainly on the ground that from 1922 till 1932 Achhutananda was in possession of Killa Patia and was thus a legal representative of the original mortgagor Raja Raghunath Deb. The learned counsel for the appellants challenged the correctness of *Sanna Govappa v. Rodda Sanna Govappa*<sup>2</sup>, and argued that the general principle to the effect that a person who is not a party to a litigation is not bound by the same should not be relaxed except to the limited extent permissible by virtue of the Privy Council decision in the wellknown case *Malkarjan v. Narhari*<sup>3</sup>, He also relied on a later Privy Council decision reported in *Khia Rajmal v. Daim*<sup>4</sup> where the previous decision was distinguished. He also relied on *Pukhraj Jeshraj v. Jamsetji Rustum*<sup>5</sup>, which has been followed in a later Madras decision reported in *Manikyanayananim Varu v. Lakshminarasimha*<sup>6</sup>, and *Amarchand v. Parmanand*<sup>7</sup>, Out of respect for the learned counsel for the appellants I would have liked very much to discuss this interesting question of law. But in the present case this question appears to be of mere academic interest because even if it be held in favor of the appellants that Krushna Chandra was not bound by the decree in O. S. No. 51 of 1936 against Achhutananda and that their interest in the impartible estate of Patia continued to exist, they cannot, in my opinion, claim any relief under Section 10 (1), Orissa Money-lenders Act.

9. As already pointed out, the Orissa Moneylenders Act came into force on 30-6-1939, nearly two years after the passing of the preliminary mortgage decree in the present case. Section 10 (1) of the Act runs as follows:

"Notwithstanding anything to the contrary contained, in any other law or in anything having the force of law or in any contract, no Court shall, in any suit brought by a money-lender in respect of a loan advanced before or after the commencement of this Act, pass a decree for an amount of interest for the period preceding the institution of the suit which, together with any amount already realized as interest through Court or otherwise, is greater than the amount of the loan originally advanced."

The expression 'decree' has been defined in Section 2 (g) as having the same meaning as in the Civil Procedure Code and with a view to avoid any ambiguity it is further expressly stated that it includes a preliminary decree and a final decree in the case of secured loans. The learned counsel for the appellants relied very much on this definition and urged that by virtue of that definition, the expression 'decree' occurring in sub-section (1) of Section 10, Orissa Money-lenders Act, should be construed as referring to a final decree also and that consequently even though the preliminary decree might have been passed prior to the coming into force of that Act, if no final decree had been passed before that date, the Court was bound to comply with the provisions of that sub-section. The whole question, therefore, narrows down to this : Does the expression 'decree' occurring in Section 10 (1), Orissa Money-lenders Act, include a final decree in a mortgage suit or else is it limited to a preliminary decree only because of the context ? The definition of the expression 'decree' in Section 2, Orissa Money-lenders Act, is itself subject to there being nothing repugnant in the subject or context' and notwithstanding the definition, if the context in any of the succeeding provisions of the Act indicates clearly that the Legislature intended only a preliminary decree in a mortgage suit, the definition must necessarily be deemed to have been modified to that extent. It will be noticed that in sub-section (1) of Section 10 the material words used are "pass a decree for an amount of interest for the period preceding the institution of the suit." Can it be said that in a final decree in a mortgage suit for sale any decree is passed for any amount of interest? The Legislature while enacting the Orissa Money-lenders Act was fully aware of the various provisions of the Civil Procedure Code dealing with preliminary decrees and final decrees in mortgage suits. It was fully aware that under Order 34 Rule 4a preliminary decree in a

mortgage suit first directs the ascertainment of the interest-due and then directs payment of the principal and interest whereas in a final decree under Order 34 Rule 5 the only direction by the Court is for sale of the mortgaged property if the amount specified in the preliminary decree is not paid within the stipulated period. Similarly in the forms of the preliminary decree and the final decree (Forms 10 and 11) of Appen. D to sch. I Civil Procedure Code, the distinction between the directions contained in the two decrees is clearly borne out. That is to say, the preliminary decree directs the payment of principal plus interest within a stipulated period and describes the consequences of non-payment, whereas the final decree directs the sale of the mortgaged property or a part thereof. Thus, the Legislature was fully aware of the nature of the directions contained in the two decrees and when in sub-section (1) of Section 10 expressly referred to a decree for an amount of interest for a period prior to the institution of the suit the reasonable inference seems to be that in the context of that sub-section the Legislature meant only a preliminary decree in a mortgage suit and not a final decree.

10. Any doubt on this point is, I think, clarified by scrutinizing the provisions of sub-section (2) of Section 10 which runs as follows :

"Where in any suit, as is referred to in sub-section (1) it is found that the amount already realized as interest through Court or otherwise for the period preceding the institution of the suit, is greater than the amount of the loan originally advanced, so much of the said amount of interest as is in excess of the loan shall be appropriated towards the satisfaction of the loan and the Court shall pass a decree for the payment of the balance of the loan, if any."

It will be noticed that in this sub-section the words used are 'pass a decree for the payment of the balance of the loan'. There can be no doubt that this refers only to a preliminary decree because that decree alone, in terms, directs payment of any sum. But it was argued that the provisions of sub-section (1) of Section 10 are not controlled by the provisions of sub-section (2) of that section and that the expression 'decree' need not necessarily have the same meaning in both the sub-sections. But in my opinion sub-sections (1) and (2) of Section 10 are closely interlinked and sub-section (2) is in the nature of a consequential provision to carry into effect the provisions of sub-section (1) in those cases where excess interest had been paid.

11. If the other provisions of the Orissa Moneylenders Act are scrutinized this view seems to gain further strength. For instance, in Sections 9 and 12 there can be no doubt that a decree in relation to mortgage suit means only a preliminary decree. But in Section 14 (1) there can be no doubt that a decree means only a final decree because the sub-section refers to a decree for the sale of the judgment-debtor's property.

12. The authorities on the subject, of the Patna High Court, are I think overwhelming. As early as 1939 in *Muhammad Yunus v. Champamani Bibi*<sup>8</sup>, a Division Bench while construing Section 11, Bihar Money-lenders Act, 1938, (which was similar to Section 10 (1), Orissa Money-lenders Act) held that that section referred to the passing of a fresh decree and not merely to the carrying out of a decree already passed which is what happens when a final decree is drawn up. Again in *Chandrawati Debi v. Nandkishore Prasad*<sup>9</sup>, a similar interpretation was given to Section 7, Bihar Money-lenders (Regulations of Transactions) Act, 1939 and it was pointed out:

"The passing of the final decree does not involve the determination of any amount of interest for the period preceding the Institution of the suit at all and the preliminary decree in the present case became binding on the parties when it was confirmed on appeal."

An attempt was made to distinguish the two Patna decisions on the ground that in the Bihar Act the expression 'decree' has not been so widely defined as in Section 2 (g), Orissa Moneylenders Act. It is true that in the Bihar Act the expression 'decree' has not been denned expressly so as to include a preliminary decree and a final decree in the case of secured loans; but there is no exhaustive definition of the expression 'decree' in the Bihar Act at all and the definition is merely of an inclusive nature running as follows:

"'decree' includes an award and an order of contribution passed under the Bihar and Orissa Co-operative Societies Act, 1935."

It cannot be seriously contended that the ordinary meaning of the expression 'decree,' namely the definition as given in the Civil Procedure Code meant to apply throughout the Bihar Act also. The sole object of the inclusive definition provided in Section 2 (b), Bihar Act, was to add something more to the definition as given in Civil Procedure Code That is to say, the definition of the expression 'decree' as given in the Civil Procedure Code includes both a preliminary decree and a final decree, was left untouched. Doubt, less in the Orissa Money-lenders Act, Section 2(g) defines the expression 'decree' more elaborately by way of abundant caution though such caution was unnecessary when it says that the definition given in the Civil Procedure Code shall apply. Thus there seems to be no doubt that both in the Bihar and the Orissa Acts the Civil Procedure Code definition of the expression 'decree' applies and the Bihar cases cannot be distinguished on this ground.

13. Apart from this reason, there is a direct case dealing with the construction of Section 11 (2), Orissa Money-lenders Act, reported in *Chakradhar Mahapatra v. Sailendra Narayan Bhanj Deo*<sup>10</sup>, where the same meaning was given to the expression 'decree' occurring in Section 11 (2), Orissa Money-lenders Act, relying on the aforesaid two previous decisions. It was urged that this view was wrong and we were requested to refer this appeal to a Full Bench for overruling that decision. But with respect I am inclined to agree with the reasons given by the learned Judges in those three Patna decisions.

14. I am, therefore, of the opinion that the appellants cannot invoke the aid of sub-section (1) of Section 10, Orissa Money-lenders Act, in view of the fact that the preliminary decree was passed long before the Act came into force.

15. The other points that were argued at great length before us have been fully dealt with in the judgment of my learned brother which I have had the opportunity of reading. I am in entire agreement with him on those matters and consequently even if the view taken by me regarding the construction of Section 10 (1), Orissa Money-lenders Act, be held to be incorrect, the appellants cannot succeed in view of their having lost in the mortgaged property in consequence of the decree in O. S. No. 51 of 1926.

