PATNA HIGH COURT

Sidheshwar Prasad Singh

Vs

Ram Saroop Singh

A.F.A.O. No. 110 of 1961 and A.F.A.D. No. 516 of 1961

(V. Ramaswami, C.J., Kamla Sahai and Kanhaiya Singh, JJ.)

16.05.1963

JUDGMENT

Kanhaiya Singh, J.

1. These two appeals have been heard analogously, as common question of law is involved, but the facts, being different, have to be stated separately. Miscellaneous Appeal 110 of 1961.

2. The respondents instituted a suit in the Court of the Subordinate Judge, Gaya, to enforce six mortgages in respect of proprietary shares in village Dharnai Madanpur, tauzi No. 3739 which included bakasht lands also. The suit was decreed on contest and a preliminary decree was passed on 15-11-1951. Against that decree, the appellants preferred on 20-3-1952 a First Appeal in this Court numbered as First Appeal 87 of 1952. During the pendency of this appeal, the preliminary decree was made final on 1-8-1953. On 23-9-1953, the respondents presented an application for execution of the final decree, numbered as Execution Case 11 of 1953. In the meantime, the Bihar Land Reforms Act, 1950 (hereinafter referred to as the Bihar Act), came into force, and by virtue of a notification published under Section 3-A of the Bihar Act, the instant estate passed to and became vested in the State on 26-1-1955. On 25-7-1955, the decree-holders respondents filed an application under Section 14 of the Bihar Act, notifying their claim to the Claims Officer for the purpose of determining the amount legally and justly payable to them in respect of these mortgages. In view of their lodging this claim, they did not prosecute Execution Case No 11 of 1953, which was eventually dismissed for default on 27-9-1955. But it seems that later they changed their mind and took no steps in the Claim case under Section 14 of the Bihar Act, and, in consequence, it was dismissed for default on 5-12-1956. During all this time, First Appeal No. 87 of 1952 remained pending, and, ultimately by an order of this Court dated 12-5-1959, it was dropped. Thereafter, the decree-holders respondents levied a second execution on 29-7-1959 for recovery of the mortgage debt by sale, not of the milkiat interest which, having vested in the State, was no longer available, but of the bakasht land comprised in the said milkiat.

3. One of the judgment-debtors, Sidheshwar Prasad Singh, the appellant before us, filed an application under Sections 47 and 151 of the Code of Civil Procedure objecting to the execution

of the decree, on the ground, first, that the execution was barred by limitation under Article 182 (2) of the Limitation Act and also under Section 4 (d) of the Bihar Act; and, second, that having proceeded under Section 14 of the Bihar Act, they were precluded from executing the mortgage decree in Civil Court. The other objections raised by the appellant are not material for the present purpose.

4. The learned Subordinate Judge held that the execution was not barred under clause (2) of Article 182 of the Limitation Act, and that, sines they first elected to pursue their remedy in Civil Court, the subsequent preferring of a claim under Section 14 of the Bihar Act did not preclude the decree holders from executing the decree in a Civil Court. He accordingly dismissed the miscellaneous case and allowed the execution to proceed.

5. On appeal, relying upon the decision of a Full Bench of this Court in *Mahanth Sukhdeo Das v. Kashi Prasad Tewari*[1], the learned Additional District Judge held that the bakasht lands could be proceeded against to recover the mortgage debt. He also found against the appellant on the question of limitation also. He, however added that the determination of the value of the property to be sold under Section 13 of the Bihar Money-Lenders Act was imperative. With this modification, he affirmed the decision of the Subordinate Judge. It is against that order that the present appeal has been filed.

6. This appeal was first placed before a Single Judge of this Court. The learned Judge thought that the subsequent decision of the Supreme Court in *Krishna Prasad v. Gouri Kumari Devi*[2], affirming the decision of this Court in *Sm. Gauri Kumari Devi v. Krishna Prasad*[3], was in conflict with the decision of the Full Bench of this Court in the case of Mahanth Sukhdeo Das, 1958 BLJR 559 , aforesaid and, therefore, referred the case to a larger Bench for an authoritative decision. Second Appeal 516 of 1961:

7. The defendants executed on December 29, 1951, a simple mortgage for a sum of Rs. 2785/-in favour of the plaintiffs'ancestors, hypothecating their 4 annas 6 gandas and odd share in the estate bearing tauzi No. 2395 in village Dardha Chawsaj. The mortgaged estate consisted of cash collections and bakasht lands. Thereafter, the Bihar Act came into force, and this estate vested in the State on 1st January, 1956. The mortgagees filed before the Claims Officer an application under Section 14 of the Bihar Act for determination of the amount of the mortgage debt, which the Claims Officer eventually did. The amount so determined was recoverable out of the compensation money payable under the Bihar Act. The plaintiffs, however, ignored the order presumably because the amount determined was not sufficient to satisfy the entire mortgage debt and raised the present suit, which has given rise to this appeal, for enforcement of the mortgage against the bakasht lands on the ground that they had abandoned their claim under the Act and did not want to enforce the order of the Claims Officer, that under Section 6 of the Bihar Act the bakasht lands remained with the intermediary mortgagees, and since they constituted substituted security they could be proceeded against to satisfy the mortgage debt.

8. The defendants admitted the execution of the mortgage bond, but resisted the suit on the ground that having elected to proceed under the Bihar Act for determination of the mortgage debt justly due to them, the plaintiffs were prevented from suing upon the mortgage. The learned Subordinate Judge gave effect to the contention of the defendants and dismissed the suit. On appeal, the learned District Judge agreed with the learned Subordinate Judge that, having elected to proceed under Section 14 of the Bihar Act, the plaintiffs were debarred from seeking the

alternative remedy in any Civil Court. He also held that under Section 4 (d) of the Bihar Act the jurisdiction of the Civil Court was ousted and the suit was not maintainable. He accordingly affirmed the decision of the learned Subordinate Judge and dismissed the appeal. Now, the plaintiffs have preferred the Second Appeal. This appeal also was first placed before a Single Judge of this Court who, in view of the identity of the questions canvassed in these two appeals, referred it to a larger Bench to be heard along with the aforesaid Miscellaneous Appeal.

9. This is how these two appeals have come before this Full Bench. The important question presented to the Full Bench is whether the previous decision of the Full Bench in the case of Mahanth Sukhdeo Das, 1958 BLJR 559 , that Section 4 (d) of the Bihar Act does not operate as a bar to a suit or proceeding to recover money secured by a mortgage of or charge on an estate or tenure by sale of the Bakasht lands comprised in such an estate or tenure after such estate or tenure has vested in the State of Bihar has been overruled by the Supreme Court in the case of Krishna Prasad, AIR 1962 S C 1464.

10. Before I consider the effect of the latest pronouncement of their Lordships of the Supreme Court on the decision of the Full Bench in the case of Mahanth Sukhdeo Das, 1958 BLJR 559 , aforesaid, it will be useful to refer to the previous decisions of this Court on this point. By virtue of the general notification issued under Section 3-A of the Bihar Act, the intermediary interests of all intermediaries in the whole of the State, including the two estates in question, passed to and became vested in the State by January 1956. Prior to this, the State had power to acquire such estates or tenures of the proprietors or tenure holders as were specified in the notification. Under Section 3, the State Government was empowered to declare by notification that the estates or tenures of a proprietor or a tenure holder specified in the notification had vested in the State. Certain proprietors and tenure holders owned and possessed several estates and tenures, and it so happened that of the estates in mortgage, some were notified and some not. In this confused state of affairs, the question arose whether Section 4 (d) of the Bihar Act barred suits to enforce a mortgage in respect of the estates that had not vested. This question first came up for decision before a Bench of this Court in *Raghubir Saran v. Kaviraj Basudevanand*[4], and it has been laid down that Section 4 (d) must be interpreted to mean that no suit shall be brought in any Civil Court for the recovery of the mortgage money or money secured by a charge so far as the vested estates are concerned, and if a suit or proceeding is already instituted, such suit or proceeding shall be dropped so far as the vested estates are concerned. In other words, Section 4(d) will not be applicable to a case where money is secured by a mortgage or charge on estates, some of which are notified under Section 3 of the Bihar Act, and others are not so notified, and in such a case Section
4(d) will be a bar to the suit or execution proceeding so far as the vested estates are concerned, but the creditor will be entitled to prosecute the suit or execution proceeding as regards the estates or portions of estates which are not vested in the State. The question, however, remains whether the creditor is entitled to both the remedies, that is to say, to execute a mortgage decree in Civil Court against the non-vested estate and to file a claim under Section 14 of the Bihar Act before the Claims Officer as regards the properties which have vested in the State. The Bench, however, ruled that both the remedies are not available simultaneously, and it is open to the creditor to make an election as to the choice of his remedies in a case of this description. It is open to him either to give up his right of filing a claim under Section 14 with respect to the vested estates and to prosecute the suit or execution proceeding exclusively in Civil Court. On the other hand, the creditor may give up his remedy in the Civil Court and prosecute his claim

solely under Section 14 before the Claims Officer who will proceed under Section 16 to re-open the decree and to grant necessary relief. This decision was given on May 8, 1953. On 4-1-1956 a contrary view was taken by another Bench in *Nihar Ganguli v. Rai Anath Nath Basu*[5], The ratio decidendi of this case is that where a decree-holder has got two remedies, one before the executing Court and the other before Claims Officer under Section 14 of the Bihar Act, it is open to him to pursue both the remedies simultaneously, and the Court cannot compel the decree-holder to elect one and abandon the other. In the case of Sm. Gauri Kumari Devi, AIR 1957 Patna 575 decided on 8-1-1957, all the properties under mortgage had vested in the State of Bihar, and their Lordships have laid down that where all the properties under a mortgage or a charge have under the Bihar Act vested in the State of Bihar, Section 4(d) comes into operation and bars the suit either to enforce the mortgage or charge in a Civil Court or for a personal decree against the mortgagor. They have further pointed out that the observation of the Bench in the case of Raghubir Saran, 1953 BLJR 563 to the effect that Section 4(d) did not bar a proceeding for a personal decree under Order 34, Rule 6 of the Code of Civil Procedure was a mere obiter dictum.

