PATNA HIGH COURT

Prahlad Pd. Modi

Vs

Tikaitni Faldani Kumari

Civil Revn. Nos. 1015 and 1075 of 1955

(Ahmad and Misra, JJ.)

01.02.1956

JUDGMENT

Ahmad, J.

1. These two applications have been heard together as they arise out of the same case registered as title suit No. 23 of 1952 in the Court of the Subordinate Judge at Deoghar. Civil Revision No. 1015 is by Prahlad Pd. and is directed against the order D/d. 7-10-1955, while Civil Revision No. 1075 is by S.K. Chatterjee and is directed against the order dated 2-8-1955. Both these petitioners in the Court below were the third party objectors in a proceeding taken by them, against the action of the party receiver appointed in the cause during the pendency of the appeal in the Supreme Court. Their common claim was that they had been in possession of the properties specified in their petitions from long before the date of the appointment of that receiver, e.g., Tikaitni Faldeni Kumari Ghatwalin, the plaintiff-appellant in the Supreme Court and now the common opposite party No. 1 in this Court, and that their possession over the same was based on their own independent paramount title, and therefore, in law under Order 40 Rule 1(2), Civil Procedure Code they were not liable to be removed from the possession of those properties at the instance of the receiver.

2. The subject-matter of claim in Civil Revision No. 1015 of 1955 is the Ramchandra Bazar and Hat while the property in Civil Revision No. 1075 of 1955 is the Basauri Mahal, both lying in the town of Madhupur in the district of Santhal Paraganas.

3. The controversy in title suit No. 23 of 1952 relates to the title of entire Birbhum Ghatwali commonly known as Pethrole estate. This estate on the death of her husband vested in Faldani Kumari as the next Tikaitni some time in 1935 and she had been in possession thereof as such till 29-5-1952, when under Section 3, Bihar Land Reforms Act, 1950, that estate was notified to have passed to and become vested in the State of Bihar. Tikaitni Faldeni Kumari challenged the validity of the aforesaid notification and instituted a title suit which was registered as the aforesaid title suit No. 23 of 1952 in the Court of the Subordinate Judge, Deogharh, for a declaration that the provisions of the Bihar Land Reforms Act, 1950 did not apply to Pethrole estate, that being a ghatwali, and in the meantime prayed for injunction restraining the State of

Bihar to interfere with, her possession over the same.
The prayer for injunction during the pendency of the suit was allowed but the suit itself ultimately on hearing was dismissed on merits. Thereupon Tikaitni Faldani Kumari filed an appeal against that decision in this Court which was registered as First Appeal No. 309 of 1954. This Court also during the pendency of the appeal had restrained the State of Bihar from interfering with her possession as Tikaitni. But that appeal too was lost by her ultimately. She has now, therefore, gone to the Supreme Court and there her appeal has been registered as Supreme Court Appeal No. 94 of 1954, and is still pending for disposal. It appears that on the very day when the leave for appeal in the Supreme Court was granted, she made an application here as well for an order of stay restraining the State of Bihar to interfere with her possession during the pendency of the appeal in that Court. But the Supreme Court instead of issuing an order for stay, as prayed for, appointed the plaintiff-appellant there as the receiver pendente lite of the estate in dispute by its order dated 23-12-1954. The relevant portion of that order reads :

> "That petitioner-appellant No. 2 Tikaitni Faldani Kumari widow of Tikait Kali Prasad Singh be appointed receiver of the property relating to her case i.e., of the Pethrole Ghatwali situated in the sub-division of Deoghar in Santhal Paraganas, Bihar, subject-matter of Title Suit No. 23 of 1952. That the said petitioners-appellants shall not be required to furnish security.

That the said petitioners-appellants be deemed to have been appointed for all purposes as receivers by the Subordinate Judge, Deoghar and shall act under the direction of the said Subordinate Judge". She has been, therefore, since that date in possession of the property as a receiver.

4. The allegations made by Prahlad Pd. Modi in Civil Revision No. 1015 of 1955 are :

> "That the petitioner has been a lessee of the said Hat from 1947 under leases executed by the said Tikaitni Paldani Kumari, the last lease having been executed by the said Tikaitni in favour of your petitioner in 1951 for a period of 9 years".
> * * * *
> "That on 14-5-55 the opposite party No. 1 after her appointment as Receiver attempted to take forcible possession of the Hat and proclaimed by beat of drum on 14-5-1955 to the shop-keepers that she would realise tolls directly. That the petitioner then applied to the Subordinate Judge to direct the opposite party No. 1 not to disturb his possession. That the learned Subordinate Judge on 12-9-55 passed the following orders :
> 'At present the matter is pending before the Honourable Supreme Court; until its decision it is hazardous to pronounce any judgment regarding the validity or otherwise of the applicant's lease. For this reason, the parties have agreed that the matter may be raked up after decision by the Honourable Supreme Court. If the Ghatwallion succeeds, he will insist upon acting on the lease. Otherwise he will have to fall back upon the amount of compensation that will be allowed to her'.

That the opposite party then applied for starting proceedings against the petitioner for contempt

of Court for interfering with the Receiver's collections and for deputation of Nazir to assist the Receiver in making collections and notice was issued on the petitioner to show cause why he should not be proceeded against for contempt of Court. That on 7-10-55 the learned Subordinate Judge passed an order directing the Nazir to go to the Hat to help the Receiver in realization of the market tolls".

It is this last order which is now before us for reconsideration in the application of Prahlad Pd. Modi.

5. In Civil Revision No. 1075 of 1955 S.K. Chatterjee has alleged :

> "That your petitioner lent money from time to time to the opposite party No. 1 to defray the expenses of litigation against the Court of Wards for recovery of possession of the Pethrole Estate and also to defend a title suit brought by the agnate of the opposite party No. 1 's husband regarding the entire estate and for payment of other Government dues.

That in consideration of the said advances, the opposite party No. 1 executed a registered agreement to lease out the Basauri Mahal of Town Madhupur and put your petitioner in possession of on 24-8-1951. That your petitioner began realising rent from different tenants from 24-8-1951 and on 18-6-1952 a registered lease was executed by the opposite party No. 1 in respect of the said Basauri Mahal of Town Madhupur".

> * * * *
>
> "That as the petitioner was in possession of the Basauri Mahal from before the date of Notification, proposed budget of the Pathrole Estate as filed by the opposite party No. 1 on 11-2-1955 did not include the income from the said Mahal, but the Subordinate Judge directed orally that the said income should be included in the budget.

That on 1-3-1955 the opposite party No. 1 filed an application in Court and para. 7 of the said application runs as follows :

> 'That the Basauri Mahal and Madhupur Hat are in the hands of lessee from long before the date of appointment of receiver and as such they cannot be considered to be the part of the Pathrole Estate assets on the date of appointment of receiver. That the lessee of the Basauri Mahal is also the manager of the Pathrole Estate does not affect the lessee at all'.

That by her petition dated 12-3-1955 the opposite party No. 1 stated in para 3 as follows :

> 'As regards the lease of Madhupur Basauri Mahal the same was leased out at Calcutta on 18-6-1952 for money taken on loan in meeting costs of appeal at the Supreme Court of India for the suit of *"Tekait Hargobind Prasad Singh v. Tekaitani Faldani Kumari'* and also for meeting costs in the suit against the Court of Wards. Hence the income of the Basauri Mahal has not been shown in the budget'.