16. The appeal is dismissed with costs.

**Jagannadhadas, J.**

17. The facts have been set out in my learned brother's judgment, and it is unnecessary to recapitulate the same. The question at issue is the right of the appellants to get relief under Section 10, sub-section (1), Orissa Money-lenders Act (Orissa Act iii [3] of 1939) in respect of the amount declared due under the preliminary mortgage decree in O. S. 9 of 1935, on the file of the Additional Subordinate Judge of Cuttack dated 6-3-1937. There independent applications were made by the appellants for the said relief during the pendency of the decree-holder's application for passing a final decree. These applications were rejected by an order of the learned Subordinate Judge dated 5-2-1942 and the final decree was passed on 24-10-1944. As pointed out by my learned brother, the present appeal, though in form an appeal against the said final decree, is, in substance an appeal against the order of the Subordinate Judge dated 5-2-1942 inasmuch as no other objection to the final decree has, been raised before us. It may also be

mentioned that the present appellants had previously filed direct appeals against the order of the Subordinate Judge dated 5-2-1942, but those appeals, namely, Misc. Apps. Nos. 12, 13 and 14 of 1942 were rejected by the High Court on 25-4-1944 on the ground that the appeals were not maintainable, but with the express reservation that the point which the appellants were trying to raise in those appeals could be properly raised in their appeal against the final decree when passed. The decision that the said miscellaneous appeals were not maintainable, may not be correct, in view of the decision of the Privy Council in *Adaikappa Chettiar v. Chandra Sekhara*<sup>11</sup>, but no objection on that ground can be taken to the challenging of the correctness of the order of the Subordinate Judge dated 5-2-1942, in this appeal since the same has been expressly reserved.

18. The learned Subordinate Judge has dismissed the applications of the appellants on the following grounds : (1) The appellants have no subsisting interest in the property which is the subject-matter of the mortgage sued upon; (2) the relief under sub-section (1) of Section 10, Orissa Money-lenders Act, is not available in respect of the amount declared due under a preliminary mortgage decree passed before the commencement of the Act.

19. The second of these questions may be taken up first. The question for consideration is whether Section 10, subs. (1), Orissa Money-lenders Act, is applicable to a final decree to be passed in a mortgage suit wherein the preliminary decree has already been passed prior to the commencement of the Act. The said sub-section runs as follows:

"Notwithstanding anything to the contrary contained in any other law or in anything having the force of law or in any contract, no Court shall, in any suit brought by a money-lender in respect of a loan advanced before or after the commencement of this Act, pass a decree for an amount of interest for the period preceding the institution of the suit which together with any amount already realised as interest through Court or otherwise, is greater than the amount of the loan originally advanced."

20. It is not disputed that this section applies as much to a suit instituted after the Act came into force as to a suit pending at the date of the Act, by virtue of Section 16 (1) of the Act. There can also be no doubt that in a mortgage action, the suit is pending notwithstanding that a preliminary decree has already been passed. It is also to be noticed that the word "decree" has been specifically defined in the Orissa Money-lender's Act by Section 2, clause (g) thereof as including preliminary decrees and final decrees in the case of secured loans. It would appear, therefore, prima facie, that Section 10 (1) applies equally to a Court which has yet to pass a final decree in a mortgage suit and that the prohibition against passing a decree for interest in excess of what is provided therein is equally applicable to such a case in view of the absolute and mandatory terms of the sub-section. It is however argued that the said provision is not applicable for the following reasons: (a) What is prohibited is the passing of a decree for interest which is not what purports to be done by a final decree; (b) The extended definition of the word "decree" to include a final decree is only when there is no repugnancy arising out of the context. The context which refers to the passing of a decree for interest shows that the final decree was not meant to be included in the word "decree" in the sub-section, (c) The effect of holding that the sub-section covers a final decree is to permit the preliminary decree itself to be reopened which has already become final between the parties and it therefore operates to give retrospective effect

to the said sub-section, which if intended would have been provided for specifically and in clearer language.

21. In support of the above arguments the cases in *Muhammad Yunus v. Champamani Bibi*<sup>12</sup>, *Chadrawati Debi v Nand Kishore Prasad*<sup>13</sup>, and *Chakradhar Mahapatra v. Sailendra Naraya Bhanj Deo*, 9 Cut. L. T. 54 have been cited. The broad consideration underlying the decision in these cases is this. A final decree in a mortgage action is passed in terms of Order 34 Rule 5, Civil Procedure Code It does not involve the determination of any fresh right, but merely carries into effect the preliminary decree after making some further arithmetical calculations that may be necessitated on account of any payments meanwhile. The preliminary decree is the decree that regulates the rights of the parties and also the amount of interest which is payable in respect of the loan and thus regulates the final decree. The preliminary decree retains its force even after final decree (see *Mt. Wahidunnissa v. Dip Narain*<sup>14</sup>, Hence the Court does not at the stage of final decree pass any fresh decree for interest. Therefore, it is argued, the sub-section does not apply to the passing of a final decree. It cannot be disputed that the above is the normal relation between the preliminary and final decrees as provided in the Civil Procedure Code But is that any sufficient reason for not giving full effect to Section 10 (1) in the face of the express provision defining the word "decree" as including the final decree in a mortgage-suit? It is to be noticed that S. '10 (1) is applicable "notwithstanding anything to the contrary contained in any other law." It would therefore follow that the fact that the giving effect to the provision would contravene the ordinary notions of the relation between the preliminary decree and a final decree as gathered from the Civil Procedure Code, cannot be a reason for its inapplicability. To my mind, the real question is whether when passing a final decree in a mortgage suit, the Court is or is not passing a decree "for an amount of interest for the period preceding the institution of the suit."

22. It appears to me with great respect that it does. A careful examination of the relevant provisions of the Civil Procedure Code will clearly show that the Court passes a decree for interest not only at the stage of the preliminary decree, but also at the stage of the final decree under Order 34 Rule 5, and of a further decree under Order 34 Rule 5, where the circumstances admit of the same. This is none the less so though there need not be a fresh determination of the amount of interest at the later stages under Order 34 Rule 5 and Order 34 Rule 6. Under Order 34 Rule 4. the Court undoubtedly determines what is the interest payable and passes a decree for principal and for interest; but the relief granted is only by way of a declaration of the amount due and an option given to the concerned persons to redeem. Under Order 34 Rule 5, the Court grants a fresh relief by way of direction for sale to realise the amount still remaining due by way of principal and interest, and in that sense passes a decree for an amount of interest still remaining due. Under Order 34 Rule 6, the Court again passes a decree for the amount still remaining due including interest, if any, and grants a relief for realisation of the same from the person of the judgment-debtor or his property other than that covered by the security. The Court thus passes a decree for interest at each and every one of these three stages covered by Order 34 Rule 4, Order 34 Rule 5, Order 34 Rule 6. the actual relief granted however being different. In the normal course, no doubt, the interest payable prior to the institution of the suit is determined at the stage of the preliminary decree and there is no fresh determination of such interest at the subsequent stages but the subsequent stages also result in decree by the express definition of the word "decree" itself in the Civil Procedure Code, obviously because the right to the further reliefs appropriate to each such stage is determined by those decrees. I can see therefore no insuperable difficulty, on principle, in giving full effect to the word "decree" in Section 10 (1) as comprising

a final decree also especially when the Legislature by way of abundant caution in specific terms states so in the definition clause and makes Section 10 (1), applicable notwithstanding any law to the contrary.

23. It has been pointed out that sub-section (2) of Section 10 which prima facie would appear to apply to the same set of facts as contemplated in Section 10 (1) uses the phrase "pass a decree for payment of the balance of the amount." Our attention has been drawn to the form of the preliminary decree as given in Schedule 1 Appendix d, Civil Procedure Code, which shows that the defendant is directed to pay the amount determined to be due. A close examination, however, of the forms of the preliminary and final decrees in Forms 5, 5-a and 6 in Schedule (1), Appendix d, Civil Procedure Code and a reference to the terms of Order 34 Rule 4, Order 34 Rule 5 and Order 34 Rule 6 with reference to their substantive provisions, would clearly show that a preliminary decree is in substance, nothing more than a declaration as to the amount due. A substantive relief by way of realisation which amounts to payment is given only by the final decree and a further decree for personal payment is passed under Order 34 Rule 6 in an appropriate case. If anything, therefore, the phrase "pass a decree for payment of the balance of the loan" in Section 10 (2) would apply to the decrees under Order 34 Rule 5, Order 34 Rule 6 and not to the decrees under Order 34 Rule 4. What appears to me to be almost decisive in the construction of the word "decree" as used in Section 10 (1) or Section 10 (2) is that to construe the word "decree" therein as referring only to a preliminary decree would be to ignore that at least so far as the decree under Order 34 Rule 6 is concerned, the Court is passing a decree for payment of the balance due and thus Section 10 (2) would in any case, apply to that decree. It would be anomalous to hold that the provisions in R. 10 would apply to preliminary decrees under Order 34 Rule 4 and to the personal decret under Order 34 Rule 6, but not to the intermediary final decrees under Order 34 Rule 5. I am also not impressed by the argument that the exercise of the powers under Section 10 (1) at the stage of the passing of the final decree would involve the re-opening of the preliminary decree and cannot therefore, be done. That appears to be in a way begging the question. When the Court is given the specific power to scale down the interest on specific principles, it is not recalculating the interest with reference to the contract between the parties or under the general law which is all that has been done under the preliminary decree and authorised to be done by the Civil Procedure Code In passing an amended final decree under Section 10 (1), therefore, the Court in terms does not purport to amend or modify the preliminary decree which determines only the contractual interest but exercises the fresh powers, dehors the contract conferred on it by Legislature and passes the further decree in exercise of those powers. I am also not impressed by the argument that there is any repugnancy in the context in which the word "decree" in Section 10(1) is used which necessarily limits it to a preliminary decree in a mortgage suit. The argument of repugnancy is really one based on the importation of the concept of inter-relation between the preliminary decree and final decree as gathered from the Civil Procedure Code It appears to me that the fact of any conflict arising out of the implications of the provisions of the Civil Procedure Code if the word "decree" is to be taken as defined in the Money-lenders Act, is in no sense a repugnancy "arising from the context. The repugnancy must be one which arises from the Money-lenders Act itself and not from anything to be implied from outside it. The Act itself in terms is intended to cut across the provisions of the pre-existing law or the implications thereof and the conflict with such law cannot amount to repugnancy in the context.