11. Because of the apparent inconsistencies in the various decisions aforesaid as to the interpretation of Section 4(d), the case of Mahanth Sukhdeo Das, 1958 BLJR 559 (FB), which came before this Court, was referred to a Full Bench for an authoritative pronouncement. One of the questions referred to the Full Bench is :

> "Whether under the provisions of the Bihar Land Reforms Act, a decree-holder mortgagee of the interest of the proprietor whose estate has vested in the State of Bihar under Section 3 of the said Act is entitled to proceed against the bakasht lands of the proprietor comprised in the said estate for recovery of his mortgage decree "

Before I state the decision of the Full Bench, it will be necessary to state succinctly the facts of that case. On the 8th April, 1940, a simple mortgage in respect of 16 annas share in tauzi. No. 8537 was executed for a sum of Rs. 5000/-. On the 31st May, 1943, the appellant purchased the equity of redemption to the extent of ten annas in the tauzi On the 15th March, 1952, a mortgage suit was brought on the basis of the mortgage, and on the 17th March, 1954, a mortgage decree was obtained. On
the 29th March, 1954, a preliminary decree was drawn up, and on the 14th April,
1955, the final decree was passed. On the 2nd May, 1955, execution was taken out in Execution Case No. 14 of 1955 Then on the 1st January 1956, under the provisions of Section 3 of the Bihar Act, the estate vested in the State of Bihar. Hence, on the 22nd February, 1956, an objection under Section 47, Civil procedure Code, was filed by the judgment-debtor, the appellant, to the effect that further proceedings in the execution case must now be dropped by reason of the provisions of Section 4(d) of the Bihar Act. The decree-holder submitted to the learned Subordinate Judge that he now intended to proceed against the bakasht lands only in execution of his decree. The learned Subordinate Judge found that the decree-holder was entitled to proceed against the bakasht lands in execution of his decree as the bakasht lands had been saved from vesting absolutely in the State and were permitted to be retained by the intermediary who was in possession of them. The objection raised by the judgment debtor was, therefore, rejected. Jamuar, J., peaking for the Court, has observed as follows :

"That Section 4(d) of the Land Reforms Act has not the effect of destroying the entire mortgage and does not bar the entire remedy of the mortgagee is plain enough. It is well to remember that this Act deals only with the interests of proprietors or tenure holders. So far as the occupancy holdings of raiyats are concerned, they are outside the scope of this Act. Now, suppose a person has borrowed money on the security of 100 bighas of his bakasht land and a fractional share or proprietary interest which fetches only a nominal income. On the enforcement of this Act the proprietary interests will now vest in the State. The occupancy holdings, however, will remain with the tenants. Now, can it be said that the mortgagee cannot enforce his mortgage against the raiyati lands : I think the answer is an emphatic no. There is nothing in this Act to bar the remedy of the mortgagee to enforce his mortgage against the raiyati lands. It is true that the proprietary share is no longer available by virtue of Section 4(d) since the estate has vested in the State tree from encumbrances. There is no law, however, to debar a mortgagee from realising his mortgage debt from the lands which did not vest in the State under the provisions of the Act. In such a situation one cannot force the mortgagee to seek his remedy as provided in Section 14 of the Land Reforms Actand to satisfy his mortgage debt out of the compensation payable under the Act. It is also sufficiently obvious that in such a case the option rests with the mortgagee either to proceed against the property not covered by this Act or against compensation payable under this Act in the manner laid down therein. It is for him to decide what course will best serve his purpose. But, I see no warrant for the contention that he must be forced to pursue the remedy provided in the Act. The resultant injustice from such a construction is too clear to require a detailed discussion. If I am correct in this view, there is no reason why the mortgagee will be debarred from pursuing his remedy against the lands which were part of the estate but has been statutorily settled with the proprietor or tenure holder by virtue of Section 6 of the Act. If the mortgage security consists of an estate yielding cash income and comprising bakasht lands, there is no reason why the mortgagee will be forced to confine his remedy only to the compensation payable and not to enforce the mortgage against the bakasht lands simply because on the vesting of the estate they changed their character and constituted the raiyati lands of the ex-proprietor or ex-tenure holder. In principle. I see no difference between bakasht lands as such and the lands which were originally raiyati lands. It is true that under Sections 3 and 3A the entire estate or tenure vests in the State of Bihar absolutely and not only the right, title and interest of the proprietor or tenure holder vide *S. N. Chaudhury v. State of Bihar*[6], But the word 'vest'does not imply that after the date of vesting no interest at all is left with the ex-proprietor or ex-tenure holder. What actually vests is the subject-matter of Section 4. It deals with the consequences which ensue on the vesting of the estate. It provides that the estate shall with effect from the date of vesting vest absolutely in the State free from all encumbrances. This general provision is subject to qualification enacted in clause (a) of Section 4. This clause provides further that the proprietor or tenure holder after the vesting shall cease to have any interests in the estate or tenure, other than the interests expressly saved by or under the provisions of this Act.

> One of the interests saved is what is laid down in Section 6 of the Act, namely, that bakasht lands will continue to remain in possession of the ex-proprietor or ex-tenure holder, but not in the character of bakast lands but as raiyati lands. They will cease to be proprietors and they will be regarded as raiyats of such lands from or after the date of vesting. Therefore, the combined effect of Sections 3, 3A, 4 and 6 is that the lands in cultivating possession of the intermediaries do not vest absolutely in the State but remain with the intermediaries and will be deemed to be settled with them. In other words, since after the date of vesting they will hold such lands not as proprietors or tenure holders but as raiyats. The State will not be entitled to resume Khas possession of such lands notwithstanding the fact that the estate has vested as provided in Sections 3 or 3A and 4 of the Act. The right of the State is restricted only to realisation of rent that may be assessed in such lands in accordance with the provisions of the Act. The net result is that such bakast lands main with the proprietors although in an altered character..... In other words, the interests which are expressly reserved to the proprietors or tenure holders under the provisions of this Act are not affected by Section 4(d), with the result that the mortgage in respect of such interests will remain infact. In my considered opinion, the effect of Section 4(d) read with Sections 3 and 6 of the Act is not to destroy the mortgage in its entirety, but only with respect to that part of the estate which has vested absolutely in the State and no interest therein is left with the mortgagor proprietor or tenure holder. In other words, the mortgage remains operative so far as the lands covered by the provisions of Section 6 are concerned as also the lands not coming within the mischief of the Act, such as the original raiyati lands..... The State does not take over the bakasht lands of the proprietor, for, the interest in bakasht lands is saved under Section 4(a), and under Section 6 it is retained by the proprietor. There is transmutation in the nature of the title. It must become a substituted security, and the altered title becomes available for the mortgagee to operate upon."

12. The basic propositions laid down by the Full Bench are that

> (1) that mortgage is not necessarily completely destroyed as a result of the vesting of the estate under the provisions of the Bihar Act;
> (2) the mortgage debt is not barred, but remains alive, even, after the vesting;
> (3) the mortgage security is destroyed only in respect of the interests that have vested in the State without reservation, and not in respect of other interests;
> (4) the intermediaries become statutory tenants in respect of the bakasht lands, because such lands, though comprised in an estate, are deemed to be settled by the State with the intermediaries; and
> (5) thus, bakasht lands are available to the mortgagees on the basis of substituted security or accession to the mortgaged property.

It is manifest that the Full Bench proceeded on the assumption that by operation of Sections 4 and 6 of the Bihar Act, bakasht lands constitute an entity separate and distinct from the estate,

which has vested in the State without reservation. It thus makes a distinction between the property that has vested and the property that has not vested and, according to the Full Bench, the mortgage can be enforced against the property that has not vested but under Section 4 (d) a mortgage cannot be enforced against the property that has vested in the State.

13. The main proposition laid down by the Full Bench aforesaid, namely, that bakasht lands must be differentiated from the estate proper that has vested in the State without reservation and are retained by the landlord, though in an altered character, is not at all affected by the decision of the Supreme Court in the case of Krishna Prasad, AIR 1962 SC 1464. In order to appreciate the decision of the Supreme Court, it will be necessary to state the relevant facts of that case. The respondent, Smt. Gouri Kumari Devi, executed a registered anomalous mortgage (combination of sudbharna and simple mortgage) in favour of the appellants on July 10, 1937, hypothecating 10 annas 8 pies Hakiat Milkiat of village Sonchari, Mouza No. 11912 in the district of Patna which was the zamindari property and 16.41 acres of Khudkasht land appertaining to khata No. 3 of the said mouza. The appellants sued on this mortgage in the Court of the Subordinate Judge at Patna and obtained a preliminary decree on the 26th August, 1946, followed by a final decree on September 30, 1947. The appellants levied execution to recover the mortgage debt by sale of the mortgaged zamindari properties. The respondent raised an objection on the ground that the mortgaged properties had in the meanwhile vested in the State of Bihar under the provisions of the Bihar Act and so they were not liable to sale in execution proceedings as the respondent had ceased to have any interest in them. Ultimately, the execution case was dismissed on January 9, 1954. In view of the objection taken by the respondent, the appellants applied for transfer of their decree for execution to the Gaya Court, intimating to the Court that they wanted to execute the decree against the respondent by proceeding against her properties other than those which were the subject-matter of the mortgage. They alleged that they were entitled so to do by reason of the personal decree which had been passed against her. The decree was transferred, and the appellants presented an application for execution in the Court of the Subordinate Judge, Gaya, and sought to recover the decretal amount by attachment and sale of the other properties belonging to the respondent. The respondent filed an application under Section 47 of the Code objecting to the maintainability of the execution on the ground that no personal decree had been obtained against her. She further contended that the appellants could not proceed against her other properties, because their remedy was to follow the compensation money which would be given by the State of Bihar to her in lieu of her properties which had vested in the said State. The executing Court held that the appellants had obtained a personal decree against the respondent and they had a right to sell her other properties in execution of the said personal decrees. On revision, the High Court took a different view. It held that the appellants had no right to execute the personal decree by proceeding to sell the other properties of the respondent, for Section 4(d) constitutes a bar against such proceedings, and dismissed the execution application. On appeal, the Supreme Court affirmed the order of the High Court, but not the ratio decidendi. Their Lordships of the Supreme Court have laid down :

> "The scheme of the relevant provisions of the Act to which we have already referred unambiguously suggested that where the whole of the mortgaged property is an estate, certain consequences follow. The decree-holder has to make a claim; the claim has to be enquired into by the Claims Officer; the amount due to the decree-holder has to be determined by the Claims Officer and the amount so determined has to be paid to the

decree-holder from out of the compensation money payable to the judgment-debtor. Having regard to the said scheme, it is difficult to confine the application of Section 4(d) only to execution proceedings in which the decree-holder seeks to proceed against the estate of the debtor. In fact, an execution proceeding to recover the decretal amount from the estate which has already vested in the State, would be incompetent because the said estate no longer belongs to the judgment-debtor. That being so, we are satisfied that on the facts of this case, the High Court was right in holding that the application made by the appellants to execute the decree against the respondent by proceeding against her non-mortgaged properties is incompetent at the present, stage The amount due to the appellants under the decree in question has been already determined by the Claims Officer and the appellants must first seek to recover that amount as provided by the relevant provisions of the Act before they proceed to execute the personal decree." In substance, their Lordships have laid down that Where the whole of the property mortgaged constituted an estate and has vested in the State, section 4(d) bars a suit to enforce the mortgage, or execution proceeding to recover the mortgage decree by sale, not only of the properties which had vested in the State, but also of other properties belonging to the mortgagor. In such a case, the only remedy left to the mortgagor is to proceed under Chapter IV of the Bihar Act and to recover the amount determined by the Claims Officer out of the compensation money. He cannot ignore the provisions of the Bihar Act and proceed to recover the amount from the other property of the judgment-debtor. The Full Bench was considering a case where part of the mortgaged property had vested in the State and part not. It included the bakasht lands in that part of the mortgage, which had not vested. On the other hand, the Supreme Court was dealing with a case where the whole of the mortgaged property constituted an estate and had vested in the State. It will be noticed that in the case of Krishna Prasad 16.41 acres of khud-kasht lands had been mortgaged but it is not clear from the facts whether those lands had ceased to be khudkasht prior to the vesting of the estate. Any way, no distinction was made in that case with respect to the khudkasht land. In the High Court as well as in the Supreme Court, the case proceeded on the assumption that the whole of the mortgaged property had vested in the State. Their Lordships of the Supreme Court have pointed out this distinction thus :

"We have already emphasised that in the present case, the whole of the mortgaged property is an estate and, therefore, it is unnecessary for us to consider what would be the effect of the provisions of Section 4(d) in cases where part of the mortgaged property is an estate and part is not. It is also unnecessary to consider whether section 4(d) would create a bar even in cases where the compensation amount payable to the mortgagor is insufficient to satisfy the mortgagee decree-holdder's claim even to the extent of the amounts scaled down under Section 16."