That on 19-3-1955 the Subordinate Judge ordered that the opposite party No. 1 should include

the income of the Basauri Mahal in the budget of the receiver, and the opposite Party No. 1 then included the said income in the budget. That the opposite party No. 1 filed an application on 25-7-1955 praying that suitable action may be taken against your petitioner for disturbing the possession of the receiver over Basauri Mahal and the Subordinate Judge issued a notice to your petitioner to show cause by 31-8-1955 as to why the petitioner should not be proceeded against the alleged disturbance in the receiver's possession, which amounts to contempt of Court. That on 2-8-1955 your petitioner filed an application that he is already in possession of Basauri Khas Mahal of Madhupur and prayed for necessary orders, but the learned Subordinate Judge ordered.

> 'Let him get his right, title and,' interest to the Basauri Mahal of the Madhupur Town declared in a properly constituted suit'.

S.K. Chatterjee has, therefore, now come to this Court in revision against this last order passed on 2-8-1955.

6. The orders under revision in both these applications have been, as already stated, attacked on the common ground that they are hit by Order 40 Rule 1, sub-clause (2), Civil Procedure Code. The relevant portion of Rule 1 of Order 40, Civil Procedure Code reads :

> "1. (1) Where it appears to the Court to be just and convenient, the Court may by order
> (a) appoint a receiver of any property, whether before or after decree;
> (b) remove any person from the possession or custody of the property;
> (c) commit the same to the possession, custody or management of the receiver;
> * * * *
> (2) Nothing in this rule shall authorise the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove".

7. The claim of Prahlad Prasad Modi as to his possession over Ramchandra Bazar and Hat on the basis of a registered lease dated 15-12-1951 executed for a period of nine years from 1st Baisakh 1360 to Chaitra 1368 B. S. is not denied and in fact no affidavit has been filed on behalf of the receiver controverting the facts stated by the petitioner in Civil Revision No. 1015 of 1955. It has, therefore, to be taken as admitted that Prahlad Prasad Modi has been in possession over Ramchandra Bazar and Hat since before the appointment of the receiver on the basis of the lease dated 15-12-1951. The only question in controversy, therefore, so far as his case is concerned, is as to whether his possession over the property under the lease dated 15-12-1951, is of such a person whom, any party to the suit has a present right so to remove.

8. In the case of S.K. Chatterjee, however, there appears to be some controversy even on the point of his possession on the date when the receiver was appointed by the Supreme Court. The facts alleged by him in his application No. 1075 of 1955 have been controverted on behalf of the receiver by an affidavit sworn by one Gurupada Sarkar as her authorized agent. In reply thereto two further affidavits were again put in by S.K. Chatterjee, one on 24-11-1955 and the other on 28-11-1955. These two affidavits sworn by S.K. Chatterjee in reply to the counter-affidavits are, in substance, one and the same, in these affidavits and counter-affidavits parties have differed

practically on all important points. What, however, broadly appear from them are :

(1) S.K. Chatterjee had been manager of Tikaitni Faldani Kumari for a long time before 24-8-1951 and in the course of that he had raised large sums of money on loan for her to meet the expenses in connection with the heavy litigations to which the asset had been put to.

(2) That on 24-8-1951, Tikaitni Faldani Kumari executed a registered agreement to lease out the Basauri Mahal of town Madhupur in favour of S.K. Chatterjee.

(3) That on 14-5-1952 Tikaitni Faldani Kumari executed another document in favour of S.K. Chatterjee stating therein that

"although the rents of the aforesaid Mahal (Basauri) have been collected by receipt printed and under my seal but the said Mahal being in reality in your possession the net profit of Rs. 7000/- after deducting establishment cost, litigation cost and income-tax is paid to you from time to time. After checking the account today and after deducting Rs. 7000/- aforesaid your dues are proved to be Rs. 92,173/-. That I shall within one month from this date execute a registered deed in respect thereof concerning the Basauri Mahal. From today you will under your name realise the rents of the aforesaid Mahal to which I or my heirs, shall not object".

(4) That on 18-6-1952, as already stipulated in the previous document, Tikaitni Faldani Kumari executed the registered lease in respect of the said Basauri Mahal of town Madhupur in favour of S.K. Chatterjee though in the meantime on 29-5-1952, the notification under Section 3, Bihar Land Reforms Act, 1950, had already been issued in regard to the Pethrole estate.

(5) That thereafter on 18-7-1952, the services of Mr. S.K. Chatterjee as manager terminated and on 2-6-1953, a criminal case was started against him for misappropriation of the estate money though, ultimately he was acquitted in that case on 23-6-1954.

(6) That near about 30-7-1954, it appears that certain reapproachment was somehow again effected between them and as a result thereof S.K. Chatterjee reentered the estate as its manager and then a fresh document as well dated 30-7-1954, executed by Tikaitni Faldani Kumari in favour of S.K. Chatterjee came into existence. Therein according to the petitioner, it was admitted by hen that the petitioner had spent a considerable amount and that in lieu thereof she had executed the document dated 18-6-1952 and that she would not interfere with the petitioner's right over Basauri Mahal until the debts were cleared off nor she would execute any deed in respect thereof in favour of any other party; and further according to the receiver it was agreed between them that the dues, if any, to the petitioner should be determined by the arbitrators named therein within three months from the date of the execution of the document.

(7) That on 2-2-1955, perhaps some accounting, was also made between the parties and as a result thereof it transpired that the due then left against Tikaitni Faldani Kumari in favour of S.K. Chatterjee was only a sum of Rs. 25,000/-, as, according to the petitioner, the major part of the debt had by then already been paid off from the income of the

properties mentioned as ka, kha, ga and gha in the schedule attached to the deed dated 18-6-1952.

(8) That a few months thereafter on 18-5-1955 i.e. at a point of time when the order by the Supreme Court relating to the appointment of Tikaitni Faldani Kumari as the receiver of the Pethrole Estate had already been passed, the service of Mr. S.K. Chatterjee as manager again terminated. And in connection therewith some notices were also got issued by the parties against each other in the Amrita Bazar Patrika. The notice issued by Tikaitni Faldani Kumari directed the tenants to pay all rents directly to the receiver while the one got issued by S.K. Chatterjee directed the tenants to pay rent to him as the attorney of the Ghatwalin.

(9) That the notice got issued by S.K. Chatterjee led to certain contempt proceeding against, him most likely on the charge that he was interfering with the possession of Tikaitni Faldani Kumari as the receiver of the Pethrole Estate. In that proceeding S.K. Chatterjee filed an application stating therein :-

"That after 2-8-55 many persons offered to pay their rents of the Madhupur Basauri Mahal but the petitioner did not accept the rents in view of the ex parte order asking him to show cause for contempt".

9. On these broad facts and other facts stated in the affidavits and counter-affidavits, the point for decision is as to whether S.K. Chatterjee was in possession of Basauri Mahal on the date when Tikaitni Faldani Kumari was appointed, receiver of the Pethrole Estate and if so whether he has been still in. possession thereof since then.