24. A close examination of the other provisions Act leads me to the same conclusion. For

instance, by parity of reasoning with reference to which the meaning of the word "decree" in Section 10 (1) and (2) is sought to be understood, the word "decree" in Sections 11 and 12 also must refer only to a preliminary decree. Under Section 11, after reopening the previous transaction, the Court has to pass fresh decree for interest that may be due. Under Section 12, the Court is to exercise the power to grant installments at the time of passing the decree in a suit, and refers also to payment by judgment-debtor. If the above reasoning relating to the interrelation between a preliminary decree and a final decree and as to the preliminary decree being the only decree for payment of interest is imported into these sections also, it would result in making these provisions equally inapplicable to final decrees under O. 34, r. 5 and personal decrees under O. 34, b. 6. But there are very clear indications in these sections to the contrary at least so far as their applicability to decrees under Order 34 Rule 6, Civil Procedure Code, is concerned. That would mean again the anomalous result that these sections which are applicable to decrees under O.34, r. 4 and O.34, R. 6 are not applicable to decrees under O. 34, r. 6. It would also follow that the specific mention in the definition of the word "decree" as including the final decree would become absolutely purposeless and devoid of any application, if in all the four Rs. 10, 11, 12 and 13 the word "decree" is not to include "final decree".

25. The construction which I am inclined to put on Section 10 (1) of the Act as being applicable also to final decrees in mortgage suits is one that would be in accordance with the scheme of the Act and would promote the purpose of the Act as stated in the preamble, namely, to grant relief to debtors in the province of Orissa. The Act provides for relief, broadly speaking, by enjoining the Courts to exercise certain powers not available to them under the Civil Procedure Code. The powers so conferred on Court when passing decrees are in sections 9 to 12, and those in execution stage are in Sections 13, 14 and 15 and in Sections 10 (3) and 11 (2). At the stage of passing the decree, the Court is empowered to scale down interest according to the provisions of sections 9, 10 and 11 and to accord the relief by way of installments under Section 12. At the execution stage there are safeguards under Sections 14 and 15 for securing that the property is sold at an adequate price and that only a sufficient portion of the property is sold. By Section 13 the executing Court is given the power to modify the decree already passed by granting installments. Under Sections 10 (3) and 11 (2) the Act is assiduous to grant relief even in execution by way of scaling down of interest in respect of unsatisfied decrees whose execution remains pending, but limits such relief to decrees passed subsequent to 1-4-1936, and confines the reliefs to those awardable under sections 10 (2) and Section 11 (1). It is unnecessary to speculate upon the reasons for these limitations or the principle behind the same and it may be difficult to gather any principle for not extending the relief in such cases to that awardable under Section 10 (1) also. But what is to be noticed is that the Legislature has thought fit to extend reliefs by way of scaling down interest to unsatisfied decrees also, though with certain limitations. It would, therefore, be contrary to the whole purpose and policy of the Act not to give the benefit of the provisions of the Act to a judgment-debtor against whom even a final decree has not yet been passed and against whom the suit still remains pending.

26. Of the three decisions above mentioned and cited in support of the opposite view the first two namely, *Muhammad Yunus v. Champamani Bibi*<sup>15</sup>, and *Chandrawati Debi v. Nandkishore Prasad*<sup>16</sup>, are decisions under the Bihar and Orissa Moneylenders Act. They may be distinguished on the ground that the definition of the word "decree" therein does not in terms include a final decree, though, of course, "a decree" would include a final decree even under the normal connotation of the word under the Civil Procedure Code. The case, however, in

*Chakradhar Mahapatra v.*

*Sailendra Narayan Bhanj Deo*<sup>17</sup>, is a direct decision under the Orissa Money-lenders Act, though it is a decision relating to Section 11 (2) and not a decision under Section 10 (1). I can only say with great respect that that decision requires reconsideration. In addition to the criticism offered above relating to the common idea running through all these three decisions about the juridical inter-relation between a preliminary decree and a final decree, there is one portion of the reasoning in *Chakradhar Mahapatra v. Sailendra Narayan Bhanj Deo*, 9 Cut. L. T. 54(Supra), which I have been unable to follow. The learned Judges refer to the definition of the word "decree" in the Orissa Moneylenders Act as supporting the view taken by them, Probably, it was meant thereby to indicate, that in order to make Section 2 (g) applicable "decree" must be the aggregate of a preliminary and a final decree, since the word "decree" is denned as including "preliminary decree and final decree" and that, therefore the condition of the decree being passed on 1-4-1936 or thereafter, would apply only if both preliminary and final decrees are passed after 1-4-1936. If so. it appears to me with respect, that this ignores that "the decree" referred to in sub-section (2) of Section 11 is the decree which is under execution and remains unsatisfied and which can only refer to a final decree and not to a preliminary decree also in any case. The learned Judges have not noticed that the definition of the word "decree" is that it includes "preliminary decrees and final decrees" in cases of secured loans and uses the plural not to indicate the combination of a preliminary decree and a final decree, but to indicate that it includes all kinds of preliminary decrees and (meaning or) all kinds of final decrees without discrimination. In view of the opinion that I have formed on this question, I should have considered it necessary to refer the same for an authoritative decision by a Full Bench, if the result of this appeal depended entirely on this.

27. I shall now take up for consideration the first point on the basis of which the learned Subordinate Judge has dismissed the applications, viz., that the appellants (applicants) have no subsisting interest in the mortgaged properties and that hence they cannot obtain any relief under the Orissa Money-lenders Act, Before dealing with the question, it would be well to appreciate at the outset how the question of subsisting interest of the appellants arises with reference to their right to relief under the Act. In order that Section 10 (1) may be applicable, it is of course necessary that the question must arise in a suit brought by a money-lender in respect of a "loan advanced." "Loan" is defined by Section 2 (i) of the Moneylenders Act. By the said definition "loan" means (omitting portions unnecessary for this discussion):

"an advance whether of money or in kind on Interest made by a money-lender . . . but shall not include ... the amount or the proportionate amount, as the case may be, payable under a mortgage by the purchaser at a sale in execution of a decree of a Court or otherwise, of the whole or part of the properties subject to a mortgage, the purchase having been made prior to the coming into force of this Act."

There is no dispute that the suit amount would be loan, but for sub-section (3) above. In this case admittedly the personal remedy in respect of the mortgage sued upon is long ago time-barred. The properties which are the subject-matter of the mortgage are now in possession of defendant 2, Raja Bahadur of Kanika, who has purchased the same in court-auction on 20-5-1931 in execution of the decree in O. S. No. 51 of 1926 specifically subject to the suit mortgage. Prima facie, therefore, the amount under the mortgage bond is

payable by defendant 2 out of the properties in his possession and it would therefore appear that the money due under the mortgage-bond is not a "loan" for the purposes of the Act, The contention of the appellants however is that the decree in O. S. 51 of 1926 was one obtained against defendant 4 herein who has been ultimately found to have no title to the mortgaged property and that accordingly the said decree and the execution proceedings thereupon do not bind him and that the execution sale is not effective to convey any title or interest to defendant 2. The argument therefore is that defendant 2 cannot be treated as a purchaser of the mortgaged properties since the purchase referred to in clause (3), sub-section (i) of Section (2) must refer to a valid purchase on account of which the purchaser would be liable to pay the mortgage amount out of the properties belonging to him by the said purchase. The question, therefore, is not directly whether the appellants have any subsisting interest in the equity of redemption, but whether the equity of redemption has validly passed to defendant 2 and as belonging to him is liable to meet the mortgage, debt. The answer to this question will depend upon whether in the circumstances relating to the suit O. S. No. 51 of 1926 which led up to the execution sale under which defendant 2 made the purchase, the decree and the execution proceedings though taken only against defendant 4 and though the predecessor of the present appellants, namely, Krishna Chandra Deb is not a party to the same, are enough in law to pass the title in the property to the purchaser, defendant 2.

28. Before dealing with this question on its merits, it is as well to clear certain preliminary arguments advanced on both sides relating to it. It has been contended on behalf of the respondents that this question is not open to be raised at this stage in these proceedings by the appellants. That argument is based on the following facts: In the suit out of which these proceedings arise, namely, O. S. 9 of 1935, the predecessor of the present appellant in para 10 of the written statement raised the plea that

"the plaintiffs had no right to institute O. S. 51 of 1926 against defendant 4 (13th respondent) on the strength of the alleged mortgage-bond dated 13-8-1939 of Raja Raghunath Deb in favor of Bhaban Sahu, knowing full well that defendant 4 had no right to represent the Patia Estate and as such the execution case No. 6/13 of the Subordinate Judge's Court was in fructuous as against the Estate of this defendant for want of proper representation and defendant 2 (11th respondent) acquired no right by sale thereunder."