This observation focuses the distinction between the case before the Full Bench and the case before the Supreme Court. In fact, the attention of their Lordships of the Supreme Court was drawn to the decision of the Full Bench, and they declined to express any opinion on the correctness or otherwise of that decision. To quote their own words :

> "In AIR 1958 Patna 630, the Full Bench of the High Court had occasion to consider whether a mortgagee decree-holder of the interest of the proprietor whose estate has vested in the State, is entitled to proceed against the Bakasht lands of the proprietor comprised in the said estate for recovery of the amount due to him under the mortgage decree, and it was held that in such a case, the mortgagee cannot be forced to seek his remedy under Section 14 and to satisfy his mortgage debt out of the compensation payable under the Act. It. appears that the Full Bench was inclined to take the view that the interest of the judgment-debtor in the bakasht lands was one of the interests saved by Section 6 and that, in consequence, the bakasht lands continued to remain in the possession of the proprietor not in the character of bakasht lands but as raiyati lands and since these lands were a part of the security offered by the mortgage-deed, the decree-holder was entitled to proceed against them without taking his remedy under Section 14 of the Act. This conclusion was based on the view that the effect of Section 4(d) read with Sections 3 and 6 of the Act was not to destroy the mortgage in its entirety but only with respect to that part of the estate which had vested absolutely in the State and no interest therein is left with the mortgagor proprietor or tenure holder. It is conceded by Mr. Jha that this decision also proceeds on the assumption that the mortgage security consists of an estate which has vested in the State and of bakasht lands which did not, in substance, vest in the State but continued with the mortgagor as raiyati lands. Therefore, it is not necessary for us to examine the merits of the conclusion reached by the Full Bench in this case."

It will be observed that the main decision of the Full Bench that the bakasht lands continued to remain in possession of the intermediaries even after the vesting of the estate, not in the character of bakasht lands but as raiyati lands, and since these lands were a part of the mortgage security, they were available for satisfaction of the mortgage debt, without following the remedy under Section 14 of the Bihar Act is not at all shaken by the Supreme Court; rather, their Lordships have referred to this part of the reasoning of the Full Bench and have refrained from expressing any opinion one way or the other. In the face of the unequivocal observations of their Lordships of the Supreme Court, it is difficult to accept the contention that the decision of the Full Bench is no longer a good law. It was emphasised that their interpretation with respect to the scope and effect of Section 4(d) had indirectly overruled the decision of the Full Bench, notwithstanding their observations to the contrary. The construction put upon Section 4 (d) by the Supreme Court cannot be considered in the abstract, divorced from the facts of that case. As has been pointed out by their Lordships more than once, they were considering a case where the whole of the mortgaged property had vested in the State. It is obvious and beyond controversy that where the entire mortgaged property forming an estate or tenure vests in the State, the mortgagor has no remedy except by an application under Section 14 of the Bihar Act. He cannot enforce the mortgage in any other way, and the remedy available in a Civil Court is barred under Section 4(d). Where the mortgaged property is divisible into two - one that has vested and the other that has not vested - it is outside the ambit of the principles laid down by the Supreme Court. If the bakasht lands are deemed to remain with the mortgagor-landlord, although in a transmuted character, and by operation of Section 6 of the Bihar Act such lands are regarded as an interest in

the estate that has been saved and is retained by the landlord, then it cannot be regarded as, and in fact it is not, a part of the estate which has vested in the State and of which the State becomes the absolute owner. The decision of the Full Bench proceeds on the basis that the bakasht lands are distinct and separate from the estate proper that has vested in the State and despite the vesting, the mortgagee will be entitled in law to proceed against the bakasht lands for realisation of the mortgage dues. That is the important ratio decidendi of the Full Bench decision, and this part of that decision, it will be noticed, is not at all affected by pronouncement of their Lordships of the Supreme Court. Nowhere has the Supreme Court laid down that the bakasht lands are in no case available to the mortgagee. If the bakasht lands are deemed to be different from the estate that has vested, as held by the Full Bench, and the Supreme Court has not pronounced to the contrary, the inescapable conclusion is that such lands do not come within the mischief of Section 4(d) and can be proceeded against for satisfaction of the mortgage debt.

14. A reference was made to an earlier decision of the Supreme Court in *Rana Sheo Ambar Singh v. Allahabad Bank Ltd*[7]*.,* arising out of the U.P. Zamindary Abolition and Land Reforms Act, 1951 (hereinafter referred to as the U.P. Act). The provisions of the U.P. Act with regard to the vesting of the estates and the consequences thereof are in some respects, though not in all, almost similar to those of the Bihar Act. Section 4 of the U. P. Act provides for vesting of an estate in the State on the making of a notification thereunder, and Section 6 prescribes the consequences thereof. One of the consequences is that all rights, title and interests of all the intermediaries in every estate shall cease and be vested in the State of Uttar Pradesh free from all encumbrances. But clause (h) of Section 6, like Section 4(d) of the Bihar Act, bars enforcement of any mortgage or charge against the interests of the intermediaries in the estate that has vested, except as provided in Section 73 of the Transfer of Property Act, 1882. Section 9 creates an exception to the property which vests in the State.
Under this section trees and wells in abadi and buildings, apart from the lands under them, shall continue to belong to the intermediary, but the land on which the buildings and the walls stand vest in the State, and it is deemed to be settled with the intermediary on prescribed terms and conditions. Section 18, corresponding to Section 6 of the Bihar Act, omitting portions not relevant, is in these terms :

> "(1) Subject to the provisions of Sections 10, 15, 16 and 17, all lands
> (a) in possession of or held or deemed to be held by an intermediary as sir, khudkasht of an intermediary's grove,
> * * * *

on the date immediately preceding the date of vesting shall be deemed to be settled by the State Government with such intermediary, lessee, or tenant, grantee or grove-holder, as the case be, who shall subject to the provisions of this Act be entitled to take or retain possession as a bhumidar thereof." On a consideration of these sections, their Lordships of the Supreme Court have laid down that the sir and khudkasht lands and grove lands vest in the State and, therefore, the proprietary right in such lands which were mortgaged would be extinguished, and the resettlement that takes place under Section 18 is a resettlement on a new tenure and not in the same right, and consequently the bhumidari right which is created by section 18 shall be a new right altogether and would not, therefore, be considered to be included under the mortgage of such an estate. They have further pointed out that bhumidari rights cannot be followed as a

substituted security and, therefore, the mortgagee cannot enforce his rights under the mortgage by sale of the Bhumidari rights. It is not inconceivable that the mortgaged property may vest partly and partly not. Rather, in that case, the Supreme Court has recognised the distinction between that part of the mortgaged estate which has vested in the State and the other part which has not so vested, and have laid down that the mortgage can be enforced against the mortgaged property which has not vested. For instance, they have laid down that the wells and trees in abadi and the buildings are liable to be sold for realisation of the mortgage money. This decision establishes that (1) the vesting has not the effect of wiping out the mortgage altogether; (2) where the mortgaged estate has partly vested and partly not, the mortgagee is entitled to proceed against the non-vested property for satisfaction of the mortgage dues; and (3) the bhumidari rights cannot be followed as substituted security. It is plain that this decision of the Supreme Court also does not undo the effect of the decision of the Full Bench. Stress was laid on the fact that bhumidari rights were not saleable, and on a parity of reasoning it was argued that bakasht lands should also not be liable to sale for satisfaction of the mortgage debt. The provisions of the U.P. Act are not in pari materia with the provisions of the Bihar Act. There is no provision in the Bihar Act corresponding to Section 9 of the U.P. Act which expressly excepts from vesting wells, trees in abadi and buildings. Again, under Section 6, corresponding to Section 4 of the Bihar Act, all rights, title and interests of all the intermediaries vest free from all encumbrances. There is no reservation of any right of any kind in the intermediary. Section 4(a) of the Bihar Act, however, lays down that the notified estate or tenure shall "vest absolutely in the State free from all incumbrances and such proprietor or tenure-holder shall cease to have any interests in such estate or tenure, other than the interests expressly saved by or under the provisions of this Act". There is no qualification in Section 6 of the U.P. Act. It is apparent that although under Section 4 the estate vests in the State free from all encumbrances, the proprietors or tenure holders continue to have such interests therein as are expressly saved by or under the provisions of the Bihar Act. One of the interests so saved is the interest mentioned in Section 6. This section provides that on and from the date of vesting, all lands used for agricultural or horticultural purposes, which were in khas possession of an intermediary on the date of such vesting, shall be deemed to be settled by the State with such intermediary and he shall be entitled to retain possession thereof and hold them as a raiyat under the State having occupancy rights in respect of such lands subject to the payment of such fair and equitable rent as may be determined by the Collector in the prescribed manner. Section 6 no doubt corresponds to Section 18 of the U. P. Act, but what is of importance is that under the U. P. Act the vesting takes place without any reservation, and then certain properties are excepted, such as are enumerated in Section 9 of that Act, and then some lands are deemed to be settled with the intermediaries as their bhumidari lands. In fact, the provisions of Section 9 afforded the clue to the interpretation of the U. P. Act. There is no such provision in the Bihar Act. The interpretation put by the Supreme Court on the U. P. Act cannot, in my opinion, govern the Bihar Act. The decision of the Supreme Court in this case cannot, therefore, be regarded as an authority for overruling the decision of the Full Bench. The bakasht lands no doubt vest in the State under the Bihar Act, but because of statutory retransference by way of lease to the mortgagor landlord, to all intents and purposes, the latter becomes the owner thereof and hence the Full Bench has laid down that though the estate vests in the State under section, the bakasht lands comprised therein continue to remain with the landlord, though under a different title, and such lands cannot be placed on the same footing as the rest of the mortgaged property that has absolutely vested in the State. Accordingly the Full Bench regarded such bakasht lands as if they had not vested in the State so as to exclude the provisions of Section 4 (d) of the Bihar Act. The word 'vest'has not acquired an admitted meaning. it is not used in all

cases in the, sense of transference of complete ownership. It is a word of ambiguous and variable import and has been used in different senses in different Indian as well as English statutes. For example, Section 56 of the Provincial Insolvency Act may be contrasted with Sections 16 and 17 of the Land Acquisition Act. Under the former, the Court appoints a Receiver for the property of the insolvent, and "such property shall thereupon vest in such Receiver". It is obvious that under Section 56 the Receiver does not become the absolute owner of the property. The property no doubt vests, but vests only for a limited purpose, that is, for the purpose of administering the estate of the insolvent. Under the latter, the properties acquired "vest absolutely in the Government free from all encumbrances". Under this Act, the Government becomes the real owner of the property without any qualification or limitation. Reference may also be made to two English decisions out of many, namely, *Coverdale v. Charlton*[8], and *Tungbridge Wells Corpn. v. Baird*[9], wherein the word 'vest'has been given qualified signification. Thus, 'vest'has not got a fixed connotation and has to be construed in the context of the provisions of a particular statute. Under the Bihar Act, by virtue of Section 4 read with Section 6, the State does not become the full owner of the bakasht lands. The intermediary is entitled to retain possession of those lands and continues to be full owner thereof, having absolute and indefeasible right therein with full power of
disposal. The only change effected is that instead of being a proprietor, he becomes
a tenant and instead of revenue he pays rent. It is well to remember that even before this Act was passed he held the lands under the State on payment of revenue. The Full Bench, therefore, rightly made a distinction between two kinds of property - one that vested in the State absolutely, leaving no interest therein to the intermediary, and the other in which the State acquired not full ownership, but only a limited right to receive rent, other interests therein being reserved to the intermediary. Therefore, the bakasht lands cannot be put on the same footing as the other property that passes to the State absolutely. If the bakasht lands can be deemed to be a property distinguishable from the estate which had vested in the State, as was held by the Full Bench, there can be little doubt that even on the authority of this decision of the Supreme Court the mortgagee can recover the mortgage money by sale of the bakasht lands. Thus, on the question canvassed before the Full Bench, the Supreme Court is wholly silent. In fact, in the case of Krishna Prasad aforesaid, the attention of the Supreme Court was invited to their earlier decision in the case of Rana Sheo Ambar Singh, AIR 1961 SC 1790, and their Lordships declined to express any opinion. They have observed as follows :

> "It may, however, be not out of place to add incidentally that Mr. Sarjoo Prasad for the respondent has suggested that the assumption made by the Full Bench about the character of the baksht lands by virtue of the provisions of Section 6 is inconsistent with the decisions of this Court in AIR 1961 SC 1790. His argument is that the provisions of Section 6 of the Act correspond to the provisions of Section 18 of the U. P. Zamindari Abolition and Land Reforms Act (I of 1951), and that what this Court has said about the effect of the provisions of Section 18, has shaken the validity of the conclusion of the Full Bench in regard to the effect of Section 6 of the Act. We do not think it necessary to consider this point as well in the present appeal. In any case, both the decisions on which Mr. Jha has relied afford no assistance to us in dealing with the point with which we are concerned in the present appeal."

