

**D.E.D. Cohen Vs. Baidyanath Mukherjee**

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**Court :** Kolkata

**Decided On :** Nov-30-1937

**Reported in :** AIR1938Cal507

**Appellant :** D.E.D. Cohen

**Respondent :** Baidyanath Mukherjee

**Judgement :**

**McNair, J.**

1. The plaintiff Cohen on 27th July 1928 executed a mortgage of the premises 57, Ballygunge Circular Road in favour of Miss Mary Jones. The property was already subject to prior mortgages in favour of the Administrator General of Bengal, but the rights of the prior mortgagee are not in dispute in the present action. The mortgage in suit inter alia provided that it should be read and construed as an English mortgage as defined by the Transfer of Property Act, 1882, and that the power of sale and all other powers and provisions ancillary or auxiliary thereto conferred upon a mortgagee by the said Act or by Sections 6 to 19 inclusive of the Trustees and Mortgagees Powers Act (28 of 1866) or any statutory modification thereof should be incorporated therein, (which includes the power to appoint a receiver) but without the restriction in the last mentioned Act contained as to giving notice. On 16th June 1933 interest on the mortgage was admittedly over six months in arrears, and Miss Mary Jones, through her constituted attorney Mr. Deveria, acting

under the powers contained in the Trustees and Mortgagees Powers Act and incorporated in the mortgage, appointed the defendant Baidyanath Mukherjee receiver of the mortgaged premises.

2. The plaintiff thereupon brought a suit in the Court of the Second Munsif at Alipore in 1934 for a declaration that the appointment was illegal and for an injunction restraining Mr. Mukherjee from taking possession of the mortgaged premises or from realizing rent from the tenants. The trial Court granted the relief claimed, but the District Court reversed that decree, and the High Court in second appeal upheld the decree of the District Court. By the decision of the High Court in appeal, which is reported in *David Elias Duck Cohen v. Baidyanath Mookerjee* : AIR1936 Cal646 , it has been finally decided that the mortgage is an English mortgage and that Mr. Mukherjee's appointment as receiver was valid. The High Court on 12th June 1935 had appointed the defendant receiver under the Court pending the hearing of the appeal and he was formally discharged as such receiver after passing his accounts by an order of the Court of the Second Munsif at Alipore on 11th September 1936. That order provided that after passing his accounts a sum of Rs. 2152 remained in the hands of the receiver out of which Rs. 179 was to be paid to Mr. Cohen and for the balance Rs. 1973 the receiver was to be 'answerable to Miss Mary Jones and Mr. Cohen as provided for in law as receiver.' Mr. Cohen tried to have this order reconsidered and to re-open the receiver's accounts, but his application was dismissed on 13th May 1937, ten days after he had filed the present suit.

3. It follows therefore that the defendant was validly appointed as a receiver by the mortgagee on 16th June 1933, and that he continued in that capacity until 12th June 1935, when he became a Court receiver until discharged as such by the Court on 11th September 1936. On 4th February 1937 a meeting was held at the office of the Administrator General at which the present plaintiff, Miss Jones, and the Administrator General were represented and an agreement was arrived at for the liquidation of the plaintiff's debts. The Administrator General was to lend the plaintiff a sum of Rs. 75,000 which was to be applied in satisfaction of the existing mortgages. Out of this sum Rs. 24,000 was to be paid by the Administrator-General to Miss Jones and the plaintiff was to pay a further Rs. 3000 either out of

arrears of rent in respect of the property or from any other source available to him. The parties agreed inter alia that 'until the transaction is ready for completion Miss Mary Jones's receiver under her mortgage shall not be discharged by her', but that he should not, in the mean time, make any further collections.

4. The plaintiff accepted the receiver's accounts up to 31st December 1936, and agreed the amount shown as arrears of rent due from tenants on that date. It was also agreed that the receiver should hand over subsequent collections to the Administrator. General less his commission and the cost of the repairs for payment of which he was liable not exceeding the maximum sum of Rs. 800. Thereafter correspondence passed in which the terms of settlement were discussed, and the receiver submitted an account showing his collections and expenditure and a balance 'cash in hand Rs. 11-9-0' on 12th February 1937. On 16th March 1937 the plaintiff wrote to Miss Mary Jones as follows:

Dear Madam,

I write to place on record that I accept the receiver's accounts excepting for a sum of Rs. 800 still remaining in his hands available for payment of the costs of repairs. Yours faithfully. D.E.D. Cohen.

5. Miss Jones' attorney replied on the same day that Rs. 100 had been paid as costs (and the validity of that payment is not in dispute) and that Rs. 525 had been paid to a mistry to whom the remaining Rs. 175 was also due for repairs. The mistry's receipt for the payment was admittedly submitted to the plaintiff's attorney but the plaintiff in his letter of 17th March 'does not see how that affects him.' On 16th March Miss Jones reconveyed the property to the plaintiff and executed a deed of release in his favour which contained a clause:

That all pending legal proceedings by and between the parties thereto or their agents should be forth-with abandoned and that no party to such proceedings should have any claim against the other party in respect of the said proceedings on any account whatsoever.