29. On this pleading an issue was raised which is covered by issue 7. The last portion of the said issue 7 runs as follows:

"Did defendant 2 or defendant 3 acquire any right under their alleged purchases in execution of a decree against the non-representation of the alleged mortgagor."

The judgment in the suit dated 6-9-1937 shows that issue 7 has not been pressed by the contesting defendants. It would appear that the contesting defendants in the suit were defendants 1 and 2. It is, therefore, argued for the respondents before us that the suit was allowed to proceed on the footing that defendant 2 obtained a valid title in the equity of redemption by virtue of his purchase and that in a later stage of the same proceedings, defendant 1 or his representatives cannot be allowed to turn round and say that defendant 2, had no title. On behalf of the

appellants, it is urged that that issue was then raised only as between defendant 1 and defendant 2 and did not arise as between the plaintiff and defendant 1 and the fact that defendants 1 and 2 as between themselves gave up the contest for purposes of the pending litigation cannot be taken advantage of by the plaintiff. It is however pointed out on the other side that though the question now raised is one between the plaintiff and defendant 1's representatives, it directly affects defendant 2 also and therefore to allow the question to be raised at this stage is to reopen an issue which has been closed in the course of the trial itself. There is, no doubt, some force in these arguments, but it appears to me that the consideration of the question on its merits cannot be shut out on this technical view of the matter. The question as to whether defendant 1 or defendant 2 had the title to the equity of redemption was one, which at that stage was not directly relevant in the mortgage suit and may well have been thought by all the parties as not requiring a decision and accordingly given up without any necessary implication as to the conflicting title between defendant 1 and defendant 2. The question has now become material on account of the fact that legislation subsequent to the judgment necessitates the consideration of the matter, in further stages of the same suit. In such circumstances, I do not think there is any prohibition based on procedure for the re-opening of the issue during the pendency of that very suit, even as between defendants 2 themselves, if it became necessary, much less as between plaintiff and defendant 1. I would, therefore, overrule this contention raised on behalf of the contesting respondents.

30. It has been equally urged on behalf of the appellants that by the very frame of the suit and by the preliminary decree therein and also by virtue of the fact that the present appellants have been specifically brought on record as representatives of the deceased defendant 1 during the pendency of the final decree-proceedings the plaintiffs-respondents must be deemed to have admitted that defendant 1 and his representatives had a subsisting interest and that the preliminary decree itself gave them the right to redeem, and that therefore it is not open to the plaintiffs in these proceedings to contend that the appellants have no such subsisting interest which will enable them to obtain relief under the Orissa Money-lenders Act. It appears to me that this argument is equally not tenable. A perusal of the plaint in the suit would clearly show that it is not based on any admission of subsisting interest of defendant 1. It merely narrates all the relevant facts that had transpired and para 20 in the plaint sets out as follows:

"While defendant 4 was in possession of the properties mentioned below, defendant 1 brought O. S. No. 24/30 in the Court of the Subordinate Judge of Cuttack against him (defendant 4) for recovery of possession of the mortgaged properties mentioned below on 29-3-30 and the suit was decreed on 25-11-30."

The plaint contains no statement whether defendants 1 or defendant 2 were entitled to the equity of redemption and it has taken the obviously intelligible course that both defendants 1 and 2 should be made parties to be on the safe side without taking any risk of committing oneself to a decision on a somewhat difficult legal question as to who was the person entitled as between the two. I do not think it fair, in those circumstances, to construe the plaint or the decree following thereon and the proceedings taken to bring the present appellants as legal representatives of the deceased defendant 1, as constituting an admission by the plaintiffs about the subsistence of the interest. It must also be remembered that as pointed out above the question at issue is not so much whether defendant 1 had or his legal representatives have a subsisting interest in the equity of redemption, but whether proceedings in the suit O.S. 51/26 are such as to bind them so as to

vest the title to the equity of redemption in defendant 2 by virtue of the execution sale thereunder. As already pointed out this question is completely outside the scope of the mortgage-suit as originally framed and has become material only by virtue of subsequent legislation and it cannot therefore be taken to have been admitted by the previous course of the proceedings. It is said, however, that since the preliminary decree in terms directs defendant 1 along with the other defendants to pay the mortgage amount declared due by the preliminary decree, he has got the right to treat that as a loan payable (by ?) himself and therefore to be relieved against that payment by provisions of the Orissa Money-lenders Act. But there is no personal liability in this case and the only-liability arises in respect of the property, title to which is the matter in conflict between defendants 1 and 2.

31. This argument, therefore, is really the same as the prior one in a different form. I have, therefore, no hesitation in equally over-ruling the same raised on behalf of the appellants.

32. It has further been argued that in certain prior proceedings arising out of the same suit the High Court had decided that the present appellants had a subsisting interest and that therefore the question cannot now be reopened. That argument is based on the following facts. After the final decree now under appeal had been passed and the decree-holder applied for execution, the present appellants applied for relief under sections 14 and 15, Orissa Money-lenders Act, praying that the Court should estimate the value of the property and direct the sale only of such portion of the property as would be sufficient for the decree-amount. This prayer was rejected by the Subordinate Judge and Misc. Appeal No. 6/47 was filed against it which was dealt with by the High Court by its judgment dated 22-5-1947 and by that judgment the learned Judges directed the Subordinate Court to proceed as prayed for by the appellants. It is argued that that amounts to an adjudication that the appellants had an interest in the property which entitled them to relief under the Orissa Moneylenders Act. A perusal of that judgment, however, clearly shows that the learned Judges directed that course more as a matter of convenience and not as a result of adjudication and have, in express terms, left the matter for adjudication in the present appeal, In fact, they were aware of the fact that the present appeal was then pending and regretted that both the appeals could not be taken up and disposed of together. There is, therefore, no substance in this contention.

33. A further contention, has, however been raised, namely, that on any view of the facts the appellants are entitled to a portion of the mortgaged property and have therefore got the right of redemption in respect of the entire mortgage by virtue of Section 91, T. P. Act. It is true that in execution of the decree which defendant 1 herein obtained against defendant 4 herein in O. S. 24 of 1930, defendant 1 had obtained delivery of two acres and forty-four decimals of Lakhraj-Baheli land and the building and the homestead of Patia Palace situate on the land lying within the Mouza of Patiagarh, Killa Patia. It would appear that defendant 2 did not obtain possession of this item of property when he obtained delivery on the strength of the purchase made by him in sale in execution of the decree in O. S. No. 51/26. Prima, facie, therefore, the 2.44 acres and the building thereon were not comprised in the second mortgage which was the subject-matter of the suit O. S. No. 51/26. The question, however, is whether they were comprised in the properties covered by the first mortgage dated 26-2-13 which is the subject-matter of the present suit. A schedule of the properties comprised in the 1st mortgage is attached to the preliminary decree which is a part of the present proceedings. The said schedule sets out the Mouzas which are the subject-matter of the mortgage, and mentions Nizagarh Patia as onand of the said Mouzas. The

appellants contend that the land of 2.44 acres with the buildings thereon must be taken to be part of Nizagarh-Patia and therefore to be comprised in the mortgage. This, however, does not necessarily follow. It will be seen from the said schedule that what has been mortgaged are the "said villages together with all sorts of proprietary interest therein" and this is also what appears on a reference to the original mortgage-bond dated 26-2-1913, which has been marked as Ext. 1 in the suit and the translation of which appears in the paper-book of F. A. 3 of 1938. When certain villages have been mortgaged "with the proprietary rights therein" it is not to be presumed that the residential house therein of the mortgagor and the land on which those residential houses stand have also been mortgaged without clear and express words to that effect. It is well settled that the execution sale of a land does not necessarily pass the buildings standing thereon unless the same has also been made the subject-matter of the sale vide *Narayan Das v. Jalindra Nath*<sup>18</sup>, See also *Mahomad Amanotullah v. Elahi Bux*<sup>19</sup>, That the residential buildings and the plot on which they stood were not intended to be mortgaged either by the first mortgage dated 26-2-1913, or by the second mortgage dated 13-8-13 which is in the same terms (and which has also been marked in the present suit as Ex. 1-E and the translation of which appears in the same paper-book in F. A. 3/38) would seem to be probalised by the fact that defendant 2 did not obtain delivery of the same in pursuance of his court-auction-purchase. I, therefore, agree with the Subordinate Judge thinking that the appellants cannot be said to have partial interest in the equity of redemption of the suit-mortgage which gives them the right to relief on that ground. If I had come to the conclusion that the 2.44 acres of land with buildings thereon was part of the mortgaged property that it was all the interest that the appellants had in redeeming the mortgagee, it should have been necessary to consider the question whether by virtue of the definition of "loan" in the Money-lenders Act, only the proportionate portion of the decree-amount which corresponded to this item of property bore to the entire mortgaged property is not all the amount that can be considered as "a loan" in relation to the relief that the appellants may have been entitled to. This would have been an extremely small amount and obviously the appellants are not interested in it. It is however unnecessary to consider the same in view of the relevant facts, which I have taken.