In view of the Supreme Court reserving their opinion on whether the decision under the U. P. Act has shaken the Full Bench decision, it is idle to contend that the decision of the Full Bench no longer holds good. The hard fact is that their Lordships of the Supreme Court were not dealing with a case where the bakasht lands were regarded as separate and distinct from the estate proper which had vested in the State without any qualification. It is manifest that the Supreme Court has definitely declined to express any opinion on the question whether or not the bakasht lands which remain with the mortgagor landlords, though under a different title by virtue of the provisions of Section 4 read with Section 6 of the Bihar Act, are liable to sale. That being so, the decision of the Full Bench on the said question survives both the aforesaid decisions of the Supreme Court.

15. I may in this connection refer to a recent decision of a Bench of this Court in *Kedar Prasad Singh v. Sita Saran Singh*[10], In that case also the question arose whether the two decisions of the Supreme Court aforesaid had affected the validity of the decision of the Full Bench and further whether the bakasht lands were liable to
sale for recovery of a mortgage debt. Similar arguments were advanced before that Court, and reliance was placed upon the decision of the Supreme Court in the cases of Rana Sheo Ambar Singh, AIR 1961 SC 1790 and Krishna Prasad, AIR 1962 SC 1464 and on an examination of the provisions of the Bihar Act and the U. P. Act in the light of the observations of their Lordships of the Supreme Court and also of the Full Bench of this Court, Mahapatra and Tarkeshwar Nath, JJ., have held that the pronouncement of their Lordships in the aforesaid cases do not touch at all the decision of the Full Bench. They have further laid down that the bakasht lands of a proprietor mortgagor do not go to the State absolutely along with the estate but they remain with the mortgagor though in a transmuted form, and they are available to the mortgagee to be proceeded against in the Civil Court, and clause (d) of Section 4 of the Bihar Act does not affect that.

16. The contention of learned counsel for the judgment-debtor, however, is that the foundation of the decision of the Full Bench is that the bakasht lands constituted substituted security. But the Supreme Court, he urged, has laid down in the case of Rana Sheo Ambar Singh. AIR 1961 SC 1790 that bhumidari rights which the intermediaries acquired under Section 18 of the U. P. Act cannot be treated as substituted security, and, therefore, the bakasht lands also under the Bihar Act cannot be regarded as substituted security. Mr. Lalnarayan Sinha for the decree-holders, while expressing doubt whether or not they can be regarded as substituted security, contended that even if bakasht lands did not constitute substituted security, the decision of the Full Bench was supportable on the ground that they constituted accession to the mortgaged property. Although the question was not pointedly pressed in this form before the Full Bench, it will be seen that the Full Bench considered it from the point of view of accession also (vide paragraph 45 of 1958 B. L. J. R. 559) : (Pr. 50 of AIR 1958 Patna 630) I think that the provisions of the Bihar Act do not exclude the application of the principle of accession to the bakasht lands.

17. Section 70 of the Transfer of Property Act provides that if, after the date of a mortgage, any accession is made to the mortgaged property, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to such accession. Similarly, under Section 63, mortgagor is entitled to any accession which the mortgaged property in possession of the mortgagee has received during the continuance of the mortgage. The apparent cases of accession are provided by Illustrations A and B to Section 70. The increase in the mortgaged property by alluvion, or improvement effected on the mortgaged property, say, by constructing houses thereon is an illustration of physical accession to the mortgaged property. In the instant

case, there was no physical accession. The question is, whether the lands in mortgage, which, after being lost by vis major or operation of law, come back to the mortgagor but under a different and diminished title, form accession to the mortgaged property. In the present case, it is true that legally bakasht lands also vest in the State, but because of the operation of Section 6 read with Section 4 of the Bihar Act, all the rights of the intermediary in the bakasht lands are not destroyed, and the State does not become the full owner. There is no doubt a vesting, but despite the vesting the possession does not change and the lands continue to remain all along in possession of the intermediary, and instead of having the right of a full owner, as it was at the time of the mortgage, the intermediary acquires only a limited interest of a raiyat in such lands on payment of rent to the State. Can such bakasht lands be regarded as accession to the mortgaged property? Mr. Datta contended that the bakasht lands cannot be regarded as accession to the mortgaged property, because (1) the accession is limited to physical accession; (2) where mortgage itself is destroyed, there is no question of accession at all; (3) once the mortgage has merged into a decree, any accession to the mortgaged property thereafter is not available; and (4) title to the accession must be in the same character as title to the original mortgaged property.

18. None of these contentions appears to be valid. Section 70 of the Transfer of Property Act speaks of accession made to the mortgaged property. Accession has not been defined in this Act and taking this word in its ordinary grammatical sense, there is no reason to restrict it to physical additions to the mortgaged property and exclude incorporeal accession, that is, acquisition of an interest in the property. Accretion to the mortgaged property and improvements upon it by construction of building or electric installations are obvious cases of accession. Property, however, is a bundle of rights, and enlargement or diminution of some of the rights which constitute property will be tantamount to accession within the meaning of Section 70 or, for the matter of that, Section 63. Whatever tends to increase the value of the security, either by additions made to the mortgaged property or by enlargement of the right in it, would constitute accession. On the same principle, if after the mortgage the mortgaged property is lost to the mortgagor by operation of law or otherwise and the mortgagor thereafter acquires some interest therein, though not the whole interest he owned at the time of mortgage, it is, in my opinion, an accession to the mortgaged property, so as to be available to the mortgagee. I do not see any principle or logic to deprive the mortgagee of his right to recover the mortgage debt by sale of the limited right of the mortgagor in such bakasht lands. Take for instance, an estate consisting of 1000 bighas of bakasht land and cash collection of rupee one and it is mortgaged for a consideration of Rs. 1,00,000, and it vests under the Bihar Act in the State. But the mortgagor retains 1000 bighas of land, not as an owner but as a raiyat. It was certainly not in the contemplation of the legislature that the mortgagee will be forced to recover the mortgage debt out of the compensation money payable under the Act. The legislature was concerned with securing to the State property free from all encumbrances. The object of the enactment was not to destroy the mortgage altogether in all cases and to deprive the mortgagee of his right to recover the mortgage debt by sale of the lands which have not vested in the State. To repeat myself, where the entire estate is mortgaged and where that estate vests in the State and no interest in that estate is left with the mortgagor landlord, it is plain that the mortgagee is debarred under Section 4(d) from realising his mortgage debt from the property that has vested in the State. In such a case he cannot also enforce the mortgage security against the other property of the mortgagor that has not vested in the State. The position, however, is entirely different where the entire interest of the mortgagor landlord in the estate does not vest in the State, but by virtue of section 6 read with section 4 of the Bihar Act, some interests in the bakasht land are left with the

mortgagor landlord. The mortgagee, in my opinion, is entitled to follow that property, namely bakasht lands, and enforce the mortgage security against that property, on the ground of accession to the mortgaged property, if not, as laid down by their Lordships of the Supreme Court, on the ground of substituted security. A case, almost parallel and relied upon by Mr. Lalnarayan Sinha is the one reported in *Sham Das v. Batul Bibi*[11]. This case has been referred to and relied upon by the Full Bench. Shortly put, in this case a zamindar having mortgaged by way of usufructuary mortgage his zamindari together with his sir land, lost his zamindari rights and became an ex-proprietary tenant of the sir land. The question arose whether the mortgagees of the zamindari rights together with sir lands could enforce the mortgage against the ex-proprietary rights which subsequently the mortgagor zamindar acquired in the sir land. It will be observed that his right as absolute owner of the sir land vanished and in respect of this land he became an ex-proprietary tenant. Still, their Lordships of the Allahabad High Court held that the usufructuary mortgage did not become ineffectual but took effect as a mortgage of the ex-proprietary rights. They have laid down that the mortgagee is entitled for the purposes of his security to all such interests as may be acquired either as accretions to or in place of the original interest which was conveyed to him. Accordingly, the ex-proprietary interest subsequently acquired by the zamindar in place of his proprietary interests in the sir land became subject to the defendant's mortgages.

19. Identity of interest in the mortgaged property and the accreted lands is not the foundation of the principle of accession. Wherever there is an alteration in the interests of the mortgaged property, the mortgagee will be entitled to the interest left with the mortgagor, be it an enhanced interest or diminished interest. In *Saila Bala Devi v. Swarna Moyee Devi*[12], it has been, laid down that where a co-sharer of a touzi taking advantage of frequent alluvion and diluvion of land dispossessed all his co-sharers and possessed all the reformed land adversely to them, and though his title did not extend to the whole, he mortgaged the entire mouza, but later on after another diluvion the mouza was again formed into thrice as big as the old one actually mortgaged, and taken possession of by the mortgagor, and recorded as such in the settlement record, by his possession the mortgagor added the reformed land to the mortgage security and as such the whole of the enlarged area must go to the mortgagee as security. On the same principle, where the subject of a mortgage is a lease for a limited period, the mortgagor or the mortgagee, as the case may be, will be entitled to the renewal of the lease. In *Motilal Hirabhai v. Bai Mani*[13], their Lordships of the Privy Council have held that where after shares, in a company, were pledged, the company issued fresh shares and allotted them to the old share-holders taking the call money from the yearly dividend payable on the old shares, on which they had resolved to pay a fixed interest of 6 per centum per annum, the new shares "were "increase or profit" and the pledgee must return them to the pledgor along with the old shares. These additional shares were, in the opinion of their Lordships of Privy Council, accessions to the shares expressly pledged of hypothecated, and the pledgor was entitled to recover them. The decision of this case is based upon section 163 of the Indian Contract Act and not upon the Transfer of Property Act; none the less, the principles underlying this decision applies to the present case also. In the case of *Shripad Laxman v. Kashibai*[14], it has been held that where a shop is mortgaged with the site on which it was standing and the shop is subsequently destroyed by fire and a new shop is constructed in its place, the new shop must be deemed to be an accession to the mortgaged property within the meaning of Section 70. Again, if a person mortgages his occupancy right in a holding and subsequently acquires the full right in
the land, that is to say, becomes the absolute owner as a landlord, the mortgagee will be entitled

to enforce the mortgage security against the enhanced right which the mortgagor happens to acquire subsequent to the mortgage. In such cases, increase in the right must be regarded as accession to the security to which the mortgagee will be entitled. Similarly the mortgagee will be entitled to enforce his mortgage, where the original right owned by the mortgagor diminishes by operation of law or otherwise, e.g., where the landlord ceases to be an owner of the bakasht land of a proprietor and acquires a limited right of a raiyat therein. I do not see why in the case under consideration, bakasht lands cannot be held to be an accession to the mortgage security. It is thus apparent that all acquisitions made by the mortgagor which tend to enhance the value of his security must be regarded as a part of the security enuring for the benefit of the mortgagee. Similarly, wherever the mortgaged property is lost and the mortgagor reacquires the same with the same right as at the time of the mortgage or with limited rights, such acquisitions also must be regarded as accession to the mortgaged property. On the other hand, the acquisitions made by the mortgagee during the subsistence of the mortgage must be treated as accession to the mortgaged property. Any other view will be wholly inequitable and will deprive the mortgagee of his mortgage money which was not the intention of the legislature in enacting the Bihar Act in my considered judgment, the bakasht lands which are deemed to be settled with the intermediaries after the vesting of the estate constitute an accession to the mortgaged property, with the result that the mortgagee can proceed against such lands for satisfaction of the mortgage debt. Therefore, the first contention of Mr. Datta has no force.