10. It is true that on behalf of the receiver it has been stated on oath in the counter-affidavit sworn by Gurupada Sarkar that the different petitions referred to in his affidavit as having been filed in the Court on her behalf were in fact the creation of S.K. Chatterjee, and that the different deeds referred to therein were got executed by him fraudulently and as such they were invalid and inoperative in law5 and further that the claim of debts alleged to have been arranged by him for her was very much bolstered up and also that the collection, if any, made by him from Basauri Mahal was only on the footing of his being a manager and an ordinary agent of Tikaitni Faldani Kumari and not on any other right alleged to have accrued to him under the documents dated 24-8-1951, 14-5-1952 and 18-6-1952. But, in my opinion, on the facts brought on the record of this case it is difficult to hold otherwise than that the collection of Basauri Mahal has for a long time been made under the authority and control of S.K. Chatterjee and that even on 23-12-1954, when the order for receivership was passed that Mahal was under the management of the petitioner. That, therefore, clearly shows that the possession of that Mahal has been with him. After all in a case of Zamindari property yielding rent only its collection by a claimant ordinarily is a very stable piece of evidence to support his case of possession. Mr. P.R. Das appearing for the petitioner in this connection, rightly drew our attention to a passage given in "Possession by Pollock and Wright" at p. 36. That reads :

> "It is well established in our books that the rent and services incident to free hold tenure are the subject of possession, and that before legal possession or seisin is complete there must be such de facto possession as the thing admits of in the shape of an actual receipt of some part of the rent."

Therefore, in my opinion, the finding on the point of possession has to be given in favour of S.K. Chatterjee. That being so, in this case also as in. the case of Prahlad Pd. Modi the only other point on the question of their claims that is left for consideration is as to the nature of right created in their favour under the documents relied upon by them.

11. Learned counsel for S.K. Chatterjee claimed that the documents dated 24-8-1951, 14-5-1952 and 18-6-1952, when read together clearly showed that the agency created in favor of S.K. Chatterjee was in law one coupled with interest end had the effect of assignment though the form given to it was that of a simple power of attorney. Therefore, according to his contention, it was of an irrevocable character. In support of this contention reliance was placed by him on the provision of law laid down in Section 202, Contract Act, and on the principle stated in the Law of Agency by Bowstead as also on the different authorities referred to hereafter. Section 202, Contract Act reads :

> "Where the agent has himself an interest in the property which forms the subject-matter of agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest."

In Article 140 of, the book Law of Agency (Ed. 10) at p. 275 the author says :

> "Where the authority of an agent is given by deed, or for valuable consideration, for the purpose of effectuating any security, or of protecting or securing any interest of the agent, it is irrevocable during the subsistence, of such security or interest.

Where an agent is employed to enter into any contract, or do any other lawful act involving, personal liability, and is expressly or impliedly authorised to discharge such liability on behalf of the principal the authority becomes irrevocable as soon as the liability is incurred by the agent."

> * * * *
> "An authority expressed by this Article to be irrevocable is not determined by the death, lunacy, unsoundness of mind, or bankruptcy of the principal, and cannot be revoked by him without the consent of the agent."

Couch, C.J., in the case of - pestanji *Mancharji Wadia v. Joseph Matchett'*[1], has laid down :

> "Where an authority or power is given for a valuable consideration or is part of
> a security, unless there is an express stipulation that it shall be revocable, it is, from its own nature and character, in contemplation of law irrevocable, whether it is expressed to be so on the face of the instrument creating the authority or not. This rule has been acted upon in many reported cases, of which it will be sufficient to mention the following.

In - *'Gaussen v. Morton'*[2], A being indebted to B, in order to discharge the debt, executed to B a power of attorney authorizing him to sell certain lands belonging to him, A. It was held that the

authority could not be revoked. In - *'Bromley v. Holland*[3]*',* Lord Eldon said that, where a power of attorney is executed for a valuable consideration, the Court of Chancery would not permit it to be revoked. And in - *'Walker v. Restron'*[4]*,* Lord Abinger, in giving judgment, said, 'The existence of a debt, although, it be not due instanter, is a good consideration; and so it is to take lawful and proper means to provide for payment, even though they be conditional. If we were to hold otherwise, you might deny the consideration for a collateral security for any debt which might not be due at the moment, although it is very common thing to require and obtain such security."

> * * * *
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> "The ground of the doctrine, to use the language of Story, J. is that "a party shall not be at liberty to violate his own solemn engagement or to vacate his own security by his own wrongful act. For that would be to allow him to perpetrate a fraud upon innocent persons who have placed implicit confidence in him, which is against the clearest principles of justice and equity." (Story on Agency, para. 477).

Similar question arose in the case of - *'Jagabhai Lallubhai v. Rustamji Nasarwanji', Bom 311* (E). Therein Sargent, C.J., observed :

> "The next question for determination is, whether the agreements entered into between the firm of Sowerby and Co. and the plaintiff, that the latter should make advances to them for the purposes of the contract with Government, operated as an assignment to the latter of the sums to become due to Sowerby and Co. on the bills passed by the Executive Engineer. As to the first agreement of 28-11-1877, it was entered into with the firm, and, coupled with the power of attorney of even date, had, we cannot doubt, the effect of an assignment.

Taken together the two instruments amount, in the language of Sir John Leach in - *Watson v. Duke of Wellington*[5]*',* 'to an engagement to pay out of a particular fund', which the Master of the Rolls says amounts to an assignment of the fund. Again in - *'Burn v. Carvaloh*[6]*',* Lord Cotton ham held that a letter to the plaintiff telling him that he would write to his agent to meet his bills out of funds in his hand, followed by a letter to the agent directing him to do so, amounted to an equitable assignment of the funds. Here the power of attorney must be deemed to have been intended to be deposited by plaintiff with the Government Engineer, and we have, therefore, in this
case virtually, although in adifferent form, all the elements which existed in the latter case for constituting an assignment of the monies in the hands of the Executive Engineer."

12. Applying the principles that emerge from these authorities to the facts stated in the documents, referred to above, I hold that the contention of Mr. Das as to the nature of right that gave rise to the possession in favour of S.K. Chatterjee over Basauri Mahal is well founded and further I think that he is also right in his submission that that right accrued to his client for the first time on the very date when the second document dated 14-5-1952, was executed. All the elements that are necessary in law to constitute an agency of an irrevocable character are present in that document even though that was not described as such. Its contents clearly show, as rightly argued by Mr. P.R. Das, that Tikaitni Faldani Kumari under that document agreed that the debts

raised by S.K. Chatterjee for her were to be realised out of the collections to be made by him from Basauri Mahal. That, in substance, amounted to an allocation of the funds to De appropriated towards the repayment of the debts.

Therefore, on the very day when that document was executed, the agency coupled with interest came into existence and that being so it cannot be said that the right on the basis of which S.K. Chatterjee claims possession was created in his favour at a time subsequent to the notification published on 29-5-1952. Such, therefore, being the position of S.K. Chatterjee over Basauri Mahal, the final question that has next to be answered is as to whether the Court or the receiver appointed in the suit is justified in law to dispossess him from that. According to Mr. P.R. Das, the title of S.K. Chatterjee on the basis of the aforesaid documents is that of a paramount character and, as such he is not liable to be removed at the instance of the receiver appointed subsequently in the suit. In support of this contention reliance has been placed by him on Kerr on Receivers as also on the decisions in - *'Evelyn v. Lewis[7]'*, - *'Re Metropolitan Amalgamated Estates Ltd[8]*. (I); - *'Bhag-wan Das v. Manindra Chandra[9]'*, (AIR V 14) (J); - *'Amulya Chandra v. Kashi Nath'[10]*, (AIR, V 14) (K); - *'Mahamed Kasim v. Panchapakesa Chetti[11]'*, - *'Johnes v. Claughton[12]'*, - *'Hudson v. Morgan[13]'*, as well as on the principles laid down in Halsbury's Laws of England at p. 51 of Vol. 28.