34. The appellants have raised a further point that the purchase by defendant 2 in court-auction was during the pendency of defendant 1's Suit O. S. No. 24/30 against defendant 4. This is no doubt so. I cannot see what advantage the present appellants can derive from that fact so far as the questions now at issue are concerned in these proceedings. That fact cannot be relied upon to show that the purchase by defendant 2 is void and of no effect. That is not the effect of Section 52, T. P. Act, or the analogous principles applicable to execution sales. The principle of *lis pendens* does not invalidate the transfer but only renders the transfer subject to the rights obtained by the decree-holder in the litigation. Defendant 1 could, therefore, have obtained delivery of possession of the entire estate against defendant 2 by virtue of the decree obtained against defendant 4, and in fact it would appear that that is what he attempted to do, but did not succeed in getting, vide judgment between the parties reported in *Krishna Chandra v. Rajendra Narayan*<sup>20</sup>, (which though not formally marked as an exhibit, has been referred to in the judgment of the Court below and by both the parties before us in the argument) If, however, it is suggested that what the auction purchaser, defendant 2 got, was only the right, title and interest of defendant 4 in the properties which in a suit between him and defendant 1 has been declared to be nil, that argument, raises the question whether what passed at such a sale, on the facts was only the right, title and interest of the particular judgment-debtor in the property or the property itself. Looked at in that light it is not a question of *lis pendens* but involves the question whether,

defendant 1's interest is bound by the sale which is the main question in the case that will be presently considered. There appears, therefore, to be no substance in the reliance by the appellants on the question of *lis pendens*.

35. It may at this stage be mentioned that during the course of the arguments before us, an application has been made on behalf of the respondents to admit as additional evidence, a certified copy of a registered document dated 26-2-42 whereby all the right, title and interest of appellants 1 and 2 in this appeal in the mortgaged property including the right of redemption are purported to have been transferred in favor of the original defendant 3, the Raja of Madhupur. This document was sought to be admitted with a view to urge that even if the present appellants had any subsisting interest they have lost the same by virtue of this deed of transfer and that, therefore, they cannot maintain this appeal. We have declined to admit the same. It is to be noticed that the purported transfer is stated to be only by appellants 1 and 2 but even if all the three appellants had been parties to the transfer, it would not follow that the present appellants would lose their right to prosecute the appeal. Order 22, Rule 10, Civil Procedure Code only provides for the continuance of the proceedings by the assignee pending the suit with the leave of the Court, but does not deprive the original assignor of his right to continue the proceedings, vide *Joti Lal v. Sheodhayan*<sup>21</sup>,

36. The main question therefore that arises in this case for decision is whether defendant 2 has, by his purchase in court auction in execution of the decree in O. S. 51/26 become validly entitled to the suit properties subject to the suit mortgage, and whether defendant 1 has lost all interest therein by such court auction sale. The contention for the appellants is that the judgment in O. S. 24/30 has conclusively established as between himself and defendant 4 that defendant 1 was the legal successor to the estate of late Raja Raghunath Deb and that since the plaintiff does not challenge the correctness of the decision, the suit which was brought by him on the 2nd mortgage against defendant 4 and the decree obtained therein and the execution proceedings thereupon do not at all bind him and do not have the effect of conveying away to defendant 2, the title in the suit properties which was vested in defendant 1 at the date of the court auction sale. The contention on behalf of the plaintiff-respondent is that though defendant 1 was not a party to the decree in O. S. 51/26, and the execution proceedings thereon, his interest in the properties was sufficiently represented by defendant 4, having regard to the facts and circumstances of the case and that consequently all the proceeding therein bound defendant 1 and have the effect of passing to the purchaser, defendant 2, the title of the original mortgagor in the property. The learned Subordinate Judge has agreed with the respondents' contention relying mainly on the case in *Sanna Govappa v. Rodda Sanna Govappa*<sup>22</sup>, and on the definition of the word "legal representative" in Section 2, clause (11), Civil Procedure Code

37. There can be no doubt about the fundamental principle that the title of a person to property cannot normally be affected by any proceedings to which he is not a party. As pointed out by the Privy Council in *Khjarajmal v. Daim*<sup>23</sup>,

"a Court has no jurisdiction to sell the property of persons who were not parties to the proceedings before it. As against such persons, the decrees and sales purporting to be made would be a nullity and may be disregarded without any proceedings to set them aside."

But it cannot also be disputed that there are certain well-recognised exceptions to the same. The only question is as to the limits of the exception and as to the principle regulating it. The Privy Council cases in *Mallearjan v. Narhari*<sup>24</sup>, and *Khairajmal v. Daim*<sup>25</sup> recognise that though a person may not be a party to an action, his interest in the property may still be bound if he can be said to have been sufficiently represented in the proceedings. Learned counsel for the appellants argues that the only exception recognized by the above Privy Council cases is the case where the proceedings in Court have been initiated against the right person who dies during the pendency of the proceedings and a wrong legal representative is substituted, whom the Court expressly or impliedly decides to be the right legal representative. It is contended that it is only in such cases that the Privy Council have upheld court auction sales in application of the larger principle that when a Court which had jurisdiction to deal with the proceedings pending before it decided wrongly as to who the legal representative is, a *bona fide* court-auction purchaser is not to be affected thereby. Learned counsel argues that the Privy Council does not lay down any general principle of representation applicable in such cases and relies on the cases in *Pukhraj Jeshraj v. Jamsetji Rustum*<sup>26</sup>, and *Amarchand v. Parmanand*<sup>27</sup>, in support of the position that the principle of the above two Privy Council cases is not to be extended. He urges that *Sanna Govappa v. Rodda Sanna Govappa*<sup>28</sup>, which the learned Subordinate Judge relied upon and which formulates a general principle of representation in broad terms is erroneous. It is also pointed out that in a later case in *Manikyanayanim Varu v. Lakshminarasimha*<sup>29</sup>, and *Pukhraj Jeshraj v. Jamsetji Rustum*<sup>30</sup>, was followed and that the case in *Sanna Govappa v. Rodda Sanna, Govappa*<sup>31</sup>, was not even referred to as an authority.

38. I am unable to agree with the contention of the learned counsel for the appellants that the principle of representation in such cases is so limited and circumscribed as the learned counsel would have it. There are quite a large number of reported cases in the various High Courts which have held the proceedings against a wrong person to be binding against the person really interested under a variety of circumstances. The Privy Council in *Khairajmal v. Daim*<sup>32</sup>, recognize this when they state as follows:

"The Court had no jurisdiction to sell the property of persona who are not parties to the proceedings or properly represented on the record."

The Privy Council also say in the same case at p, 35 as follows:

"The Indian Courts have properly exercised a wide discretion In allowing the estate of a deceased debtor to be represented by one member of the family and in refusing to disturb judicial sales on the mere ground that some members of the family who were minors were not made parties to the proceedings, if it appears that there was a debt justly due from the deceased and no prejudice is shown to the absent minors. But these are usually cases where the person named as defendant is, de facto, manager of a Hindu family property, or has the assets out of which the decree is to be satisfied under his control."

In *Court of Wards v. Ramaput Singh*<sup>33</sup>, a suit was brought against the widow of the deceased debtor and a decree was obtained thereon and property sold in execution. It was held that the sale

bound the son of the deceased debtor, who and not the widow turned out to be the real heir. A perusal of the decision in the case shows that in so holding their Lordships laid stress both on the course of the proceedings which showed that the estate of 'the deceased was throughout intended to be bound and the widow was treated as the sole legal representative by the Court, on objection taken, and also on the fact that the widow happened to be the registered proprietor of the estate after the deceased. It is instructive, however, to notice that their Lordships followed the case in *Eshan Chunder v. Buksh Ali Sowdagur*<sup>34</sup>, also reported in *Baksh Alt Sowdagur v. Eshan Chunder*<sup>35</sup>, and approved of the decision of Peacock C. J. therein. In this case as in the case in Court of *Wards v. Ramaput Singh*<sup>36</sup>, the creditor filed a suit against the widow of the debtor and obtained a decree thereon, and brought the properties of the deceased debtor to sale. It was held that the auction purchaser obtained title to the property and that the sale was binding on the son of the deceased debtor who was the real owner. Their Lordships relied largely on the fact that the proceedings in Court clearly showed that the decree and the execution proceedings were intended to be taken as against the deceased debtor's estate, that the widow was intended to be sued as representing the debtor's estate and that there is no suggestion of any fraud or collusion.. This case has been specifically referred to and approved in *Khیارajmal v. Daim*<sup>37</sup>, as also in *Bissessur Lall v. Luchmessur Singh*<sup>38</sup>,. In this later case, their Lordships summarise the facts of the case in *Ehsan Chunder v. Buksh Ali Soudagur*<sup>39</sup>, and *Court of Wards v. Ramaput Singh*<sup>40</sup>, as showing that:

"in execution proceedings the Court will look at the substance of the transaction and will not be disposed to let aside the execution upon mere technical ground when it is found that it is substantially right."

A similar view of the principle of substantial representation was taken by the Privy Council in the case in *Hari Saran v. Bhubanessarih Debi*<sup>41</sup>, There can, therefore, be no doubt that the principle of representation and the binding character on the true legal representative, of execution sales, in proceedings taken against the wrong legal representative on the principle of valid representation, is not so limited and circumscribed as that contended for by the appellants' counsel.