20. The second contention of Mr. Datta has no relevancy. The decisions of the Supreme Court aforesaid establish that the vesting of the estate has not the effect of destroying the mortgage. Only, it does not operate on the property which has vested. It is enforceable against the non-vested property. Thus, the premise of Mr. Datta is wrong and without foundation.

21. In support of his third contention, namely, that the accession to be valid must take place before the mortgage matures into a decree, he relied upon a Bench decision of this Court in *Haradhan v. Hargobind*[15], In this case, their Lordships have held that where a mukarraridar mortgaged his mukarrari right and the mortgagee obtained decree on the mortgage for sale of the mortgaged property, the decree holder was not entitled in execution of the decree to sell the brahmottar right in the property which had been acquired by the mortgagor subsequent to the passing of the decree. This decision is based upon the principle laid down by the Privy Council in *Het Ram v. Shadi Ram*[16], that the mortgagee's security as well as the mortgagor's right to redeem are both extinguished after the mortgage decree is passed. This decision no doubt supports the argument of Mr. Datta but has no force now. In the said Privy Council case, the decree which had to be considered had been passed under Section 89 of the Transfer of Property Act. Sections 89 and 93 of the Act no doubt provided that on the making of the order for sale the right of redemption and the security would both be extinguished. This led to the conflict of decisions in different High Courts, and, therefore, in the corresponding Rules 5 and 8 of Order 34 of the Code of Civil
Procedure, which have replaced Sections 89 and 93 of the Transfer of Property Act, the provision for the extinction of the right of redemption and the mortgage security on the passing of the final decree for sale has been omitted. The effect of the provisions of Order 34 is that the mortgage decree does not extinguish the mortgage security or the right of redemption. Accordingly, in a later case, *Mt. Sukhi v. Ghulam Safdar Khan*[17], arising under the Code of Civil Procedure, their Lordships of the Privy Council, referring to the case of Het Ram aforesaid, observed as follows :

"But the second proposition which was absolutely necessary for the judgment was that the mortgage was gone for ever so scon as the decree of sale was obtained; and that was based on the express words of Section 89 of the Transfer of Property Act, 1882, which ends after providing for the decree 'and thereafter the defendants'right to redeem and the security shall both be extinguished'. Now the group of Sections 85 to 90 inclusive, of the Transfer of Property Act, 1882. were repealed by the Code of Civil Procedure, 1908, and were replaced by the rules under Order xxxiv. In these rules the words above quoted are omitted in the rule which corresponds to Section 89. They do not occur in either the foreclosure section of the Act of 1882 or the corresponding rule of Order xxxiv, which are limited to providing for the extinction of the debt."

They have held that Order 34, Rules 3 and 5, which now govern final decrees for foreclosure and sale, do not provide that after a decree thereunder the mortgage security is extinguished. The case of Haradhan Chakerverty aforesaid was also considered by a Bench of the Bombay High Court in the case of Shripad Laxman, AIR 1945 Bombay 248, and relying upon the decision of the Privy Council in the case of Sukhi they held that the decision in the case of Haradhan Chakerverty was no longer valid and that the mortgage decree has not the effect of extinguishing the mortgage security and in spite of that decree the mortgagee continues to be mortgagee and is, therefore, entitled to the benefit of Section 70 of the Transfer of Property Act. This contention of Mr. Datta also is not correct and must be overruled.

22. The last point of Mr. Datta, namely, that the nature of the mortgaged property and the nature of the accreted land must be identical, is not supported by any authority and cannot be accepted as correct. The principle of accession is based upon equitable consideration, and the mortgagor is not entitled to repudiate the mortgage and claim the mortgaged property to the prejudice of the mortgagee, simply because by operation of law or otherwise a change in his interests in the land occurs, or the title he had in the land at the time of mortgage is diminished or enhanced. If that were so, any change in the interest owned by the mortgagor will deprive the mortgagee not only of his mortgage security but, in most cases, of his money. Such a contingency, however, does not flow from the provisions of Section 70 of the Transfer of Property Act. Therefore, this contention is also equally void of substance.

23. It follows that the bakasht lands, though forming part of the mortgaged estate that has vested in the State, eventually go back to the mortgagor under an altered title and constitute an accession to the mortgaged property. The decision of the Full Bench is
supportable on the ground of accession, if not on the ground of substitution, and is thus not invalidated by the two decisions of the Supreme Court relied upon.

24. The next question is, what is the remedy of the mortgagee where the mortgaged property partly vests and partly not?. In the case of Raghubir Saran Rastogi, 1953 BLJR 563, it has been held by a Bench of this Court that Section 4(d) of the Bihar Act is not applicable to a case where money is secured by a mortgage or charge on estates, some of which are notified under Section 3 of the Bihar Act and the others are not so notified. In such a case, Section 4(d) will be bar to the suit or execution proceeding so far as the vested estates are concerned, but the creditor will be entitled to prosecute the suit or execution proceeding as regards the estates or portions of estates

which are not vested in the State. Where the mortgaged property consists of both vested and non-vested property it is open to the creditor to make an election as to the choice of his remedies. He may give up his right of filing a claim under Section 14 with respect to the vested estate, and prosecute the suit or execution proceeding so far as estates which have not vested, in the Civil Court. Or he may give up his remedy in the Civil Court and prosecute his claim solely under Section 14 before the claims officer. This decison was affirmed as correct by the Full Bench in the case of Mahanth Sukhdeo Das, 1958 BLJR 559 aforesaid, and it overruled the decision of this Court in the case of Nihar Ganguli, 1956 BLJR 177 to the effect that in such a case the mortgagee could pursue both the remedies simultaneously, and the Court cannot compel the decree-holder to elect one and abandon the other. The decision of the Full Bench with respect to election also is not affected at all by the decision of the Supreme Court in the case of Krishna Prasad, AIR 1962 SC 1464. In fact, the attention of their Lordships of the Supreme Court was drawn to the decision of this Court in the case of Raghubir Saran Rastogi, 1953 BLJR 563 aforesaid, and their Lordships refrained from expressing any opinion on the correctness or otherwise of that decision. They have observed; "Since we are dealing with a case where the whole of the mortgaged property is an estate, it is unnecessary for us to consider whether the view by the Patna High Court in this case is correct or not." I entertain no doubt as to the correctness of this decision. It may be noticed that under Chapter IV of the Bihar Act which contains Sections 14 to 18, a mortgaged debt is liable to be considerably scaled down, and the mortgagee is given the right to recover the amount so fixed out of the compensation money. Where, however, the mortgagee goes to the Civil Court, he is entitled to a decree for the entire mortgage money, and the debt cannot be scaled down, except in the matter of interest if it is beyond the statutory limit. If both the remedies are simultaneously available, it will give rise to the conflicting decrees and render the position of the mortgagor extremely anomalous. It cannot, therefore, be reasonably urged that he can prosecute both the remedies, either simultaneously or consecutively. To confer on the mortgagee such a right will give rise to anomalous position, and there will be two conflicting decrees, one for reduced amount under the Bihar Act and the other for the full amount under the general law. It is not a question of Court placing any limitation upon the right of the mortgagee by putting him to election. It follows as an inevitable consequence from the two different provisions under the two different Acts for the recovery of the debt. The right to elect flows as a necessary corollary from the two conflicting remedies provided to the mortgagee one under the Bihar Act and the other under the general law. Both the rights cannot exist together, and from the nature of the relief granted under the one or the other, both rights cannot be exercised simultaneously or consecutively. Such a course would be obnoxious to the sense of justice from the point of view of the mortgagor. Therefore, the mortgagee undoubtedly has a right of election. It seems to me to be equally true that once he has finally elected to pursue one remedy and abandon the other, he cannot subsequently turn back and ignore the choice already made and pursue afresh the abandoned remedy. Mr. Lalnarayan Sinha assumed that there was in the mortgagee a right to election and both remedies were not simultaneously available. But his contention is that the principle of election is based upon the principle of estoppel, and before any one is pinned down to election it must be shown that he had a clear knowledge of all the facts concerning his right and he made a conscious choice after an intelligent appreciation of the consequences of his act. He argued that prior to the decision of the full Bench the law was wholly unsettled. At one time it was held that the mortgagee had a right of election and could not approbate and reprobate and there was also a contrary decision that both the remedies were simultaneously available to him and the Court could not compel him to make an election. Thereafter, the Full Bench settled the law and held that there was a right of

election. His submission is that in this state of law if the mortgagee once filed an application under Section 14 of the Bihar Act and again changed his mind and prosecuted his remedy in a Civil Court, he should not be compelled to adhere to his remedy under the Bihar Act. In this connection, he referred to several English decisions, namely, *Lissenden v. C.A.V. Bosch, Ltd*[18]*., Coe v. London and North Eastern Rly. Co*[19]*., Young v. Bristol Aeroplane Co. Ltd*[20]*., Sales Tax Officer v. Kanhaiya Lal*[21]*.* and *United Australia, Ltd. v. Barclays Bank, Ltd*[22]*.,* The first three cases are based upon the construction of the provisions of the Workmen's Compensation Act, 1925. These considerations do not obtain here. In the cases before us, the right of election is inherent in the nature of the remedies under the two differing provisions of law - one, the Bihar Act and the other the general law. As observed, above, law will not permit two conflicting decrees to remain at one and the same time. The fourth case enunciates the well-known principles of estoppel. In the last case, the question of alternative remedies in contract and tort were involved. In that case, a cheque payable to the appellants was converted by the M. Company and collected for that company by its bankers, the B. Bank. The appellants brought an action against the M. Company for the amount of the cheque either as money lent or as money had and received to the use of the appellants, but they discontinued that action and no final judgment was obtained. The appellants afterwards brought the present action against the B. Bank for conversion of the cheque. It was held by the House of Lords that the appellants by merely initiating proceedings against the M. Company for money lent or for money had and received had not thereby elected to waive the tort so as to be precluded from bringing the present action in tort. In such a case it is judgment and satisfaction in the first action, and not merely the bringing of the claim, which constitutes a bar to a second action. I agree that mere initiation of the proceedings is not proof positive of the final choice. The mortgagee is not estopped from changing his mind and pursue his other remedy, provided he finally abandons the first proceeding. Where, however, the proceeding has resulted in a decree, either under the Bihar Act or under the general law, it is, in my opinion, final, and the mortgagee cannot be permitted to renounce it and proceed to prosecute his claim under the other law. Thus, the mortgagee has a right of
election, and whether or not afinal election has been made in any case will depend upon the facts and circumstances of each case.

