

State of Bihar Vs. Bank of Bihar Ltd.

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Overruled by : [The Bank of Bihar Vs. The State of Bihar and Ors.](#)

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Court : Patna

Decided On : Apr-23-1963

Reported in : AIR1963Pat344

Judge : Kanhaiya Singh and Ramratna Singh, JJ.

Acts : [Contract Act, 1872](#) - Section 180; Essential Supplies (Temporary Powers) Act, 1946; Essential Supplies (Temporary Powers) Rules - Rule 46A(5); Bihar Sugar Factories Control Act, 1937; [Code of Civil Procedure \(CPC\), 1908](#) - Order 22, Rule 4 - Order 41, Rule 33

Appeal No. : A.F.O.D. No. 420 of 1955

Appellant : State of Bihar

Respondent : Bank of Bihar Ltd.

Advocate for Pet/Ap. : K.D. Chatterjee, Adv.

Judgement :

Ramratna Singh, J.

1. This appeal has been preferred by the State of Bihar against the decision of the Fourth Additional Subordinate Judge, Patna, granting a decree for a sum of Rs.

93,910/10/9, together with interest at 6 per cent per annum from the date of the institution of the suit to the Bank of Bihar Ltd., the sole plaintiff, in the suit of which this appeal arises.

2. The facts now admitted are these : Under an arrangement with the South Bihar Sugar Mills Ltd., defendant No. 2, that is, the Jagdishpore Zamindary Co. Ltd. (hereinafter referred to as the Company) came into possession of the manufacturing section of the Mills at Bihta from the beginning of the crushing season of 1946-47. Defendants 3 to 5 were the Directors of the Company. Early in 1947, the Company entered with the Bank into a cash credit agreement, according to which the company was to pledge with the Bank the entire stock of sugar manufactured by them in the Mills and to take advances of money from the Bank under the cash credit system. On the 6th December, 1947 the outstanding advances of the Bank against the Company stood at Rs. 3,23,486/2/-, and the Bank was holding 6239 bags of sugar as pledgee, the sugar bags having been kept in the godowns within the premises of the Mills, but under the locks and keys of the Bank. The cash credit account was further secured by the personal guarantee furnished by the aforesaid Directors.

On the 24th August, 1947, the Sugar Controller for India passed an order under the Essential Supplies Temporary Powers Ordinance 1946, which was replaced by the Essential Supplies Act, 1946, directing the Mills to place at the disposal of the Government of Bihar 680 tons of sugar. Under Clause 7 of the Sugar and Sugar Products Control Order the Chief Controller of Prices and Supplies, Bihar, issued an order on the 27th September, 1947 directing the said Mills to supply to the District Magistrate of Patna 17441 maunds of sugar during the period from January to November, 1947; and the deliveries of sugar were to be made to different stockists as per direction of the District Magistrate or the Subdivisional Magistrates concerned. In pursuance of this order, a direction was issued to the Mills on the 2nd December, 1947 for the supply of 14,743 maunds of sugar. Even though the Factory Manager of the Mills had received advances from many of the stockists, no supply of sugar was made and it was apprehended that the Factory was only bidding time and trying to avoid making the supply until the 8th December, 1947, when sugar was to be decontrolled.

The Government of Bihar, therefore, passed an order on the 5th of December, 1947 under section 3 of the Act for the seizure of 5,000 maunds of sugar, and in pursuance of this seizure order, the Rationing Officer and the District Magistrate of Patna got the locks of the Bank put on the godowns broken open on the 6th or 7th December, 1947 and forcibly removed 4999 1/2 maunds of sugar. Thereafter, two separate criminal cases were started against the General Manager and the Cane Manager of the Company. The case under Section 7 of the Essential Supplies (Temporary Powers) Act ended in acquittal; but the case under section 186 of the Penal Code against the General Manager, Shree Santosh Kumar Jan, ended in conviction, as the obstruction offered by the accused to the seizure was held to be illegal. This conviction was upheld by the Patna High Court in *S. K. Jain v. State*, AIR 1950 Pat 436 as also by the Supreme Court in *S. K. Jain v. State*, AIR 1951 SC

201. Both the High Court and the Supreme Court also found that the seizure was lawful. Ultimately, the seized sugar was sold by auction at Rs. 29/8/- per maund, and the amount of money fetched by the sale was deposited in the Government Treasury. Subsequently, however, the Cane Commissioner got a certificate issued against Jagdishpu Zamindari Company for realisation of arrears of cane cess and the entire sale proceeds deposited in the treasury were attached and ultimately made over to the Cane Commissioner.

3. The plaintiff-Bank contended that the seizure of the sugar was illegal and claimed from the State the quantity of sugar seized plus damages calculated as interest on the price of sugar at 6 per cent per annum from the 7th December, 1947 to the date of the institution of the suit, or the price of the sugar which, according to the Bank, would come to Rs. 1,81,700 79/3 plus interest, at the same rate and for the same period. In the alternative, the Bank prayed for a decree against defendants 2 to 5 for Rs. 93,910/- and odd being the amount due against them under the said cash credit account of defendant No. 2 as maintained in the plaintiff's book with future interest at a reasonable rate. These defendants asserted that the Bank had no claim against them, though they supported the Bank in other respects.

4. The State of Bihar (defendant No. 1) asserted, however, that the seizure of the sugar was in accordance with law, and the sale proceeds, that is, a sum of Rs. 1,50,039/1079 deposited in the treasury under two chalans dated the 30th October, 1949 and 10th January, 1950 were attached by the Certificate Officer, Patna, in a certificate case under the Bihar and Orissa Public Demands Recovery Act on account of arrears of cane cess amounting to Rs. 2,00,000/- due from the South Bihar Sugar Factory.