13. Kerr in his book (Ed. 11) on Receivers at p. 167 says :

> "If persons with paramount rights, who are not parties to the action, are actually in possession of those rights, the appointment of a receiver does not prejudice them in the enjoyment of those rights. ((1844) 3 Hare 472). But if they are not actually in possession, then, after a receiver has been appointed, they must come to the Court for leave to exercise those rights, in which case their application cannot be refused ((1912) 2 Ch 497)".

It may be stated here that in this case we need not consider as to what would have been the position if S.K. Chatterjee in spite of the right given to him under the documents referred to above had not been in possession and enjoyment of that right, for, in my view of the matter, he is, as found, above, in fact, in possession.

14. In (1844) 67 ER 467, the Vice-Chancellor observed :

> "The Court did not allow the possession of the receiver to be interfered with or disturbed by any party, whether claiming paramount or under the right which the receiver was appointed to protect. If a party claiming a right in the same subject-matter was in possession of the rights which he claimed at the time the receiver was appointed the appointment of the receiver left him in such possession; if, on the other hand, the claimant was out of -possession he must apply for the leave of this Court before he instituted any legal proceedings affecting the possession which the receiver had acquired.

The Court had then an opportunity of considering, and in a sense of trying, the right of the applicant to proceed at law, before it sanctioned proceedings. How far that preliminary trial in this Court should go might depend upon the circumstances of the case : (See - *'Angel v. Smith[14]'*, (O)). Whether, the party proceeding at law did or did not know that a receiver had been

appointed over the property, or however clear the right of the claimant might be, the Court would restrain the prosecution of the claim, if it were instituted without the leave of this Court. The Court had the power of indemnifying a party who applied in a regular manner for the prosecution of his rights, or to have them put in a train for adjudication (*'Thomas v. Brigstocke[15]',)*".

15. In (1912) 2 Ch 497, Swinfen Eady, J. observed :

> "It is well settled that until a mortgagee takes possession by himself or a receiver the mortgagor is in undisputed possession of the property and the results. If a puisne incumbrancer enters into possession or receipt of the rents the mortgagor's possession is displaced and the puisne incumbrancer can receive the rents without accounting to any prior incumbrancer until that prior incumbrancer intervenes. When he intervenes he displaces the puisne incumbrancer, but until that intervention, the puisne incumbrancer is entitled to remain in possession of the rents. This law is clear and undisputed."

16. In case of 1927 Pat 397 (AIR V 14), Ross J., sitting singly quoted with approval the passage from Kerr on Receivers, already referred to above, and decided the case on the principle laid down in (1912) 2 Ch 497.

17 . The other case of this Court in 1927 Pat 297 (AIR V 14), is a decision by a Division Bench by Das and Allanson, JJ. The leading judgment in that decision is by Das, J. In that case the third party had sought relief against the interference by the receiver appointed in the action by a suit and not by an application. In that suit injunction had been granted to the third party restraining the receiver from dispossessing the plaintiff from the properties in suit. Against that order the receiver came in appeal to this Court. On behalf of the appellants two points were raised; first that the leave to sue the receiver was not obtained and, therefore, the learned Subordinate Judge should not have made an effective order against the receiver and the second that there being an equally effective remedy in an examination pro
interesse suo before the Court which appointed the receiver it was not open to him to apply for an injunction against the receiver. In answer to the first question Das, J., observed :

> "I am not prepared to accede to the argument that Kashi Nath could obtain, to adopt the words of the statute, 'equally efficacious relief in an examination pro interesse suo before the District Judge of Hoogly
> ".

And in answer to the second question the learned Judge said :

> "The rule is firmly established that as against a stranger to the action, who is in actual possession, the appointment of a receiver is of no effect : See Halsbury's Laws of England, Vol. 24, p. 379. But it is equally well settled that you cannot sue a receiver except with the leave of the Court."

Thereafter the learned Judge further observed :

> "That so long as the stranger whose possession is challenged by the receiver acts strictly, on the defensive, the receiver cannot touch him in any way, but that, if he comes as a complainant and asks the Court to investigate the conduct of the receiver, he must obtain the leave of the Court by which the receiver was appointed."

18. In the case of 35 Mad 578 the suit was to recover certain goods which were attached in an execution of a small cause court decree and of which the plaintiff was appointed receiver, or, in the alternative, the value of the goods. Those goods had in the meantime before the appointment of the receiver been sold to the defendant in a sale deed. The defendant, therefore, inter alia contended that the receiver plaintiff had no authority to institute the suit as the order sanctioning the appointment of the receiver was passed sometime after the date of the sale in his favor. On those acts Benson and Sundara Ayyar, JJ., held :

> "Under Section 503, Old Civil Procedure Code, when a person is appointed receiver of any moveable or immoveable property, he is entitled to take possession of it from the parties to the suit, to manage it, to realize its incomes and to continue in custody of it until discharged by the Court.

The title to the property does not rest in him, see - *'Ram Lochun Sircar v. C.S. Hogg[16]',* (Q). His rights arise only on the date of his appointment and not before, see - *'Defries v. Greed[17]',* (R); and *'Edwards v. Edwards[18],* (S). He is not entitled to recover possession from a third party stranger to the suit, whose rights date prior to his appointment. Nor does his appointment affect any rights previously acquired by third persons : See Alderson on Receiver, Section 169. In High on Receivers, the author states (S. 359) : 'As regards the title acquired by a receiver of a National Bank thus appointed, the rule is that he holds such estate and title as the bank itself had in its assets, his title being similar in this respect to that of an assignee in bankruptcy. He is not a third person in the sense of commercial transactions, and cannot avoid a pledge of estates of the bank which could not be avoided by the corporation itself. When, therefore, the bank has deposited notes constituting a part of its assets with a creditor as security for advances, the bank itself being concluded by the deposit or pledge, the receiver is not entitled to such notes, and cannot maintain an action therefor until the creditor or pledgee is made whole for his advances.' " Halsbury in para 92 at p. 51 of Vol. 28 says :

> "As against a stranger to the action who is in actual possession, the appointment of a receiver is of no effect."

19. In '(1822) 37 ER 966', the third party to the action had at the time when the estate was in the possession of the receiver appointed by the Court turned his cattle on part of the estate, claiming a right of common. Thereupon the receiver impounded the cattle and moved that the third party might stand committed for a contempt in trespassing on the estate in question. In the decision on that motion Lord Chancellor Eldon held :

> "If at the time when the receiver was appointed this person had been in the exercise of the right of common which he claims, the appointment of a receiver could not be understood to interfere with that exercise. On the other hand, if that was not the case, the Court will

not permit him, without leave, to exercise an alleged right of common abandoned for several years; ...."