25. In the light of the above principles, I proceed to consider the cases before us.

26. In both the appeals the decree-holders seek to recover the mortgage debt by sale of the bakasht lands. This they are entitled to do. They have further right of choice of remedies. In both the cases, the mortgagees had preferred claim under Section 14 of the Bihar Act. The important question that falls for determination is whether they are debarred from prosecuting their claim in a Court of law by reason of their having filed a claim case under Section 14 of the Bihar Act. In the Miscellaneous Appeal, there was no doubt an application under Section 14, but this application was not prosecuted and was allowed to be dismissed for default. The amount due under the mortgage was not determined by the claims officer.

27. In my opinion, mere preferring of a claim under Section 14 is not a conclusive evidence of final choice of remedy. It is likely that he appreciated his position better after he had filed a claim under Section 14. In this case, therefore, I do not think, there was a final election to proceed under the Bihar Act for recovery of the mortgage dues, and consequently the decree-holders are not precluded from changing their mind and prosecute the execution proceeding in a Court of

law.

28. In the Second Appeal, however, the position is entirely different. The mortgage was created in 1951, and before the mortgagees instituted any suit to recover the mortgage debt, the estate vested in the State on 26-1-1955. Soon, thereafter, the mortgagees preferred before the Claims Officer a claim under Section 14 of the Bihar Act to determine the amount due under the mortgage, and this amount was eventually fixed by the claims officer. The consequence was that the mortgage debt was made payable out of the compensation money. Notwithstanding the determination of his claim under the Bihar Act, they, in disregard of the order of the claims officer, brought the present suit for realization of the mortgage money. They alleged that they had abandoned the claim and did not want to enforce the order of the Claims Officer. In this appeal, the mortgagees cannot be permitted to approbate and reprobate, and once they have successfully prosecuted their claim under the Bihar Act and the amount justly due to them had been adjudged, they cannot turn round and seek remedy in a Court of law, in utter disregard of the order of the claims officer. In this case, therefore, there was a final election, and the mortgagees are debarred from seeking an alternative remedy in the Civil Court. The suit brought by them in the Civil Court was, therefore, not maintainable.

29. In the Miscellaneous Appeal, Mr. Dutta took an additional ground that the execution was barred by time. In this case, the preliminary decree for sale was passed on 15-11-1951. The First Appeal was preferred on 20-3-1952. The preliminary decree was made final on 1-8-1953. The first application for execution of the final decree was made on 23-9-1953. Thereafter, the vesting occurred. The execution case was dismissed on 27-9-1955 The First Appeal was dropped on 12-5-1959. The second application for execution was presented on 29-7-1959, and the question is whether the second execution is barred by time. If the period of limitation is computed from the date of the dismissal of the first execution, then the second execution was levied nearly four years thereafter and was manifestly barred by time. If, however, the starting point of limitation is the date of the disposal of the First Appeal, namely, 12-5-1959, then the second execution, having been filed within three years of that order, is well within time. The contention of Mr. Datta is that the second execution must have been filed within three years of the date of disposal of the First execution. On the other hand, Mr. Lalnarain Sinha contended that the computation of the period of limitation must be made from the date of the order of the Court in the First Appeal, i.e., 12-5-1959, because the decree of the Court below merged in the appellate decree. Article 182 of the Limitation Act provides a period of three years for the execution of a decree or order of a Civil Court to be computed, inter alia, from the date of the decree or order or, where there has been an appeal, from the date of the final decree or order of the appellate Court or the withdrawal of the appeal. Thus, where there has been an appeal, limitation for execution under clause (2) of Article 182 runs from the date of the final decree or order of the appellate Court. It is well-settled that the final decree or order has not been used in contra-distinction to the preliminary decree or order of the appellate Court. Therefore, the final decree or order in clause (2) means final disposal of the appeal, whether the appeal is from a preliminary decree or a final decree. On the plain wording of clause (2), there is no escape from the conclusion that the period of limitation must be computed from the date of the disposal of the First Appeal. Mr. Datta, however, contended that it was not an appeal from the final decree; the appeal was from a preliminary decree, and, therefore, the order of disposal of the First Appeal does not furnish the starting point of limitation. He referred in this connection to a decision of the Supreme Court in *Bhawanipore Banking Corpn. Ltd. v. Gouri Shankar*[23], a decision of the Full Bench of this Court

in *Rameshwar Prasad v. Parmeshwar Prasad*[24], and a Bench decision of the Allahabad High Court in *Latafat Ali Khan v. Kalyan Mal*[25], None of these cases has any application. The Supreme Court has laid down that however broadly the words of clause (2) of Article 182 are construed, it cannot be held to cover an appeal or an order which is passed in a collateral proceeding or which has no direct or immediate connection with the decree under execution. In the present case, the appeal was not an appeal from an order passed in a collateral proceeding. It was an appeal from a preliminary decree. It is true that there was no appeal from the final decree. It is manifest, however, that the final decree follows the preliminary decree, and the result of the appeal from the preliminary decree will certainly affect the final decree. Hence, it cannot be said to be an appeal from an order in a collateral proceeding. The facts of the case of Rameshwar Prasad, AIR 1951 Patna 1 aforesaid before the Full Bench are entirely different. In that case, an ex parte preliminary decree in a suit for partition was passed. An application was filed for setting aside the ex parte decree which was refused, and an appeal was preferred against the order of refusal. In that context, the Full Bench has laid down that the word 'appeal'in clause (2) of Article 182 does not include an appeal preferred against an order refusing to set aside an ex parte preliminary decree in a suit for partition in computing the period of limitation for executing the final decree passed in such a suit as the word 'appeal'in the clause means an appeal only from the decree or order sought to be executed. This case also is plainly distinguishable. Here, the appeal against the preliminary decree was in
essence an appeal from the final decree, because the finality of the final decree
depended upon the result of the said appeal. The aforesaid Allahabad case has no application at all. In my opinion, this case is governed by the Bench decisions of this Court in *Somar Singh v. Deonandan*[26], and *Somar Singh v. Devanandan Prasad*[27], and it must be held that the execution was within time. Mr. Lalnarayan Sinha contended in the alternative that the objection to the execution based on the ground of limitation is barred by the principles of constructive res judicata. His contention is that the notice under Order 21, Rule 22, in the second execution was served and no objection as to limitation was taken, and, therefore, in view of the decision of the Full Bench in *Baijnath Prasad. v. Ramphal*[28], it was barred by limitation (sic). This contention is not valid. In the first place, this objection was not raised in the Court below and all the material facts have not been established; and, in the second place, it appears that the notice under Order 21, Rule 22 had not been served on all the judgment-debtors, and before the notice could be served on the remaining judgment-debtors, the application objecting to the execution was made. This objection, therefore, is not tenable and must be overruled.

30. In the result, both the appeals must be dismissed with costs.

Ramaswami, C.J.

31. I agree entirely with the reasoning and the conclusion reached by my learned brother Mr. Justice Kanhaiya Singh and I agree with him that both Miscellaneous Appeal No. 110 of 1961 and Second Appeal No. 516 of 1961 should be dismissed with costs.

Sahai, J.

32. I have read with great care and respect the judgment prepared by my learned brother Kanhaiya Singh, J. With great regret, however, I find myself unable to agree with his conclusions on the main point raised for our decision in this case. As he has mentioned, a Full Bench of this

Court has held in AIR 1958 Patna 630 that a mortgagee, whose money was secured by a mortgage. of an estate, which has vested in the State of Bihar under the Bihar Land Reforms Act, 1950 (hereinafter called the Bihar Act), can pursue his remedy against the bakasht lands of the mortgagor, which are deemed to have been settled with him under Section 6 of the same Act. The main question which arises for consideration is whether that decision has been indirectly overruled by the decisions of the Supreme Court in AIR 1961 SC 1790 and AIR 1962 SC 1464.
33. The facts of Miscellaneous Appeal No. 106 of 1956 in AIR 1958 Patna 630 are short. The entire sixteen annas share in tauzi No. 8537 was given in simple mortgage on the 8th April, 1940. In 1943, the appellant purchased the equity of redemption in the tauzi to the extent of ten annas. The mortgagee instituted a mortgage suit, and obtained a final decree in 1955. He put the decree into execution in Execution Case No. 14 of 1955. The entire tauzi, i.e., the whole of the mortgaged property, vested in
the State on the 1st January. 1956. The judgment-debtor filed an objection under
Section 47 of the Code of Civil Procedure , and it was argued on his behalf that the execution proceeding was liable to be dropped under Section 4(d) of the Bihar Act. The Subordinate Judge dismissed the objection, and hence the judgment-debtor presented the miscellaneous appeal in this Court.

34. I may also mention that the Subordinate Judge noted in his order that the decree-holder had stated that he intended to proceed only against the bakasht lands in execution of his decree. Counsel for the judgment-debtor argued in this Court that, in view of the provisions of Section 4(d), the mortgage had been extinguished, that the judgment-debtor had no longer any bakasht land because the bakasht lands in his possession were deemed to have been settled with him by the State as a raiyat under the State, having occupancy rights, and that Section 4(d) clearly laid down that all suits and proceedings for the recovery of any money in a case of that kind would be dropped. Learned Counsel for the respondent argued, on the other hand, that the mortgage could not be held to have been destroyed as a result of the vesting of the estate under the Act, that it merely became inoperative upon those properties of the mortgagor which no longer belonged to him, and that it was open to the mortgagee to make a claim under Section 14 of the Act or to execute his decree by pursuing a property of the mortgagor which had not vested in the State. Their Lordships accepted the arguments advanced by learned Counsel for the respondent, and held that a mortgagee of the interest of the proprietor, whose estate had vested in the State of Bihar, is entitled, in execution of his mortgage decree, to proceed against the bakasht lands of the proprietor in the same estate which are deemed, under Section 6 of the Act, to have been settled with him as a raiyat. The grounds for this conclusion as given by Jamuar, J., who delivered the leading judgment, may be summarised as follows :

1. That interest of the intermediary in bakasht lands does not vest in the State but is saved by the provisions of Section 6 as those lands are deemed to have been settled with him. The mortgage in respect of such interest remains intact and operative so far as the lands covered by Section 6 are concerned.
2. As the State does not take over the bakasht lands of the proprietor and there is a mere transmutation in the nature of the title of the intermediary-mortgagor in respect of those lands, they will form a substituted security, and the altered title would become available for the mortgagee to operate upon.
3. Section 4(d) of the Bihar Act has not necessarily the effect of destroying the entire

mortgage, and does not bar the remedy of the mortgagee.

4. There is no warrant for the contention that the only remedy left to a mortgagee, whose money is secured by mortgage of an estate which has vested in the State of Bihar, is to make a claim under Chapter IV.

5. The provisions of Section 4(d) are not intended to benefit the mortgagor-proprietor and to destroy the rights of the mortgagee. The provision for the recovery of the mortgage money out of the compensation has been made in the Bihar Act for the benefit of the mortgagee.