39. The exact principles, which determine such representation have not, however, so far as I am aware, been authoritatively formulated in any decision of the Privy Council and there is a certain amount of conflict on that matter in the decisions of the various High Courts. The Madras High Court in a series of cases commencing from *Janki v. Dhanu Lall*<sup>42</sup>, have recognized a principle of representation much wider than that applicable to a case where there has been an express or implied decision by the Court that the particular person before it is the proper legal representative. (See *Kadir Mohideen v. Muthu Krishna*<sup>43</sup>, *Ramaswami Chettiar v. Oppliamani Chetty*<sup>44</sup>, *Gnanambal Ammal v. Veeraswami Chetti*<sup>45</sup>, *Madhayar Ayudu v. Subbama*<sup>46</sup>, *Soorayya v. Chinna Anjaneyalu*<sup>47</sup>, *Nallappa v. Nilana Gowda*<sup>48</sup>, *Kolaremathu Amma v. Madhavi Amma*<sup>49</sup>, *S. Govappa v. R. S. Govappa*<sup>50</sup>, *Chaturbhuj Doss Khushal Doss and Sons v. Rajamenicka Mudali*<sup>51</sup>, The entire case law on this matter as far as the Madras High Court is concerned, has been fully reviewed and some general principles have been attempted to be formulated in the later two cases in *S. Govappa v. R. S. Govappa*<sup>52</sup>, and *Chaturbhuj Dans Khushal Dass and Sons v. Rajamanicka Mudali*<sup>53</sup>, It is unnecessary to notice all these decision in detail and it is sufficient to refer to the last of these cases as showing that in Madras the position appears to have been accepted as stated by Reilly J. in his judgment as follows :

"If a plaintiff in good faith sued a person who appears to him to be the proper legal representative of his deceased debtor and that representative has an existing interest to defend the estate and there is no fraud or collusion in the proceedings, then a decree so obtained is binding on the deceased's estate whoever may be actually entitled to the residue of the estate after the debts have been paid."

In the view of that learned Judge "this is both good sense and good law as laid down by the Privy Council". The other learned Judge Madhavan Nair J. also laid down the principle in substantially the same terms as follows :

"In my opinion there is no justification for confining the principle enunciated in this decision only to those cases where a wrong representative is brought on record in the course of execution proceedings. The question to be considered whether it arises in the course of execution proceedings or in the course of the suit is this : whether the estate of the deceased person was sufficiently represented by the legal representative who has been actually brought on record. I think the same principle should govern all cases where a wrong representative has been brought on record, where such representative has been added in the course of the suit or in the course of the execution proceedings. The same consideration should apply also to a case where the suit itself is instituted against the wrong legal representative at the very commencement."

It may be pointed out that the decision in the later case of *Mantkyanayanin Varu v. Lakshminarasimha*<sup>54</sup>, cannot be said to weaken the authority of these prior decisions in the Madras jurisdiction since it makes no reference at all to any of the prior decisions and also since on the facts that case can be distinguished.

40. It is unnecessary for me for the purpose of this case to consider whether the principles as so broadly formulated in the Madras cases are entirely correct. The cases in *Pukhraj Jeshraj v. Jamsetji Rustum*<sup>55</sup>, and *Amarchand v. Parmanand*<sup>56</sup>, relied upon by the counsel for the appellants show that a somewhat stricter view has been taken in other High Courts. A perusal of the large number of reported cases on this matter shows that questions arose for decision under the following circumstances: (a) Proceedings have been taken against a person who has the prima facie title, the real title being in a person who is not a party to the proceedings; (b) proceedings have been taken against only one or some of the proper legal representatives, the others not being parties thereto; (c) proceedings have been taken against a person who was found to be in actual possession of the property of the deceased claiming to succeed to him or to represent, the persons legally entitled not being a party. A further distinction has arisen in some of these cases as to whether the proceedings have been initiated against the wrong person or whether the wrong person was brought on the record during the proceedings.

41. While there is a conflict of decisions in respect of (a) and (b) above, there is a fair unanimity of reported decisions right from the earliest times in respect of (c) to the effect that proceedings taken *bona fide* by the creditor against the person actually in possession by virtue of the assertion

of a claim to succeed to or represent the estate of the deceased debtor, are binding against the real legal heir, whether such proceedings were commenced or continued against the wrong person and irrespective of any express or implied decision by the Court that the person so impleaded was the proper legal representative. The earliest reported case on this question is the case in *Ishanchunder v. Bukhsh Ali, Marsh 614, Weekly Reporter, Special Number, p. 190* which I have already referred to and which has been approved by the Privy Council in the case in Court of *Wards v. Ramaput Singh*<sup>57</sup>, *Khiarajmal v. Daim, (32 i.a. 23 : 32 Cal. 296 P. C.)*(*Supra*) and in *Bissestur Lal v. Luchmessur Singh, 6 i.a. 233: (5 C.I.R. 477 P. C.)*. (*supra*) It may be noticed that on the facts of that case, it was found that, after the original debtor's death the widow's name was entered in the collector's books as the owner of the property and that the creditor alleged that the widow was in possession of the estate, The execution sale as against her was held to bind the real heir. In *Prosunno Chunder v. Kristo, 4 Cal. 342*(*supra*), a creditor suing on a debt due to him from a deceased debtor, obtained a decree for sale against a person who took possession of the property of the deceased honestly believing her to be the widow and legal representative of the deceased, though it appeared ultimately that she was not a widow, but only a concubine and that the deceased had left a will in favor of another. It was held that the decree was binding against the real legal representative. This was followed in *Chumlal Bose v. Osmond Beeby, 30 Cal. 1044*(*supra*) where the proceedings taken against the prima facie heir, who had taken possession of the estate, was held to be binding against the true legal representative. In *Jatha Naik v. Venkatapa, 6 Bom. 14*(*Supra*) where the sale in execution of a decree obtained against the wrong legal representative of the deceased judgment-debtor was held not binding on the real heir the case in *Ishan Chunder v. Bukhsh Ali Sowdagur, Marsh. Rep. 614*(*supra*) was accepted, but distinguished on the ground that that was a case where the defendant therein, though not an heir of the deceased, was in possession of the estate of the deceased and was sued in a representative capacity. In *Premraj Motiram v. Javarmal, 18 I. C. 381 : (15 Bom. L. r. 41)*(*Supra*) where a decree against the wrong person was held not binding it was bound on the facts that the person against whom the decree was obtained was not in possession of the property of the deceased. In *Pukhraj Jeshraj v. Jamsetji Bustum, A.I.R. (14) 1927 Bom. 63 : (50 Bom. 802)*(*supra*) which has been relied on on behalf of the appellants is also a case where it does not appear that the wrong person against whom the decree was obtained was in possession of the property of the deceased. In *Mt. Kaniz Abbas v. Lala Baladin*<sup>58</sup>, the mortgagee obtained a preliminary decree against a mortgagor who died before a final decree was passed, and the widow of the mortgagor was entitled only to the 1/4th share of the property, but she was in actual possession of the entire property and was mutated in the revenue Court on the basis of that possession in respect of the entire property and was substituted as the only legal representative. It was held that the final decree and the further proceedings thereon were binding on the real heir. *Ramaswami Chettiar v. Oppliamani Chetty, 33 Mad. 6 : (4 I. C. 1059)*(*Supra*), *Granambal Animal v. Veeraswami Chetti, A. I. R. (8) 1916 Mad. 1022 : (31 I. C. 920)*(*Supra*) and *Nallappz v. Nilana Gowda*<sup>59</sup>, were all cases in which the wrong legal representative was in actual possession of the estate of the deceased and the decree in execution proceedings obtained against him was held binding on the true legal heir. *Madlayar Ayudu v. Subbamd, A. I. R. (4) 1917 Mad. 979 : (35 I. C. 124)*(*Supra*) was a case in which the decree against a wrong person was held not binding on the true legal representative; but it was recognized in that case that if the decree had been obtained against the person in possession it would be binding. In *Jharu v. Pardhana, A. I. R. (26) 1939 Lah 277: (183 I. C. 487)*(*Supra*) the position was accepted, referring to the case in *Ehsan Chunder v. Bukhsh Ali Sowdagur, Marsh. Rep. 614*(*supra*) and Court of *Waras v. Ramaput Singh, 14 M. i. A. 605 : (10*

*Beng. L. r. 294*)(*Supra*) that if the person against whom the decree was obtained was in possession of the estate, the decree would be binding. It was accordingly held that in the circumstances of that case there was proper representation and that the decree was binding. *Lalsa Rai v. Udit Rai*<sup>60</sup>, and *Amarchand v. Parmanand*<sup>61</sup>, seem disposed to take the contrary view and appear to hold that a decree against a wrong person even though he may be in possession of the estate of the deceased is not binding against the true legal representative. The former is a case where the true representative intervened before the actual sale in pursuance of the decree and sued for a declaration that the decree was not binding on him and it may be distinguishable on the ground that there the protection of the rights of a *bona fide* purchaser in Court was not involved. *Amarahand v. Parmanand*, *Air (21) 1934 ALL. 474 : (150 I. C. 323)*(*supra*) however was a case in which the title involved was that of the purchaser in execution of a decree obtained against the wrong legal representative who was in possession and it was held that the decree and the execution sale were not binding on the true legal representative. It appears to me that the case in *Amarchand v. Parmanand*, *A.I.R. (21) 1934 ALL. 474: (150 I. C. 323)*(*supra*) has not sufficiently considered the relevant provisions of the Civil Procedure Code and the cases of the Privy Council which recognise the principle of substantial representation for the protection of the rights of the *bona fide* purchaser in court auction, where such rights come into conflict with the rights of the real heir of the deceased debtor who was not *eo nomine* a party to the proceedings which led the court auction sales. The principle of substantial representation in connection with such matters has been indicated in *Subramania Ayyar v. Arumuga Chetty*, *26 Mad. 330*(*supra*) and *Ramaswami Chettiar v. Oppliamani Chetty*, *33 Mad. 6 : (4 I. C. 1059)*(*supra*). It is based upon the fact that interests of the real representative and of the person wrongly impleaded are identical in respect of all matters arising on the proceeding in question, though they may be rivals in respect of their title to the debtor's property. If, therefore, he acts without any fraud or collusion he may be presumed to have done what all the real legal representatives would have done if he had been a party. The real legal representative could not, therefore, be prejudiced by his not being a party and the creditor would not be saddled with the undue burden or having to determine for himself at his risk and peril who the real legal representative is. That the identity of interests as regards the particular proceeding is the basis of representation in legal proceedings can be clearly gathered from the decision of the Privy Council in *Krishnayya v. Rajah of Pittapuram*<sup>62</sup>, That case no doubt deals with a totally different matter arising under Section 33, Evidence Act, but the case is instructive. Their Lordships in that case pointed out at p. 207 (1) that one of the essential elements of substantial representation as between parties to two different proceedings is that that the interest of the party to the first proceeding in the answer to be given to the question at issue in that proceeding is the same as that of the party to the second proceeding and therefore