6. Miss Jones, who had given up more than half her claim in order to bring these disputes to an end, resents in her letter to the receiver dated 18th March 1937, the objections now raised to the mistry's bill. These objections were pressed and the attitude of Miss Jones and the receiver as appears from the correspondence is, that although the whole of the accounts were agreed as a result of the compromise at the Administrator-General's Office, they were not unwilling that the mistry's work should be checked against his bills. Unfortunately, meetings arranged for this purpose fell through, and the plaintiff in the meantime has continued to litigate both here and in Alipore, apparently with the object of re-opening the whole of the receiver's accounts. He now alleges that he only accepted the accounts in order to come to a compromise with Miss Jones. Apparently, he is under the impression that he can accept the receiver's accounts as accurate, and on that basis obtain from Miss Jones the remission of some thousands of rupees which he owed to her as interest, but that he can at the same time turn round on the receiver appointed by Miss Jones (who has passed his accounts to her satisfaction, and parted with the money in his hands) and call upon him once more to account when he no longer retains funds from which he can deduct his costs if the plaintiff's claim is rejected.

7. The confusion which the meeting of 3rd February was intended to check, was once again renewed and the receiver from the correspondence appears doubtful of his exact legal position. He has filed accounts and he has handed over all the documents in his possession to the mortgagee who appointed him. The mortgagee accepts the situation and has ceased to take any further interest in the property, but the plaintiff seeks to question the receiver's accounts and refuses to give him his discharge. The defendant in the circumstances refrained from collecting any further rents, but being unaware of his true position and in face of the plaintiff's opposition he has naturally refused to inform the tenants that he has been discharged. After the present suit was brought on 3rd May, the plaintiff applied for an interlocutory injunction restraining the defendant from further acting as receiver. On 16th June, Ameer Ali J. heard the application and discharged the defendant from the receivership without prejudice to the contentions of the parties, and on 16th June he ordered the trial of the suit and framed the following issues :  
(a) As to whether the receiver is accountable to the mortgagor (to plaintiff) and if

so, from what period? (b) Whether the receiver's account has already been accepted and passed by the plaintiff and the receiver thereby discharged

8. In dealing with Issue 1 it is necessary to consider the particular circumstances of this case. The mortgage is an English mortgage; the interest was six months in arrear, and in the circumstances the mortgagee had the power to appoint a receiver and such power was validly exercised. These facts cannot be contested after the decision in *David Elias Duck Cohen v. Baidyanath Mookerjee* : AIR1936 Cal646 . Section 69-A, T.P. Act which was added by the Amending Act 20 of 1929 is admittedly inapplicable to this mortgage which was executed in 1928, but Sections 12 and 13 of the Trustees and Mortgagees Powers Act, 1866 apply. Section 12 provides for the appointment of a receiver by the mortgagee and Section 13 provides that the receiver shall be deemed to be the agent of the person entitled to the property subject to the charge, that is to say, in this instance, of the mortgagor Cohen.

9. Mr. Carden Noad for the mortgagor argues that once it is conceded that the receiver is the agent of the mortgagor the general rule is applicable that the agent is accountable to his principal. What the Court has to consider is whether that general rule is applicable to the peculiar relationship which is created where the receiver is appointed under the power contained in an English mortgage. No deed or documents relating to the appointment have been produced and the parties seek a decision on general principles without relying on any peculiar provisions of a document. Kekewich J. has discussed the position of a receiver under English law in *White v. Metcalf* (1903) LR 2 Ch 567. Before the Legislature intervened, the receiver was appointed by the mortgagee to protect his security but he was the agent of the mortgagor. He was appointed in order that the money should not go to the mortgagor, but should be stopped in the hands of a third person who would have to pay the rates and taxes and other outgoings affecting the mortgaged property, but subject to that, would be directed to pay the interest to the mortgagee, handing over the net balance to the mortgagor. The Conveyancing Act 1881 merely adopted the practice of conveyancers.' Section 24, Sub-section 2 provides that the receiver shall be deemed to be the agent of the mortgagor and the mortgagor is to be entirely responsible for his receipts, 'in other words,' says

the learned Judge,

if the receiver taking the rents and profits levants leaving the mortgagee in the lurch, the result is that the mortgagor still remains liable on his covenant and is bound to pay notwithstanding that his agent unfortunately has received more than sufficient to keep down the interest.

10. The question for decision in that case was whether the receiver could execute necessary repairs and charge them to the mortgagee. The Court held that no such expenditure could be allowed unless authorized in writing by the mortgagee, and then only to the extent of the rents and profits. The receiver is appointed to receive the rents and profits. What he has in hand after payment of all outgoings is applicable to keeping down the interest on the mortgage:

When he has done that, the balance belongs to the mortgagor, and the mortgagor may do what he likes with that balance and may have it applied in repairs or otherwise as he thinks fit. But until the interest is kept down, the balance after paying these outgoings which are provided for, belongs to the mortgagee and the only discharge which the receiver can get is from the mortgagee. It is to the mortgagee that he must look for his authority and to the mortgagee that he is accountable.