6. The construction put upon Section 4(d) in 1953 BLJR 563 and the conclusion reached in that case that the wide grammatical meaning of the language used in that sub-section must be cut down and restricted on a consideration of the scope and object of the statute is correct.

35. It is necessary to refer to some provisions of the Bihar Act and some provisions of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (U.P. Act No. I of 1951) (hereinafter to be called the U.P. Act) before proceeding any further.

36. Sections 3 and 3A of the Bihar Act correspond to section 4 of the U. P. Act as all these sections relate to the issue of notification for the vesting of estates in the State. Section 4 of the Bihar Act gives the consequences of the vesting of an estate or tenure in the State under section 3 or 3A. Similarly, section 6 of the U. P. Act gives the consequences of the vesting of an estate in the State under section 4 of that Act. Clause (d) of section 4 of the Bihar Act provides :

> "(d) No suit shall lie in any Civil Court for the recovery of any money due from such proprietor or tenure-holder the payment of which is secured by a mortgage of, or is a charge on, such estate or tenure and all suits and proceedings for the recovery of any such money which may be pending on the date of vesting shall be dropped."

37. The provisions of clauses (h) and (i) of section 6 of the U. P. Act may also be quoted.

> "(h) no claim or liability enforceable or incurred before the date of vesting by or against such intermediary for any money, which is charged on or is secured by a mortgage of such estate or part thereof shall, except as provided in section 73 of the Transfer of Property Act, 1882, be enforceable against his interest in the estate;"
>
> "(i) all suits and proceedings of the nature to be prescribed pending in any court at the date of vesting, and all proceedings upon any decree or order passed in any such suit or proceedings previous to the date of vesting, shall be stayed;"

38. I may mention here that reference has not been made in section 4 (d) of the Bihar Act to section 73 of the Transfer of Property Act; but, instead, a complete procedure has been laid down in Chapter IV of that Act for the creditor, whose debt is secured by the mortgage of, or is a charge on, any estate or tenure or part thereof which has vested in the State as a consequence of issue of a notification under section 3 or 3A, to get the amount of debt legally and justly payable

to him determined. The creditor has to make a claim under section 14, and he has to furnish full particulars and documents under section 15. The Claims Officer has, under section 16, to re-open the account and to determine the principal amount justly due to each creditor and the interest due at the date of such determination in respect of such principal amount. An appeal has been provided against the Claims Officer's decision to a Board to be constituted by the State Government in the manner provided in section 18. Section 24 (5) provides, firstly, that compensation found to be payable to an intermediary will be payable to the creditor or creditors, and only the balance, if any, will be payable to the intermediary; and, secondly, that, notwithstanding anything contained in any law for the time being in force, the amount of compensation payable to a creditor or creditors on account of mortgage or charge on any estate or tenure or portion thereof shall not, in any case, exceed the amount of compensation payable in respect of that estate or tenure or a portion thereof.

39. I may also mention that sub-section (1) of Section 6 of the Bihar Act corresponds to section 18 (1) of the U. P. Act. Omitting the proviso, section 6 (1) of the Bihar Act reads :

> "6. Certain other lands in khas possession of intermediaries to be retained by them on payment of rent as raiyats having occupancy rights. - (1) on and from the date of vesting all lands used for agricultural or horticultural purposes, which were in khas possession of an intermediary on the date of such vesting, including -
> (a) (i) proprietors'private lands let out under a lease for a term of years or under a lease from year to year, referred to in section 116 of the Bihar Tenancy Act, 1885 (8 of 1885).
> (ii) landlord's privileged lands let out under a registered lease for a term exceeding one year or under a lease, written or oral, for a period of one year or less, referred to in section 43 of the Chota Nagpur Tenancy Act, 1908 (Bengal Act 6 of 1908).
> (b) lands used for agricultural or horticultural purposes and held in the direct possession of a temporary lessee of an estate or tenure and cultivated by himself with his own stock or by his own servants or by hired labour or with hired stock, and,
> (c) lands used for agricultural or horticultural purposes forming the subject matter of a subsisting mortgage on the redemption of which the intermediary is entitled to recover khas possession thereof;

shall, subject to the provisions of Section 7A and 7B, be deemed to be settled by the State with such intermediary and he shall be entitled to retain possession thereof and hold them as a raiyat under the State having occupancy rights in respect of such lands subject to the payment of such fail and equitable rent as may be determined by the Collector in the prescribed manner :" Sub-section (1) of section 18 of the U. P. Act provides :

> "18. Settlement of certain lands with intermediaries or cultivators as bhumidhar. - (1) Subject to the provisions of sections 10, 15, 16 and 17, all lands -
> (a) in possession of or held or deemed to be held by an intermediary as sir, khudkasht or an intermediary's grove,
> (b) held as a grove by, or in the personal cultivation of a permanent lessee in Avadh,
> (c) held by a fixed-rate tenant or a rent-free grantee as such, or

(d) held as such by

(i)

(ii)

(i) an occupancy tenant,	Possessing right to transfer the holdings by sale.
(ii)a hereditary tenant.	
(iii)a tenant on Patta Dawami or Istamrari referred to in Section 17.	

on the date immediately preceding the date of vesting shall be deemed to be settled by the State Government with such intermediary, lessee or tenant, as the case may be, who shall, subject to the provisions of this Act, be entitled to take or retain possession as a bhumidhar thereof."

40. It is also necessary to quote section 9 of the U. P. Act :

> "9. Private wells, trees in abadi and buildings to be settled with the existing owners or occupiers thereof. - All private wells in holding, grove or abadi trees in abadi, and all buildings situate within the limits of an estate, belonging to or held by intermediary or tenant or other person, whether residing in the village or not, shall continue to belong to or be held by such intermediary, tenant or person, as the case may be, and the site of the wells or the buildings with the area appurtenant thereto shall be deemed to be settled with him by the State Government on such terms and conditions as may be prescribed."

41. In Rana Sheo Ambar Singh's case AIR 1961 SC 1790, the Supreme Court had to consider the interpretation of some provisions of the U. P. Act. The facts of that case were as follows. The appellant's father had executed a simple mortgage in favour of the Allahabad Bank for a sum of Rs. 6,00,000/- in respect of 67 villages. The Bank instituted a mortgage suit, and a final decree for recovery of the balance of the mortgage money due to it was passed. On the 1st July, 1952, the U. P. Act came into force, and the entire mortgaged properties vested in the State. The Bank, thereafter, sought to realize its decree from the compensation money payable to the judgment-debtor and by a sale of the judgment-debtor's rights in trees and wells in abadi and buildings situated in the villages which had been mortgaged as well as the judgment-debtor's rights in grove and sir and khudkasht land on the ground that they constituted substituted security in place of the proprietary right which had been mortgaged. The judgment-debtor's objections were overruled by the executing Court. On appeal, the High Court at Allahabad held that the execution could proceed also against the bhumidhari right created in favour of the judgment-debtor appellant under section 18 of the U. P. Act. The main contention on behalf of the appellant in the Supreme Court was that the bhumidhari right created under section 18 of the U. P. Act could not be sold in execution of the mortgage decree. The argument on behalf of the respondent Bank was the bhumidhari right created under section 18 was liable to be sold as it represented the proprietary right which was mortgaged and thus constituted substituted security in place of the mortgaged property. Their Lordships held that the bhumidhari right in the grove, sir and khudkasht land created by section 18 could not be sold in execution of the mortgage decree.

Wanchoo, J., who delivered the judgment of the Court in that case, contrasted the provisions of Section 9 with those of Section 18. His Lordship observed that the effect of section 9 was that wells, trees in abadi and buildings continued to belong to the intermediary, but the lands on which the wells and buildings stood with the lands appurtenant thereto vested in the State, and were deemed to have been settled with the intermediary. He has further observed :

> "If the intention were that sir and khudkasht land and grove land should not vest in the State, section 18 would have been worded in the same way as section 9. Further the way in which section 18 is worded, (namely that khudkasht and sir land and an intermediary's grove shall be deemed to be settled with the intermediary and he would have bhumidari rights therein) shows that these three kinds of property vested in the State under section 6 (a) (i) and were then resettled with the intermediary on a new tenure and not in the same rights, which he had in them before the vesting. The legislature was therefore creating a new right under section 18 and the old proprietary right in sir and khudkasht land and any intermediary's grove land had already vested under section 6 in the State."

He has added that the legal effect of the notification under section 4 would be that –

> "sir and khudkasht land and grove land would vest in the State and would not be an exception to the consequences of vesting in section 6 and therefore the proprietary right in sir and khudkasht land and grove land which were mortgaged would be extinguished and the bhumidhari right which is created by section 18 would be a new right altogether and would not therefore be considered to be included under the mortgage . . . ."

42. His Lordship has then proceeded to examine the provisions of Section 6 (h) of the U. P. Act, and has held that it has a two-fold effect : firstly, that "it makes it impossible for the mortgagee to follow the proprietary right after it vests in the State", and secondly, that "it provides that the only way in which the mortgagee can recover his money . . . . . is to follow the procedure under section 73 of the Transfer of Property Act". He has emphasised this point of view further by saying :

> ". . . . . the only course open to the mortgagee is to follow the compensation money under section 6 (h). The bhumidari rights created under section 18 are not compensation; they are special rights conferred on the intermediary by virtue of his cultivatory possession of the lands comprised therein. The respondent therefore cannot enforce his rights under the mortgage by sale of the bhumidari rights created in favour of the appellant under section 18 so far as his sir and khudkasht land and grove land are concerned; it can only follow the compensation money as provided in section 6 (h). The argument that bhumidari rights can be followed as substituted security must therefore equally fail."

43. The important words in section 6 (1) of the Bihar Act are "shall . . . . be deemed to be settled by the State with such intermediary and he shall be entitled to retain possession thereof and hold them as a raiyat under the State having occupancy rights". The effective words in section 18 (1)

of the U. P. Act are "shall be deemed to be settled by the Stale Government with such intermediary.....who shall, subject to the provisions of this Act, be entitled to take or retain possession as a bhumidar thereof". I am unable to find any material difference between the language used in the two sections. In view of the decision in Rana Sheo Ambar Singh's case, therefore, there can be no escape from the conclusion that the kinds of properties which have been described in Section 6(1) of the Bihar Act have not been saved from vesting but have vested in the State of Bihar, and have there been settled with the intermediary. A completely new right as an occupancy raiyat under the State has been created in him.

44. Reference may be made in this connection to the construction placed by their Lordships in that case on section 9 of the U. P. Act. Their Lordships have held that the interest of the intermediary in wells and buildings is saved under that section as the words are that they "shall continue to belong to or be held by such intermediary, tenant or person"; but the site of the wells or the buildings vests in the State and is then settled with the intermediary, tenant or person because the words used are "shall be deemed to be settled with him by the State Government". Hence, grounds Nos. 1 and 2, as summarized above, in the Full Bench decision of this Court can no longer be considered to be correct.