"the relevant party in the first proceeding, in fact represented in the first proceeding, the relevant party in the second proceeding and may grammatically and truthfully be described as a representative of the party to the second proceeding."

As their Lordships say, "he was in effect fighting that person's battle as well as his own." There can be no doubt that judged with reference to this test, a person in possession of the estate of the deceased debtor by virtue of a claim to succeed to him has the same identical interest as his rival claimant, who equally claims to succeed the deceased in proceedings taken to realise the debt out of the property in his possession. Therefore at least in so far as the validity of the title of the

court-auction-purchaser in such proceedings is concerned, such a person fully represents the real heir.

42. This result also follows from a consideration of the relevant provisions in Sections 60 and 52, Civil Procedure Code which deal with the remedies of a creditor to realise his debt from the estate of his debtor. Section 50 relates to a case where a creditor has obtained a decree against the original debtor, but the debtor dies before the decree is fully satisfied. The said section declares that he can execute the decree against the proper legal representative to the extent of the property which has come to his hands and has not been duly disposed of. Section 52 says that where a decree is passed against a party as the legal representative of a deceased person and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment or sale of any such property which is in the possession of such legal representative. Subs. (2) of the said section provides for cases where the legal representative is not in possession of the property and we are not concerned with that. What is necessary to note is that this Section 52 is sufficiently wide in terms to apply both to the case of the original debtor dying during the pendency of the suit and of his dying before the institution of the suit. In either case, a decree may be obtained against the legal representative for payment of the money out of the property of the deceased in his hands. Now the expression "legal representative" has been defined in Section 2, clause (ii) as not only the person who in law represents the estate of the deceased, but also to include one who intermeddles with the estate of the deceased. Whatever may be the connotation of the words "intermeddles with the estate of the deceased" in this definition, there can be no doubt that a person in possession of the estate of the deceased by virtue of a claim to succeed to him or represent him and therefore liable to pay his debts out of the property in his possession, is a legal representative of the deceased at least to the extent of the property in his possession, for the purpose of satisfying the debts of the deceased out of such property. If that is so Sections 50 and 52 give a clear right to the creditor to obtain satisfaction of their debts out of that property in the hands of the intermeddler by proceedings taken against that intermeddler alone. It follows that such proceedings bind the real legal representative. That a person in such situation is a legal representative is recognised by the decisions in *Gnanambal Ammal v. Veeraswami Chetty*, A. I. R. (3) 1916 Mad. 1022: (31 I. C. 920)(*Supra*), *Madhayar Ayudu v. Subbama*, A. I. R. (4) 1917 Mad. 979 : (35 I. C. 124)(*supra*); *Kusum Bandhu v. Ramdayal*, A. I. R. (11) 1924 Cal. 362 : (69 I. C. 179)(*supra*); *Nagendra Nath v. Hasan Chandra*, A. I. R. (20) 1933 Cal. 865: (149 I. C. 927)(*supra*). In the last case it was stated as follows:

"It is one of the essential tests with regard to the case of persons who intermeddle with the estate of another before they can be called as legal representatives of the deceased person, that they; must retain possession of properties belonging to the estate with the intention of representing the estate."

It has also been pointed out in *Chockalingam Chettiar v. Karuppan Chettiar*, A. I. R. (35) 1948 Mad. 386 at p. 387 : ((1948) 1 M. L. J. 82))(*supra*) that intermeddling referred to in Section 2 (ii) must involve

"an assumption of a representative capacity in relation to the estate and not in assertion of a claim of right, adversely to the estate."

That is a person in possession by way of "intermeddling" to be treated as legal representative must claim to succeed to the deceased debtor and hold it as his representative in the same way as his real heir would have done, if he had been in possession. There can be no doubt, therefore that by virtue of this specific provisions in the Civil Procedure Code above pointed out, a decree *bona fide* obtained against a wrong person who is in possession of the estate of the deceased as above stated is binding on the real legal heir. In *Lasa Rai v. Udit Rai*, A. I. R. (11) 1924 all. 717 : (75 I. C. 114)(*supra*) and *Amarchand v. Parmanand*, A. I. R. (21) 1934 all. 474 : (150 I. C. 323)(*Supra*) it has been remarked that the definition of the word "legal representative" in the Civil Procedure Code is only for purposes of the Civil Procedure Code but does not alter the substantive law. It may be so, but it is applicable to the procedure provided in Section 52 which relates as such to an action commenced after the death of the debtor as to one continued after his death.

43. It is however necessary to emphasise that in order that Section 52 may be applicable, the decree must have been obtained against the wrong person as representing the deceased deb. for and with a view to get satisfaction out of the estate of the deceased. In an ordinary money decree obtained against an individual, the decree-amount is realised by attachment and sale of the judgment-debtor's property, which means normally, his right, title and interest. But if the suit is so framed as to indicate clearly the intention of the creditor to obtain satisfaction out of the property of the deceased and is brought as against the legal representative as defined in Section 2 (ii) and a decree obtained accordingly, the Code gives the power to the Court by Sections 50 and 52 of selling the property of the deceased debtor himself and not merely the particular judgment-debtor's right, title and interest. In order therefore that proceedings taken against a wrong legal representative should bind real heir, it is essential that the proceedings themselves taken as a whole, must show that the estate of the deceased was intended to be bound and satisfaction intended to be obtained there from.

44. In a case, however, where the proceedings are for realisation of the amount due on a mortgage created by the deceased debtor, it is obvious that such proceedings stand on a different footing from proceedings which result in a simple money-decree. In such a suit, the clear intention of the creditor is to realise his debt from the very property which was originally given to him as security for the debt by the deceased debtor. Indeed by virtue of the provisions of the Civil Procedure Code he cannot get satisfaction out of any other property until the security is exhausted. Order 34, B. 5 (3) clearly shows that the Court is given powers specifically in a mortgage-suit, properly constituted, to direct the sale of the mortgaged-property itself. It is also well settled that in a sale in execution of a mortgage decree, the purchaser normally gets not the right, title and interest of the judgment-debtor at the date of the sale, but the rights of the original mortgagor as they stood on the date of the mortgage. (See *Karamat Ali v. Gorakhpur Bank Ltd.*, A. I. R. (9) 1922 all 495 at p. 496 Col. 2 : (44 all. 488)(*supra*) and *Kalipada Mukerji v. Basanta Kumar*, A. I. R. (19) 1932 Cal. 126 at p. 133 Col 1: (59 Cal 117) (*supra*)Therefore, while it may be that in an ordinary simple money suit where it is not made out that the proceedings were intended to be taken against the estate of the deceased and that the provisions of Rs. 50 and 52 have been properly utilised, the Court may have no jurisdiction to sell the property of the real heir in a proceeding against the wrong person and therefore such sale is a nullity, in a mortgage suit where by the very terms of the Civil Procedure Code, the Court has jurisdiction to sell the mortgaged property itself and where the wrong legal representative is on the record, the sale is valid and binding against the true heir and is not vitiated by any want of jurisdiction. At best all that can be said is that if there are any defects, it is an irregular sale which the real heir can challenge and get

set aside by appropriate proceedings in time.

45. I have therefore no hesitation in coming to the conclusion that where a mortgagee institutes a suit *bona fide* against the person in possession of the estate of the deceased mortgagor, who is in such possession in assertion of a claim to succeed to that estate, and where a person purchases the mortgaged property *bona fide* in execution of that decree, such purchaser gets the full title to the mortgaged property by virtue of such sale and the real heir is bound thereby and that his only remedy, if at all, in a proper case is to get the sale set aside by appropriate proceedings in time.