20-21. In '36 Cal 713', the trial Court had authorised the receiver appointed in the suit to take possession of the properties in the custody of a third party. In appeal against that order Mookerjee and Carnduff, JJ., found that the properties had accrued to the third party after the date on which the receiver was appointed, and, therefore, the plaintiff in that suit at whose instance the receiver was appointed had a present right to remove him. In the course of discussion, however, in that case this question also came for discussion as to whether the Court had jurisdiction to remove from-possession a person who claimed under a title paramount to that of the parties to the litigation in which the receiver was appointed. On behalf of the third party it was argued that the Court had. no jurisdiction to do so, and that as soon as a receiver found that the subject-matter of the litigation was in the possession of persons who claimed under a paramount title, he, as well as the Court from which he derived authority, must withhold their hands. In answer to that contention the learned Judges held :

> "In our opinion, this contention is not supported either by principle or by authorities. Section 503, Civil Procedure Code, clearly contemplates the removal from possession of persons who are not parties to the suit, and the last paragraph of the section formulates the test to be applied in cases of this description.

In determining whether the Court should remove from possession or custody of property under attachment, any person who is not a party to the litigation, the test to be applied is, whether the parties to the suit or some or one of them, have or has a present right so to remove him. If the intention of the Legislature had been that a person who was not a party to the suit should not, under any circumstances be deprived of possession of the disputed properties, the Code would have made an appropriate provision to that effect. On the other hand, the Code expressly provides for the test to be applied in cases of controversy between the Receiver and a stranger to the suit." Furtheron it was observed therein :-

> "No doubt, when the question arose whether the Court should remove from possession a person who is a stranger to the suit, the Court has a discretion which must be exercised judicially and not arbitrarily. But the view that the mere assertion of a paramount title compells the Court to withhold its hands cannot be supported.

Substantially the same principle has been adopted in the English and American Courts. Thus, it has been ruled in England that although the effect of the appointment of a Receiver is to remove the parties to the action from the possession of the property, if at the time when a Receiver is appointed, a party claiming a right in the subject-matter under a title paramount to that under which the Receiver is appointed is in possession of the right which he claims, the appointment of the Receiver leaves him in possession : '(1884) 3 Hare 472', - *'Bryant v. Bull*[19]*'.* (T); - *'Wells v. Kilpin'*[20]*,* and - *'Underhay v. Read*[21]*',* In the American Courts, also, when a Receiver comes into conflict with third persons, such third persons are, it appears, permitted to come in and be heard in relation to their interests or they are given leave to bring a suit against the Receiver to test the question of their rights. In other words, as observed in Alderson on Receivers, Section 193, 'the

Court will, in general, entertain such an application on affidavits only where it clearly appears that the adverse possession began subsequent to the commencement of the action and is therefore subject to the decree or order which has been made, or where the person holding the property has no legal right; but, as a rule, wherever the testimony is conflicting, and there is a reasonable ground for difference of opinion as to which is entitled to possession of the property, the Court will not assume to try the title by hearing a motion for a writ of assistance' : - *'Musgrave v. Gray*[22]*'*, - *'Gelpeke v. Milwaukee'*[23]*,* (X); and - *'Vincent v. Parker*[24]*',* (Y). It is obvious, therefore, that we must determine whether the Receiver is entitled to possession as against the appellant by the application of the test, whether or not the parties to the suit for some, or one of them have or has present right so to remove him."

22. Here I may also refer to the authority which was relied upon by Mr. De on this very point under discussion in supporting the application of his client, namely, Prahlad Pd. Modi. That is laid down in - *'Inderdeo Narain Singh v. Gouri Shanker*[25]*',* (AIR V 5) (Z). There the property, as far as it appears from the facts stated there, originally belonged to one Mathura Prasad. Mathura Prasad executed a mortgage in respect to that property in favor of one Rai Bahadur Harihar Prasad Singh who on the basis of that obtained a mortgage decree against him sometime on 4-2-1905 and then in the execution of that decree put the property on sale sometime in September 1917 when it was purchased by one Gouri Shanker. After the sale an application was filed by one Bindeshwari to set aside the sale held in execution of the mortgage decree. Bindeshwari claimed that he had purchased the property from one Lokenath who had himself purchased it at a sale in execution of a mortgage decree obtained by him. In that proceeding Gouri Shanker, the purchaser, on 19-11-1917, applied for the appointment of a receiver of that property which was acceded to by the Court. Thereafter on 25-11-1917, before the receiver had taken possession of the property, an objection was fi3ed by Inderdeo Narain Singh Who claimed that he had been in possession of it on the oasis of a lease executed in favour of his father sometime on 23-12-1907 and that he was entitled to retain possession. He, in substance objected to the taking of possession by the receiver because, according to him, though the lease was subsequent to the date of Harihar Parasad's mortgage yet he had paid off debts and other charges prior to the decree in the suit under which the sale had been held and that he had retained possession of the property as holder of prior charges. The learned Subordinate Judge dismissed the application of objection on the ground that the ijara claimed by Inderdeo Narain Singh had no existence in the eye of the law, having been made during the pendency of the mortgage suit. Against that order Inderdeo Narain Singh came to this Court. Here that application was heard by Chapman and Atkinson, JJ. They held :

> "The appointment of the Receiver was by implication an order to the parties in the case to deliver possession to the Receiver and to permit the Receiver to comply with the orders of the Court, but it was not by implication or otherwise any order to a person who is not a party to the suit, and it was not an order to Inderdeo Narain either to deliver possession to the Receiver or prohibiting him from interfering with what the Receiver was required to do by the Court.

The only ground upon which the Court could have overruled the objection made by Inderdeo Narain appears to be that Inderdeo was in fact acting on behalf of one of the parties to the suit and did not put in a *bona fide* claim of right. The learned Subordinate Judge has not proceeded

upon any ground of that kind, he has in fact determined the question of right in the case, namely, whether Inderdeo Narain could make any claim in fact under his ijara or not. The Subordinate Judge has omitted to deal with the real point in the case which is the claim by Inderdeo that he was entitled to a prior charge by reason of the fact that he had discharged the prior mortgage and also by reason of the fact that he had discharged a rent decree. I am of opinion that we should interfere upon both grounds, the first ground being that the Subordinate Judge had no jurisdiction to overrule the objection unless he was satisfied that the claim was not made *bona fide* or was made really on behalf of one of the parties to the case, the other ground being that the learned Subordinate Judge has not dealt at all with the claim that Inderdeo was entitled to a prior charge."
23. In my opinion, the principles of law that arise from the authorities referred to above are, broadly speaking, the following :

> (1) That a third party in possession having of *bona fide* paramount title is not affected by the appointment of a receiver in a suit relating to that property.
> (2) That in case his possession is interfered with either by the Court, which appoints the receiver, or the receiver himself, he has two remedies open to him to redress his grievance (i) either to place his claim before the Court, which has appointed a receiver for his examination 'pro interesse suo' or (ii) to institute a regular suit with the leave of that Court.
> (3) That in case the third party claimant follows the first remedy and examines himself 'pro interesse suo', it is for the Court to test the claim judicially so that, as observed in '36 Cal 713', "the Court shall not by its dominant power hold the property on which the parties to the suit have no claim and told it in despite of the real owners."
> (4) That in case a regular suit has already been Instituted by the third party claimant for the relief against the receiver or when the facts of the case are too much complicated for an easy decision in a summary proceeding like one by way of examining the objector 'pro interesse suo', it is open to the Court not to decide the matter in that summary proceeding but to direct the party to get the claim tested in a regular suit on the grant of leave to him for the same.