45. Mr. Lalnarayan Sinha has argued that the decision in Rana Sheo Ambar Singh's case, AIR 1961 SC 1790 proceeds mainly upon the provisions of section 6 (h) of the U. P. Act, and, as there is no provision in the Bihar Act like the provisions in that section, the decision cannot affect the validity of the Full Bench decision of this Court. I do not agree. In the first place, the decision in Rana Sheo Ambar Singh's case, AIR 1961 SC 1790 proceeds, firstly, upon a construction of the language used in sections 6, 9 and 18 of the U. P. Act, and, secondly, on a construction of section 6 (h). As the language used in section 6 (1) of the Bihar Act is similar to the language used in section 18 and the latter part of section 9 of the U. P. Act, it is difficult to place upon the language used in section 6 (1) a construction different from that put by their Lordships of the Supreme Court on the language used in sections 9 and 18 of the U. P. Act. In the second place, I think that the words used in section 4 (d) of the Bihar Act are very much more definite and emphatic than those used in clauses (h) and (i) of section 6 of the U. P. Act. On an analysis of the provisions of section 4 (d) of the Bihar Act, it is manifest that (1) if there is money due from a proprietor or tenure-holder whose estate or tenure has vested in the State, and (2) if the payment of that money is secured by a mortgage of, or is a charge on, such estate or tenure, the consequence will be that no suit shall lie in any Civil Court for the recovery of such money, and all suits and proceedings for the recovery of any such money, which might be pending on the date of vesting, shall be dropped. It is abundantly clear from this analysis that the prohibition is not only against the enforceability of the mortgage or charge but the prohibition is against recovery of the money by a suit or proceeding already instituted or to be instituted after the date of vesting. If the money itself is irrecoverable by way of a suit or other proceedings, I do not see how it can be said that, even in a case in which the entire mortgaged or charged property has vested in the State, the creditor can proceed to realise his money in a manner other than that provided in Chapter IV. It seems clear that the entire mortgage is destroyed in such a case. Ground No. 3 in the Full Bench decision, as summarised above, cannot, therefore, be accepted as correct. Clause (h) of section 6 of the U. P. Act lays down that no claim or liability of the kind mentioned in that clause will be enforceable against the intermediary's interest in the estate except as provided in section 73 of the Transfer of Property Act. Clause (1) says that suits and proceedings would only be stayed and that they would be dropped as provided in section 4 (d) of the Bihar Act. Under Section 6 (h) of the U. P. Act, therefore, the person holding the mortgage or charge can pursue the substituted

security in the shape of the compensation; whereas, under section 4 (d) of the Bihar Act, the creditor cannot recover his money by a suit or other proceeding if the entire estate, subject to the mortgage or charge, has vested in the State, and it has not been provided that he can follow a substituted security. The result is that, as I have said, his only remedy is to make a claim under section 14 of Chapter IV of that Act. Their Lordships considered, in Rana Sheo Ambar Singh's case, AIR 1961 SC 1790 whether the bhumidari right created in favour of the intermediary could be pursued as substituted security because the right was given to the mortgagee, under section 6 (h) of the U. P. Act, to proceed against substituted security as provided in section 73 of the Transfer of Property Act. Under the Bihar Act, no right has at all been given to the mortgagee, whose money is a charge on, or is secured by, a mortgage of the estate which has vested in the State, to proceed against any property of the mortgagor which can be treated as substituted security or as an accession to the mortgaged property.

46. Mr. Lalnarayan Sinha has urged that the bakasht lands which are deemed to be settled with the mortgagor intermediary as an occupancy raiyat must be deemed to be an accession to the mortgaged property, if not substituted security. I do not think it is necessary to consider whether the lands can be treated as accession to the mortgaged property. My reason is that, as I must emphasise, there is a prohibition under section 4 (d) of the Bihar Act against recovery of the money itself by way of a suit or proceeding. The mortgagee cannot, therefore, pursue any property either because, according to him, it is substituted security or an accession to the mortgaged property. When, therefore, their Lordships of the Supreme Court have said, in Rana Sheo Ambar Singh's case, that the only course open to the mortgagee is to follow the compensation money under section 6 (h) and the bhumidhari right cannot be followed as substituted security, it is difficult to see how a mortgagee can be held to stand on a better footing under section 4 (d) of the Bihar Act. It follows that ground No. 4 in the Full Bench decisions, as I have formulated it above, cannot now be held to be correct.

47. Other considerations may arise if part of the mortgaged or charged properties vests in the State and part of them does not so vest; but, where the entire mortgaged estate vests in the State under the Bihar Act, the conclusion reached by their Lordships of the Supreme Court in Rana Sheo Ambar Singh's case, AIR 1961 SC 1790 that the mortgagee cannot pursue the land in which bhumidhari rights are created under Section 18 of the U. P. Act in the intermediary's favour must provide the basis for the interpretation of the provisions of the Bihar Act also. It follows that the mortgagee cannot pursue the occupancy raiyati right created in favour of the ex-intermediary under Section 6 (1) of the Bihar Act. The decision in Rana Sheo Ambar Singh's case, AIR 1961 SC 1790 has thus superseded the decision in the Full Bench case of this Court.

48. It remains now to consider the decision in AIR 1962 SC 1464. The facts of that case may be shortly stated. The appellants obtained a mortgage decree. The trial Judge ordered that "the mortgaged properties would be charged preliminary and if the decretal amount is not fully satisfied from them, then alone the respondent would be personally liable for the satisfaction of the balance, if any." Thus, a composite decree, in the sense that it was not only a decree for realisation of the mortgage money by sale of the mortgaged properties but a personal decree, was passed. The entire mortgaged properties vested in the State of Bihar under the Land Reforms Act. The appellants sought to realise their mortgage decree by sale of properties of the judgment-debtor respondent other than those which were mortgaged. The executing Court held that the appellants had obtained a personal decree also, and that they had a right to sell his other

properties. When the matter came to this Court in civil revision, it was held that a personal decree had been passed, but the appellants had no right to execute the personal decree by selling the other properties of the respondent because Section 4 (d) of the Act constituted a bar. The judgment of this Court has been reported in AIR 1957 Patna 575. Incidentally, I may mention that this is one of the cases which have been overruled by the Full Bench decision in AIR 1958 Patna 630.

49. As their Lordships of the Supreme Court were of the opinion in Krishna Prasad's case, AIR 1962 SC 1464 that the terms of the decree required that the appellants must, first, seek their remedy from the compensation payable to the respondent before they could proceed upon the basis of the personal decree against those properties which were not mortgaged, they overruled the argument advanced on behalf of the appellants in that they were entitled to execute the personal decree without taking recourse to the remedy available to them under Chapter IV and Section 24 (5) of the Bihar Act. The Full Bench decision in Mahanth Sukhdeo Das's case, AIR 1958 Patna 630 was brought to the notice of their Lordships; but they did not consider it necessary to examine the merits of the conclusions reached in that case. They mentioned, however, that the decision in Rana Sheo Ambar Singh's case had been referred to on behalf of the respondent, and it was argued that the decision in that case had shaken the validity of the Full Bench decision. Mr. Lalnarayan Sinha has laid great stress upon this part of the judgment, and has urged that the decision in Krishna Prasad's case cannot be regarded as shaking the validity of the Full Bench decision. It is true that their Lordships did not pronounce upon the correctness of the decision; but some observations of Gajendragadkar, J., who delivered the judgment of the Court, are important. His Lordship has stated that the point which fell to be decided was in regard to the scope and effect of Section 4 (d) of the Bihar Act. He has observed :

> "So, the scheme of Chapter IV which consists of Sections 14 to 18 clearly is that all claims based on mortgages relating to estates have to be submitted to the Claims officer and the amounts due to the creditors have to be determined in accordance with the principles laid down by the Act. Where whole of the property mortgaged is an estate, there can be no doubt that the procedure prescribed by Chapter IV has to be followed in order that the amount due to the creditor should be determined by the Claims Officer. The decision of the Claims Officer or the Board has been made final by the Act."

He has further said :

> "Thus, the scheme of Chapters IV, V and VI is clear. The provisions in the said Chapters constitute an integrated and self-sufficient Code for the determination of the amount due to the creditors in question and for their payments, and so Section 35 which occurs in Chapter VIII prescribes a bar to the jurisdiction of Civil Courts in the matters included in it."

Another observation is :

> "It was not the object of the Act, says Mr. Jha, to extinguish debts due by the proprietors or tenure-holders and so it would be reasonable to confine the operation of Section 4 (d)

only to the claims made against the estates which have vested in the State and no others. In our opinion, this argument proceeds on an imperfect view of the aim and object of the Act. It is true that one of the objects of the Act was to provide for the transference to the State of the estates as specified. But as we have already seen, the provisions contained in Section 16 in regard to the scaling down of the debts due by the proprietors and tenure-holders clearly indicate that another object which the Act wanted to achieve was to give some redress to the debtors whose estates have been taken away from them by the notifications issued under Section 3".

Referring to the words used in Section 4 (d), his Lordship has stated :

"..... these words are wide enough to include within their sweep execution proceedings, even though the recovery of the amount due may have been claimed by the decree-holder from properties other than those which have vested in the State. The only limitation imposed by the clause is that the execution proceedings should be for the recovery of any such money - meaning any money due from the proprietor on the strength of a mortgage executed by him in respect of an estate."

After a consideration of the scheme of the relevant provisions of the Act, he has said :

"..... it is difficult to confine the application of Section 4 (d) only to execution proceedings in which the decree-holder seeks to proceed against the estate of the debtor. In fact, an execution proceeding to recover the decretal amount from the estate which has already vested in the State, would be incompetent because the said estate no longer belongs to the judgment-debtor."

50. Though their Lordships have not, in Krishna Prasad's case. AIR 1962 SC 1464 overruled the Full Bench decision in Mahanth Sukhdeo Das's case, AIR 1958 Patna 630 because it was not necessary for them to do so, great weight must be attached to the observations which I have quoted above. In view of those observations, none of the grounds given for the decision in the Full Bench case can be regarded as correct any longer.

51. In my judgment, the Full Bench decision in Mahanth Sukhdeo Das's case that a mortgagee can pursue his remedy against the bakasht lands of the mortgagor, which are deemed to have been settled with him under Section 6, cannot, in view of the two Supreme Court decisions mentioned above, be considered to be good law.

52. In view of the conclusions which I have reached above, it is unnecessary for me to consider any other point raised in the case. On the basis of those conclusions alone, I would allow Miscellaneous Appeal No. 110 of 1961 and dismiss Second Appeal No. 516 of 1961 with costs. The result will be that, in Miscellaneous Appeal No. 110 of 1961, the objection raised by the judgment-debtors would be accepted, and the decree-holders would not be allowed to proceed against the bakasht lands of the judgment-debtors which are deemed to have been settled with them under Section 6 (1) of the Bihar Act. In the second appeal the suit for enforcement of the

mortgage would be dismissed.
Appeals dismissed.

Cases Referred.

[1]1958 BLJR 559
[2] AIR 1962 S C 1464
[3] AIR 1957 Pat 575
[4]1953 BLJR 563
[5]1956 BLJR 177
[6]1957 BLJR 72: (AIR 1957 Pat -226)
[7] AIR 1961 SC 1790
[8](1878) 4 Q. B. D. 104
[9]1896 AC 434
[10]1963 B.L.J.R. 198
[11] ILR 24 All 538
[12] AIR 1939 Cal 275
[13] AIR 1925 PC S6
[14] AIR 1945 Bom 248
[15]6 Pat LI 347
[16]28 Cal LI 188 : 45 Ind App 130
[17]48 Ind App 465
[18](1940) 1 All ER 425
[19](1943) 2 All ER 61
[20](1946) 1 All ER 98
[21] AIR 1959 SC 135
[22](1941) AC 1
[23] AIR 1950 SC 6
[24] AIR 1951 Pat 1
[25] AIR 1938 All 210
[26] AIR 1927 Pat 215
[27] AIR 1928 Pat 581
[28] AIR 1962 Pat 72