11. In view of the peculiar position of the receiver in these cases, no analogy in my opinion can be drawn from the law of principal and agent. It is the mortgagee who appoints the receiver and without reference to the mortgagor if so provided by the deed. Again the mortgagor cannot of his own will revoke the appointment of the receiver. The appointment is made to enable the mortgagee to obtain the benefit of possession without its disadvantages and if it be urged that the position bears hardly on the mortgagor, the answer is that is the contract into which he entered. The dangers of introducing such a doctrine throughout India, where expert legal advice is not always available and where the parties are frequently illiterate, has been considered by the Courts and by the Legislature and the persons by whom and the places where such mortgages may be made are restricted by statute. The parties to the mortgage in suit must be taken to be well aware of the transaction into which they were entering and the principles evolved by English conveyancers

have been adopted by the Legislature in India and incorporated in the Indian Acts, with the limitation I have mentioned. In my opinion Section 13, Trustees and Mortgagees Powers Act, 1866 which provides that the receiver shall be deemed to be the agent of the mortgagor, intended that he should be such agent to the same extent as a receiver under Section 24, Sub-section 2, Conveyancing Act, 1881 and in the words of Kekewich J., 'it is to the mortgagee that the receiver must look for his authority and to the mortgagee that he is accountable.'

12. It is possible that in special circumstances where the receiver has made sufficient collections to satisfy the mortgagee's interest and holds a balance which belongs to the mortgagor, the mortgagor could call upon him to account to the limited extent of such balance. That is not the case here, for, the mortgagee's interest has never been paid in full and it is difficult to imagine such a contingency. The answer to Issue 1 is that the receiver is not accountable to the mortgagor. Even if he were to succeed on Issue 1, the plaintiff must in the main fail on Issue 2. At the meeting with the Administrator-General on 4th February 1937, the plaintiff admittedly accepted the receiver's accounts upto 31st December 1936. He may have genuinely been under the impression that he could accept them in order to come to terms with Miss Jones and retain his right to challenge them against the receiver. But nowhere does any such limitation appear from the terms of the agreement. From the correspondence it is clear that both the receiver and Miss Jones looked upon it as an unqualified acceptance, and it is also apparent that Miss Jones would never have accepted the compromise, and released the plaintiff from a heavy liability, if she had thought that he retained a right to raise further objections on the accounts. The receiver submitted a supplementary account on 12th February 1937, and again the plaintiff on 16th March accepts the receiver's account with the single exception of the mistry's bill. Clearly on this letter, there is an unqualified acceptance of the account as submitted with the exception of the single item of Rs. 800. That account showed cash in hand Rs. 11-9-0 and as the plaintiff complained that he had no knowledge of how this sum was dealt with, he was offered the amount in Court in full settlement of his claim.

13. The Rs. 800 has dwindled to Rs. 700 and relates entirely to a mistry's bill for repairs to the property. Rs. 525 has already been paid to the mistry and his receipt

had been shown to the plaintiff and the receiver settled the rest of his claim for Rs. 125. The plaintiff has given evidence that the mistry has not completed the repairs according to the estimate and he has been cross-examined to show that he has never inspected the actual repairs closely enough to justify his contention. That question does not arise on the issue, but from the evidence it is apparent that the plaintiff's objections, even if sustainable, would refer to a comparatively small sum of money. For the reasons already stated, on Issue 1, I hold that the plaintiff is not entitled to an account even of the mistry's bill. The plaintiff has covenanted in the mortgage to keep the property in good and substantial repair, but, once the receiver is appointed, the latter's duty is to collect the rents and profits and to pay the rates and taxes and other outgoings, and, subject thereto, to pay the balance in discharge of any interest that may be due to the mortgagee. It is only after the mortgagee's dues for interest are satisfied that any available balance may be used for the mortgagor and it is only such balance that the mortgagor may use for the execution of repairs. The proposition is clearly laid down in *White v. Metcalf* (1903) LR 2 Ch 567. The mortgagee's dues had not in this case been satisfied, and if the mortgagee allows a sum of Rs. 800 out of those dues to be expended on repairs, it is the mortgagee and not the mortgagor who must be satisfied as to the manner in which the money is spent.

14. I hold that the defendant is not accountable to the plaintiff, but that his accounts have in fact been accepted and passed by the plaintiff except in regard to the mistry's bill for repairs. The suit is dismissed. The receiver has stated that he has returned all documents in his possession to the mortgagee who appointed him. His attitude appears to me to have been correct throughout, and I consider that he should be indemnified for the costs that he has incurred. The plaintiff must pay to the defendant his costs as between attorney and client, including all reserved costs.