24. The learned Government Advocate appearing for the State as also Mr. J.C. Sinha appearing for the 'receiver substantially have accepted the principles just stated. They, however, in challenging the application of S.K. Chatterjee have raised two contentions, first, that the interest claimed by S.K. Chatterjee is not one of a paramount character as contemplated by sub-clause (2) of Rule 1 of Order 40, Civil Procedure Code, and second, that the facts of this case are go complicated that the Court was justified to direct the claimant to institute a regular title suit in support of his claim, in support of the first contention the learned Government Advocate relied on the words of sub-clause (2) of Rule 1 of Order 40, Civil Procedure Code. That, as already quoted above, says :

> "Nothing in this rule shall authorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove".

The argument of the learned Government Advocate is that under this clause the possession of

that person alone is protected who in law should be such as cone of the parties to the suit may have a present right to remove him. In this case, according to the learned Government Advocate, the notification issued by the State on 29-5-1952, under Section 3, Land Reforms Act resulted in the vesting of the entire interest of the Ghatwalin in the State of Bihar including her interest in the building used primarily as cutcherry and her interests in trees, forests, fisheries, jalkars, hats, bazars and ferries and all other sairati interests as also her interest in all sub-soil including any rights in mines and minerals, whether discovered or undiscovered, or whether being worked or not, inclusive of such rights of a lessee of mines and minerals, comprised in such estate or tenure (other than the interests, of raiyats or under raiyats) and further thereafter consequences as given under Clauses (b) and (g) of Section 4, Land Reforms Act began to operate, Clause (b) says :

> "All rents, cesses and royalties accruing in respect of lands comprised in such estate or tenure on or after the date of vesting shall be payable to the State and not to the outgoing proprietor or tenure-holder and any payment made in contravention of this clause shall not be binding on the State Government."

Clause (g) reads :

> "Where, by operation of this Act, the right to the possession of any estate or tenure or any part thereof vests in the Stats, the Collector may, by written order served in the prescribed manner, require any person in possession of any lands and buildings other than the lands and buildings referred to in Sections 5, 6 and 7 comprised in such estate or tenure to give up possession of the same by a date specified in the order, and it shall be competent for the Collector to take or cause to be taken, such steps and use, or cause to be used, such force as, in the opinion of the Collector, may be necessary for securing compliance with the said order or preventing any breach of the peace".

He has, therefore, argued that in this case it cannot be said that the State of Bihar, which is one of the parties to the suit, has not the present right to remove S.K. Chatterjee from his possession over Basauri Mahal. In my opinion, the argument of the learned Government Advocate is without substance. Whatever may be the powers given to the Collector under the Land Reforms Act for starting proceedings against the person in possession of any part or parts of any estate or tenure vested in the State of Bihar under Section 3, Land Reforms Act, those powers cannot be said to be available to a receiver appointed during the pendency of the action or to any of the parties to the suit as such nor can those powers be said to be tantamount to a power having the same legal import as the power of removal contemplated by sub-clause (2) of Rule 1 of Order 40, Civil Procedure Code. The powers given to the Collector under the Land Reforms Act are different to the powers of removal of a third party to the suit under Order 40 Rule 1(2), Civil Procedure Code, by the outgoing landlord or the incoming landlord as such. The former cannotes the concept of ejectment and dispossession of a third party by the Collector on the ground of the statutory determination of his title in the estate and that too in a manner prescribed under that statute while the latter in the case of a third party to the suit implies a power to discharge or dismiss such a person under a right already present In any or both of the parties to the suit as such. This is clear from what Kerr on Receivers says at p. 150. That reads :

> "In appointing a receiver the Court appoints an officer of its own to take possession of the property over which he is appointed. The appointment, however, does not, without an express direction, effect any change in the possession of land, nor does it create an estate in, or (apart from statutory provisions) charge in favour of, receiver, or the person obtaining the appointment."

In the present case, as found above, S.K. Chatterjee has been in possession of Basauri Mahal from a time before 28-5-1952, as it is apparent from the document dated 14-5-1952, and in any case from a time before the appointment of the receiver and further that he is in possession on the basis of a document creating in his favour an interest in that property.
Therefore, his possession is not one which may be disturbed either by the Court or the receiver without any action being taken against S.K. Chatterjee by the Collector under sub-clause (g) of Section 4, Land Reforms Act. The case of - *'Mt. Dulhin Sona Kuer v. Mt. Jamil Ahmad[26]',* (AIR V 5) , relied upon by the learned Government Advocate in support of his contention on this point is not in the least of any avail to him. In that case one of the parties to the suit, wherein the relief sought amongst others was one for administration, mortgaged one of the properties in suit in favour of a third party and the third party on the basis of that mortgage brought the mortgage, property to sale and purchased it himself and thereafter came in possession of the same. While the third party was thus in possession, the Court appointed a receiver of all the properties which were the subject-matter of the suit. The receiver on his appointment tried to get possession over the properties in possession of the third party as well. The third party, however, refused to deliver its possession to him. The receiver thereupon brought the matter to the Court which had appointed him. The Court gave at decision in his favor. The third party being aggrieved by that order came to this Court in revision. Here it was argued on behalf of the third party that –

> "Under Order 40 Rule 1, sub-clause 2, the Court is not authorized to remove from the possession or custody of property any person whom any party to the suit has not a right so to remove; that Muhammad Umar as one of the heirs of Mt. Fasihan was a co-owner who had full power to give a mortgage to the extent of his share in the estate and that the other co-owners could only eject him if it was shown that he had taken possession of more than his proportionate share." In answer to this argument the learned Judges who heard the case held :
> "That is an argument which might have had some force if the transfer had been one before the suit, but it being 'pendente lite' I do not think there can be any doubt that the plaintiffs in the administration suit were competent to ask the Court to take possession of all the property in the custody not only of the co-owners but also of transferees who had obtained possession by transfers subsequent to the institution of the suit."

In my opinion, the aforesaid case is on its own facts clearly distinguishable. In the present case the agency coupled with interest was created in favour of S.K. Chatterjee long before the institution of the suit which ultimately at the appellate stage before the Supreme Court gave rise to the appointment of Faldani Kumari as the receiver of the estate. Therefore, the principle reported in 1918 Pat 668 (AIR V 5) , cannot apply to the facts of the present case.

25. Then comes the argument of Mr. J.C. Sinha appearing for the receiver on this point. What he has contended is that the documents dated 14-5-1952, and 18-6-1952, are not properly stamped, and, therefore, they are void documents and should not be looked into in support of any title claimed there under. This argument by him is based on the authority of *'Nandubai v. Gau[27]',* and on the principle laid down in *'Mulraj Khatau v. Vishwanath Prabhuram Vaidya[28]',*

26. In the case of 27 Bom 150 , the defendant Gau Halia had authorized the plaintiff,
his creditor, to receive a sum of money on his behalf, due to him by the Panjrapol authorities at Bhiwandi by a letter on an unstamped paper on the basis of which the plaintiff, it was alleged, had realised the money. Notwithstanding the fact that he had by then already realised his due, the plaintiff again sued the defendant for that money. At the hearing of the suit, the defendant relied on the letter written by him to Panjrapol authorities at Bhiwandi. In those circumstances the learned Subordinate Judge referred to the High Court two questions one of which was as follows :

> "Is the letter authorizing payment of the money to Mangaldas liable to stamp duty under Act 2 of 1899, and if so, with what stamp duty ?" In answer to that a Bench of the Bombay High Court consisting of Chandavarkar, Batty and Aston, JJ. observed :
> "It was a transfer of property by Gau Halia to his creditor in consideration of a debt due to the latter (see Section 24, Stamp Act, 2 of 1899). The letter falls, therefore, within the definition of 'conveyance' in that Act and must be stamped as such."