46. It is in the light of these principles, that the relevant facts in this case have to be appreciated and the question at issue decided. Those relevant facts may now be stated. The original proprietor of Killa Patia was one Raja Raghunath Deb. He executed on 26-2-13 a simple mortgage for Rs. 1,07,000 mortgaging the said Killa Patia in favor of one Bhaban Sahu, predecessor in interest of the plaintiff-respondents which is the subject-matter of this suit. He also executed a second mortgage for the same property for Rs. 5,000 on 13-8-13 in favor of the same mortgagee. It was this second mortgage that was the subject-matter of the suit instituted by the said mortgagee in O. S. 51/26. That suit was instituted after the death of the original mortgagee, Raghunath Deb, who died on 4-11-13. It was instituted against one Achutananda Roy, defendant 4 in the present suit. Between the date of death of Raja Raghunath Deb and the institution of the suit, O. S. 51/26, there was litigation about succession to the estate of Killa Patia. On Raghunath Deb's death, one Madan Mohan Deb claiming to be the adopted son of Raghunath Deb took possession of the estate. Achutananda (the present defendant 4) filed O. S. 762/17 against the said Madan Mohan alleging that he was the legitimate son of Raghunath Deb and impugning the adoption of Madan Mohan Deb. He lost the suit in the first Court and filed an appeal f. a. 1/20 in the High Court. During the pendency of the appeal Madan Mohan Deb died and the Government appear to have taken possession of the estate. It is not very clear from the records, why the Government intervened, but it looks not unlikely that it took possession on the footing of escheat. However that may be, it is undisputed that the Government was in possession of the estate immediately on the death of Madan Mohan Deb and that Achutananda brought the Government on the record in his appeal on the death of Madan Mohan. That appeal in the High Court was ultimately compromised as between Achutananda (defendant 4 herein) and the Government by the terms of which the Government consented to the appeal of Achutananda being allowed. Defendant 4, Achutananda was put in possession of the estate by the Government by virtue of this compromise on 10-3-22. It was in these circumstances that the mortgagee, Bhaban Sahu, instituted his suit O. S. 51/26 on his second mortgage against the present defendant 4 Achutananda alone. [After stating various proceedings and evidence his Lordship proceeded:] These various proceedings therefore, show that the action of the present plaintiff's predecessor in the present suit, in filing a suit on his second mortgage against the person then in possession of the mortgaged property namely, defendant in assertion of a claim to have succeeded to the original mortgagor, was perfectly *bona fide* and that all the proceedings that he has taken to bring the property to sale in execution of his mortgage decree were also *bona fide* and that the purchase by defendant 4 must be taken to be equally *bona fide*. The present defendant 1 had full knowledge of the execution proceedings and made an unsuccessful attempt to stop the same, but did not intervene in the execution sale to assert his rights of redemption and refrained from taking any proceedings to have the sale set aside or declared null and void, though he failed to obtain possession, and now after the lapse of nearly 10 years from the date of the execution sale his representatives have come forward with these applications.

47. It has been noticed that even such interest as defendant 1 may have had was likely to have been completely extinguished by this date since defendant 2 has admittedly been in continuous possession of the suit mortgaged properties from 4-9-32 when he obtained delivery of possession up to date for a period much over 12 years. Of course, if the case had to be decided on that footing alone, it might have been necessary to consider, in view of the fact that the present applications for relief under the Orissa Money-lenders Act were filed in 1941 (before the lapse of 12 years), whether subsequent continuance of possession should be taken into account and also whether anything had transpired during all these years to render the possession of defendant 2 not adverse to defendant 1. But this is mentioned only to show that the appellants appear to be fighting a battle from which they themselves are likely to derive no benefit except by way of speculation.

48. In view of all the facts and circumstances of this case as above pointed out, I have come to the clear conclusion that defendant 2 has become the valid purchaser of the property involved in the present suit in the court auction held in execution of the decree in O. S. 51/26, subject to the present suit mortgage, and that defendant 1 has no subsisting interest therein and that consequently defendant 1 or his alleged successors, the present appellants, have no subsisting interest. They are, therefore, not entitled on this ground to any relief under Section 10 (1), Orissa Money-lenders Act.

49. The appeal must accordingly be dismissed with costs.

Appeal dismissed.

#### Cases Referred.

<sup>1</sup> A.I.R. (27) 1940 Pat. 376 : (186 I.C. 401)

<sup>2</sup> A.I.R. (16) 1929 Mad. 482: (120 I.C. 65)

<sup>3</sup> 27 I. a. 216 : (25 Bom. 337 P.C)

<sup>4</sup> 32 I. a. 23 : (32 Cal. 296 P.C)

<sup>5</sup> A.I.R. (14) 1927 Bom. 63 : (50 Bom. 802)

<sup>6</sup> A.I.R. (20) 1933 Mad. 43 : (139 I. C. 465)

<sup>7</sup> A. I. R. (21). 1934 ALL. 474 : (150 I.C. 323)

<sup>8</sup> 18 Pat. 141 at p. 152: (A.I.R. (26) 1939 Pat. 49)

<sup>9</sup> A.I.R. (27) 1940 pat. 376: (186 I.C. 401)

<sup>10</sup> 9 Cut. l. t. 54

<sup>11</sup> A.I.R. (35) 1948 P. C. 12 : (I.L.R. (1948) Mad. 505)

<sup>12</sup> A.I.R. (26) 1939 pat. 49: (18 Pat. 141)

<sup>13</sup> A.I.R. (27) 1940 Pat 376 : (186 I.C. 401)

<sup>14</sup> A. I. R. (3) 1916 Pat. 370: (1 Pat. L J. 406 F B)

<sup>15</sup> A.I.R. (26) 1939 Pat. 49 : (18 Pat. 141)

<sup>16</sup> A.I.R. (27) 1940 pat. 376 : (186 I. C. 401)

<sup>17</sup> 9 Cut. L. T. 54

<sup>18</sup> A.I.R. (14) 1927 P.C., 135 : (54 Cal. 669)

<sup>19</sup> 2 Cut. L. T. 91

<sup>20</sup> 20 Cut. L. T. 49 : (A. I. R. (23) 1936 Pat. 465)

<sup>21</sup> A.I.R. (23) 1936 Pat. 420 : (16 Pat. 607)

<sup>22</sup> A.I.R. (16) 1929 Mad. 482 : (120 I. C. 65)

<sup>23</sup> 32 I. a. 23 at p. 32

<sup>24</sup> 27 I. A. 216 : (25 Bom. 337 P.C)

- <sup>25</sup>32 I. A. 23 : (32 Cal. 296 P.C)
- <sup>26</sup>A.I.R. (14) 1927 Bom. 63 : (50 Bom. 802)
- <sup>27</sup>A. I. R. (21) 1934 all. 474 : (150 I. C. 323)
- <sup>28</sup>A. I. R. (16) 1929 Mad. 482 : (120 I. C. 65)
- <sup>29</sup>A.I.R. (20) 1933 Mad. 43 : (139 I. C. 465)
- <sup>30</sup>A.I.R. (14) 1927 Bom. 63 : (60 Bom. 802)
- <sup>31</sup>A.I.R. (16) 1929 Mad. 482 : (120 I. C. 65)
- <sup>32</sup>I. a. 23 at p. 33 : (32 Cal. 296 P. C)
- <sup>33</sup>14 M. I. a. 606 : (10 Beng. l. B. 294)
- <sup>34</sup>Marsh. Rep. 614
- <sup>35</sup>W. R. Special Number, 119 (F.B)
- <sup>36</sup>14 M. I. A. 605 : (10 Beng. L. R. 294)
- <sup>37</sup>32 I. A. 23: (32 Cal. 296 P.C)
- <sup>38</sup>6 I. A. 233 : (5 C. L. R. 477 P.C)
- <sup>39</sup>Marsh. Rep. 614
- <sup>40</sup>14 M. I. A. 605 : (10 Beng. L. R. 294)
- <sup>41</sup>16 Cal. 40 : (15 I. A. 195 P.C)
- <sup>42</sup>14 Mad. 454
- <sup>43</sup>26 Mad. 230 : (12 M.L.J. 368)
- <sup>44</sup>33 Mad. 6 : (4 i. C 1059)
- <sup>45</sup>A.I.R. (3) 1916 Mad. 1022 : (31 I. C. 920)
- <sup>46</sup>A. I. R. (4) 1917 Mad. 979 : (35 I.C. 124)
- <sup>47</sup>A.I.R. (6) 1919 Mad. 16 : (52 I. C. 509)
- <sup>49</sup>A.I.R. (15) 1928 Mad. 243 : (108 I. C. 409)
- <sup>48</sup>A. I. R. (13) 1926 Mad. 487: (93 I. C. 625)
- <sup>50</sup>A.I.R. (16) 1929 Mad. 482: (120 I. C. 65)
- <sup>51</sup>A. I. R. (27) 1930 Mad. 930: (54 Mad. 212)
- <sup>52</sup>A.I.R. (16) 1929 Mad. 482 : (120 I. C. 65)
- <sup>53</sup>A. I. R. (27) 1930 Mad, 930 : (54 Mad. 212)
- <sup>54</sup>A.I.R. (20) 1933 Mad. 43: (139 I. C. 465)
- <sup>55</sup>A.I.R. (14) 1927 Bom. 63: (50 Bom. 802)
- <sup>56</sup>A.I.R. (21) 1934 all. 474 : (150 I. C. 323)
- <sup>57</sup>14 M. I. a. 605 : (10 Beng. l. B. 294)
- <sup>58</sup>A. I. R. (12) 1925 Oudh 330 : (28 O C. 177)
- <sup>59</sup>A. I. R. (13) 1926 Mad. 487 : (93 I. C. 625)
- <sup>60</sup>A. I. R. (11) 1924 ALL 717 : (75 I. C. 114)
- <sup>61</sup>A. I. R. (21) 1934 ALL. 474 : (150 I. C. 328)
- <sup>62</sup>A. I. R. (20) 1933 P. C. 202 : (57 Mad. 1)