Relying on the principle stated above, Mr. J.C. Sinha has contended that the documents dated 14-5-1952, and 18-6-1952, should have been stamped as a conveyance and not merely as a deed of acknowledgment or a power of attorney. In my opinion, this contention is without force. Whatever may be the nature of the property transferred by the letter written in that case but here it cannot be said that Tikaitni Paldani Kumari under the documents dated 14-5-1952, and 18-6-1952, transferred any debt due to her. The document dated 14-5-1952 is on the face of it a deed of acknowledgment and the other dated 18-6-1952 a power of attorney and it was not contended that they were not stamped as such. That being so, it cannot be said that either of these documents is not properly stamped and is, therefore, vitiated in law.

27. Similarly, the case of 37 Bom 198 , does not deal with the point which falls for determination in the present case. In that case there were two creditors of a common debtor with regard to his policy of insurance. With one the debtor had deposited his policy and to the other had assigned it by an instrument in writing. In the course of the conflicting claim advanced by the two creditors over the insurance policy, the Court held, as it appears from the placitum :

> "The case was governed by Section 330, Sub-Section (1), Transfer of Property Act (4 of 1882, as amended by Act 2 of 1900) which precluded the application in India of the principles of English law; and the title of the appellant, as being based on an instrument in writing, and so conforming in all respects, with the provisions of that section, was absolute as against that of the respondent who acquired no right to the policy or its proceeds by reason of the deposit. The right to the proceeds was an actionable claim; and

> Section 130 covered transfers by way of security, as well as absolute transfers, as appeared from Illus. 2 to the section."

In this case the deed of acknowledgment dated 14-5-1952 or the power of attorney dated 18-6-1952 does not transfer any actionable claim. Therefore, the contention of Mr. J.C. Sinha on this point also falls.

28. The other point contended by the learned Government Advocate, as also pressed by Mr. J.C. Sinha appearing for the receiver, is that the grant of remedy to a third party by examination 'pro interesse suo' is a matter of discretion with the Court and that as in the present case the facts are very much complicated, the Court was right to refer S.K. Chatterjee to test his claim in a regular suit. In support of this contention the learned Government Advocate laid reliance on two cases, namely, - *'Sreedhar Chaudhury v. Nilmoni Chaudhury[28]',* (AIR V 12) and - 1927 Pat 297 (AIR V 14) (K). In 1925 Cal 681 (AIR v 12) , the third party claimants were the mortgagees on the basis of a document dated 22-1-1920. On 14-8-1923 a suit was instituted by those mortgagees for enforcing that mortgage in the Court of the Subordinate Judge at Dhanbad. In the meantime another suit was also instituted in a Subordinate Court in Bengal. That was for dissolution of partnership and partnership account of the concern of which, the mortgagor was one of the partners. In that suit a receiver was appointed and that receiver, it was alleged, instead of paying the interest due on the mortgage paid large sums of money to various other creditors in satisfaction of their unsecured debts and also filed a suit praying for a declaration that the mortgage of the third party was no longer subsisting and that the same had been over paid. The mortgagees thereupon filed an application before the Court which had appointed the receiver alleging that the mortgagees had a title paramount to that of the persons who procured the appointment of the receiver and that they were entitled to be examined 'pro interesse suo' and to establish their claim as mortgagees and to have the rents, issues and profits of the mortgaged properties already received and to be received by the receiver, applied in satisfaction of the in-cumbrances held by them. The Court on hearing the parties held :

> "I should have been glad to assist the mortgagees who claim a title paramount by making an order for their examination 'pro interesse suo', but for the reasons about to be given I must refuse the present application. My reasons are two in number. In the first place, there is the suit in the Dhanbad Court, where the mortgagees rights will have to be established, and there is also suit in this Court instituted by the receiver in which no summons has yet been served; and in the second place, an examination 'pro interesse suo' is never made unless the applicant shows diligence, and in this case the applicants have not shown diligence.

The applicants cannot be allowed now to come into this suit by petition for examination 'pro interesse suo' laying by the suit which they had begun in the Dhanbad Court to obtain the same relief. As the Master of the Rolls (Plumer M. R.) said in - *'Brooks v. Greathed[29]',* ,

> "it would not be consistent to give to the applicants that on petition, which they had themselves sought by another remedy. The conclusion, therefore, to
> which I have regretfully come, on the facts of this case, is that I must refuse

the present application."

29. This makes it clear that the decision in that case was mostly based on two considerations, firstly, on the facts that two suits relating to the mortgage were already pending, and, secondly, on the fact that the third party claimant had not been diligent in the prosecution of the remedy. In the present case none of these factors is present for no title suit, so far as we know, is pending in my Court relating to the interest claimed by S.K. Chatterjee nor it can be said on the facts of this case that S.K. Chatterjee was in any way lacking in diligence in prosecuting his remedy. The Government Advocate, however, in the course of his argument on this point gave some emphasis on the observation made in that judgment in the following passage :

> "No doubt, when a receiver is in possession of property under the process or authority of the Court his possession is not to be disturbed even by an ejectment under an adverse title without the leave of the Court, for the receiver's possession is deemed the possession of the Court and the Court will not permit itself to be made a suitor in a Court of law. The proper and usual mode adopted under such circumstances is for the party claiming an adverse interest to apply to the Court to be permitted to come in and be examined 'pro interesse suo' (See in this connection - *'Bearle v. Choat[30]',* (26)).

The practice in England is to allow the applicant to go before the Master and to state his title upon which he may in the first instance have the judgment of the Master and ultimately, if necessary, that of the Court, but where the question to be tried is a pure matter of title, the Court from a sense of convenience and justice will generally authorise a suit to be brought taking care, however, to protest the possession by giving proper directions. (See (1804) 9 Ves 335; (1820) Jac and W 176 ; - *'Bryan v. Cormick[31]',* - *'Hayes v. Haves[32]',* - *'Empringham v. Short[33]*." This passage, in my opinion, does not add much to what I have already stated above that the power in the Court though discretionary has to be exercised judicially and not arbitrarily as has been done in this case. The order under revision does not show that the learned Subordinate Judge at all applied his mind to this aspect of the question and in any case did not dismiss his application on the ground that the facts were too complicated to be decided in an application for examination 'pro interesse suo'. The other case, e.g., 1927 Pat 297 (AIR V 14), does not also anyway improve the matter. Therein Das, J. held :

> "As has been pointed out there are two remedies available to the plaintiffs; one to go to the District Judge and apply to be examined 'pro interesse suo'; the other to institute a suit as against the receiver with the sanction of the learned District Judge of Hoogly. As I have said, in a case of this nature, where complicated questions of fact arise, the proper remedy would be a suit with the leave of the Court."

The learned Government Advocate, in his efforts to bring his case within the rule of
law, laid down in the aforesaid authorities tried to establish that as a result of the vesting of the Pethrole Estate in the State of Bihar by the notification dated 29-5-1952, the facts of this case and the question of rights between the parties have become too much complicated, and, therefore, the proper remedy to be followed in a case like this for a third party claimant is to try his claim in a regular suit and not by an examination 'pro interesse suo'. I have already dealt with this aspect of

the contention in the earlier part of my judgment. I do not think that the question of vesting as contended can on the facts of this case stand in the way of the application of the law as laid down in clause (2) of Rule 1 of Order 40, Civil Procedure Code. Mr. J.C. Sinha on the other hand, in supporting the order of the learned Subordinate Judge tried to raise the issue that the amount of debt claimed by S.K. Chatterjee as stipulated in the documents dated 24-8-1951 and 14-5-1952 was not at all correct and was put therein as a result of his manipulation. In other words, he lies contended that the debt even if any has by now been completely wiped out as stated in the counter-affidavit sworn on behalf of the receiver, and, therefore, under clause (2) of Rule 1 of Order 40 the outgoing landlord has a present right to remove him. In that view of the matter, he has suggested that the case should be sent back to the learned Subordinate Judge to find out as to whether the debt claimed by S.K. Chatterjee does or does not exist at present. In my opinion, his point is beside the issue and the order under revision has not been passed on that aspect of the case. If, however, the client of Mr. Sinha wants to raise an issue like this, it is open to him to take necessary steps for the relief that the right and title claimed by S.K. Chatterjee has now been determined as a result of the total satisfaction of the debt due to him and, therefore, his possession with the property should not be continued any further, I have no doubt that an action if taken by the client of Mr. Sinha on this line will be properly dealt with in due course by the Court concerned. At present, however, in considering the order under revision this question needs no decision.

30. In view of what I have stated above it has, therefore, to be held that there is no ground for holding that for the decision of the right claimed by S.K. Chatterjee the facts are so complicated that the Court should have necessarily without even applying its mind to it referred him to a title suit for testing his claim.

31. The only other point now left is as to the interest claimed by Prahlad Pd. Modi. The case against him has been mostly based on the interpretation of an order passed by the learned Subordinate Judge on 12-9-1955. That order reads :

> "At present the matter is pending before the Hon'able Supreme Court. Until its decision it is hazardous to pronounce any judgment regarding the validity or otherwise of the applicant's lease. For this reason, the parties have agreed that the matter may be raked up after decision by the Hon'ble Supreme Court. If the Ghatwalin succeeds, he will insist upon acting on the lease. Otherwise she will have to fall back upon the amount of compensation that will be allowed to her. In this light the matter stands disposed of."

On the side of the receiver it has been contended that it meant that the lessee had consented to the possession of the receiver and to suspend his right, if any, till the decision of the appeal pending in the Supreme Court while on the side of the petitioner Prahlad Pd, Modi it was contended that it meant that the status quo would be maintained and is would be left in possession over the property on the basis of the lease till the disposal of the appeal pending in the Supreme Court. We have carefully gone through all the order-sheets and in our opinion it appears that the interpretation put by the petitioner is more probable and consistent with the facts alleged by him. In that view of the matter, it cannot be held that the petitioner Pralhad Pd. Modi at any stage waived his right in any form or manner in favour of the receiver.

32. The learned Government Advocate, however, further raised the point that the interest claimed by Prahlad Pd Modi is in the nature of an incumbrance as contemplated by Section 161, Bihar Tenancy Act and Section 2(t), Land Reforms Act, and therefore the State of Bihar on the vesting of the whole Pathrole Estate in it has a right to avoid it. In support of this contention reliance has been placed by the learned Government Advocate on the cases of - *'Sm. Tayefa Khatun v. Surendra Kumar[34]',* (AIR V 19) and - *'Profulla Nath v. Santosh Kumar[35]',* (AIR V 27) . In my opinion, this question, does not arise for consideration, here. It has been admitted that the State of Bihar has not so far taken any action for avoiding the interest claimed by Prahlad Pd. Modi even if it be held that the right claimed by him is in the nature of an incumbrance and the State of Bihar has power under the Land Reforms Act to annul, such an incumbrance. Therefore, this point also fails.

33. Lastly, Mr. J.C. Sinha has attacked both the applications on the ground that they are not maintainable in law under Section 115, Civil Procedure Code. According to him, as the present receiver was not appointed by the trial Court or any Court subordinate to this High Court, therefore, any order passed in the matter of receivership of Tikaitni Faldani Kumari by the trial Court cannot be said to be one passed by it in. the capacity of a Court. In other words, what he has contended is that as the trial Court became 'functus officio' as soon as the judgment in Title Suit No. 23 of 1952 was delivered by it, therefore the orders under revision that were passed thereafter by it were made on the authority given to it by the Supreme Court and not on the authority possessed by it as a Court and as such these orders were passed by it as an agent of the Supreme Court. I must confess that I have not properly appreciated this part of the argument of Mr. J.C. Sinha. To me it appears that the appointment of Tikaitni Faldani Kumari as the receiver in the case under the orders of the Supreme Court was made tantamount to an appointment made by the trial Court itself. That order says :

> "That the said petitioners-appellants be deemed to have been appointed for all purposes as receivers by the Subordinate Judge, Depghar, and shall act under the direction of the said Subordinate Judge."

That being the position, it has to be held that the orders under revision passed by the trial Court in that matter have been made by it as a Court. Therefore, I think the argument on this point advanced by Mr. J.C. Sinha has no merit whatsoever.

34. In the result, therefore, I think that the interests claimed by the petitioners S.K. Chatterjee and Prahlad Prasad Modi are such as should so far be held protected under clause (2) of Rule 1 of Order 40, Civil Procedure Code, and, therefore, the receiver, unless some other new facts are brought to the notice of the Court, is not justified in interfering with their possession over the interests claimed by them.

35. For the reasons stated above, I hold that the applications should be allowed and the orders under revision passed by the learned Subordinate Judge should be set aside. In the circumstances of these cases there will be no order as to costs.

Misra, J.

36. I agree that the two applications should be allowed.

Applications allowed.

Cases Referred.

[1]7 Bom HCR AC 10
[2](1830) 10 B and C, 731
[3](1802) 7 Ves 3 (28)
[4](1842) 9 M and W 411 (420)
[5](1830) 1 Russ and M 602
[6](1839) 4 My and Cr 690
[7](1844) 67 ER 467
[8](1912) 2 Ch 497 (501)
[9]1927 Pat 397
[10]1927 Pat 297
[11]35 Mad 578
[12](1822) 37 ER 966
[13]36 Cal 713
[14](1804) 9 Ves. 335 (339)
[15](1827) 4 Russ 64
[16]10 Suth WR 430
[17](1865) 34 LJ Ch 607
[18](1876) 2 Ch D 291
[19](1878) 10 Ch D 153
[20](1874) 18 Eq 298
[21](1887) 20 QBD 209
[22](1898) 123 Alab 376
[23](1860) 11 Wis. 454
[24](1838) 7 page N. Y. 65
[25]1918 Pat 364
[26]1918 Pat 668
[27]27 Bom 150
[28]37 Bom 198 (PC)
[28A]1925 Cal 681
[29](1820) 1 Jac and W 176 (178)
[30](1884) 25 Ch D 723
[31](1738) 1 Cox Eq 422
[32](1674) 1 Ch 223
[33](1844) 3 Hare 461 (1844) 3 Hare 472)
[34]1932 Cal 165
[35]1940 PC 187