5. The learned Subordinate Judge found that the seizure order on the strength of which the stock of sugar was seized was perfectly valid, and the persons seizing the stock could not be said to have committed trespass to the goods so as to give rise to a claim for unliquidated damages pressed on behalf of the Bank. It was further held that, though strictly speaking, the Bank was entitled to the price of sugar at the controlled rate of sugar, namely, Rs. 19/8/- per maund on the date of seizure; but, as sugar had been sold at a higher rate at the auction, the advantage of the higher price should also go to the Bank or the Company. He also held that, although the attachment order of the Certificate Officer was valid and binding on defendant No. 2, it was not binding on the plaintiff-Bank, and it could be legally operative only with respect to that portion of the price which was not necessary for the liquidation of the dues of the Bank from the Company, and the Bank's right as the pledgee would prevail despite this attachment in view of the fact that the sale proceeds of the seized sugar were never in the custody of the Criminal Court.

It was also held that the Bank's right as pledgee could not be extinct on account of the seizure inasmuch as the pledge of the goods was not meant to replace the liability under the cash credit agreement but was intended to give the Bank a primary right to sell the same in satisfaction of the said liability and consequently a subsidiary right to prevent the Company from depleting the stocks in derogation of the aforesaid primary right of the Bank. The guarantee executed by defendants 3 to 5, making themselves personally liable for the dues of the Bank from the Bank, was held to be valid and effectual despite the seizure. Ultimately, the learned Subordinate Judge passed a decree against the State only for Rs. 93,910/10/9, the amount of the Bank's dues, from the Company with interest at 6 per cent per annum from the date of the suit until realisation.

6. Shri K. D. Chatterji, Government Pleader, submitted on behalf of the appellant that, In view of the finding that the seizure was lawful and that the plaintiff was not entitled to any damages against the State, the learned Subordinate Judge was wrong in granting a decree against the State for the amount due from defendants 2 to 5. His argument was that the claim of the plaintiff against the State was only for damages on account of illegal removal and detention of sugar, and the Court could not grant a decree against the State on any other ground. He further submitted that the plaintiff had no cause of action against the competing creditor, that is, the Cane Commissioner, who had withdrawn the money deposited in the treasury through the certificate proceedings in respect of the cane cess, legally recoverable from the Company, that is, the pledger of the Bank. The finding that the seizure of the sugar was lawful was not challenged in this Court by the respondents. But relying on the decision in *Chetandas Gulabchand v. State of Bihar*, AIR 1958 Pat 512, it was faintly contended that, even in case of a lawful seizure, the Bank was entitled to damages from the State.

The facts of that case were completely different. In that case, a certain quantity of cloth was lawfully seized under Rule 75A of the Defence of India Rules in pursuance of the order of the Additional District Magistrate and sold; and the sale proceeds were deposited in Government Treasury. But in spite of repeated requests the price deposited in the treasury was not paid to the plaintiffs. This Court granted a decree for compensation on account of this refusal as also on the ground that the State profited by the refusal in retaining the amount in its treasury. But in the instant case, the State was willing to pay the sale proceeds, and it was prevented from doing so on account of the attachment in the certificate case. This contention of the Bank must, therefore, be rejected.

7. Then, it was submitted that the Bank as a pledgee of the goods was a secured creditor, and, therefore, the claim for its dues against the Company in respect of the goods seized had priority over the claim of the Cane Commissioner in respect of the cane cess. It is, therefore, necessary to examine the position of the Bank and its remedies for the recovery of the dues.

8. A pledge or a pawn is a bailment, of goods as a security for some debt or engagement; and, the pledgee or the pawnee can retain the goods pledged only for the debt to secure which the goods were pledged as also for the interest thereon and the expenses incurred by the pawnee for the preservation of the goods pledged (see Sections 172 to 175 of the Indian Contract Act). The pledgee can, in default of payment of the debt by the stipulated time, sell the goods pledged out of court or bring a suit for sale thereof (see Section 176). A "bailment" is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them (see Section 148); and the delivery to the bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or of any person authorized to hold them on his behalf (see Section 149). As stated earlier, pledge is a bailment of goods. It will, therefore, be seen that delivery of goods to the pledgee, either actually or symbolically, e. g., by making over the key of the warehouse in which the goods are stored is an essential condition. It was conceded in the instant case by the learned Government Pleader that the Bank was the pledgee of the sugar on account of the fact that it was in possession of the keys of the go-downs where the sugar was stocked at the time of seizure.

9. A pledgee does not have the right of ownership, though he has the right of possession of the goods for a limited purpose but not the right of enjoyment. The interest that the pledgee has in the pledged goods is a special kind of interest or property, which excludes the notion of ownership. If the pledgee sells the goods, he does so by virtue and to the extent of his pledgor's ownership, and not with a new title of his own; and the right of sale is exercisable by the pledgee by virtue of an implied authority from the pledgor and for the benefit of both the parties. In other words, a pledgee has merely possession of the goods coupled with a power to sell them on default by the pledgor, but the latter retains the ownership subject to a lien to the extent of the debt enforceable by exercise of the power of sale. This lien, however, ceases to exist when the goods go out of his possession, except when he is wrongfully deprived of the same.

10. In this connection, the provisions of Sections 180 and 181 of the Contract Act, which are reproduced below, are important:

"180. If a third person wrongfully deprives the bailee of the use or possession of the goods bailed, or does them any injury, the bailee is entitled to use remedies as the owner might have used in the like case of no bailment had been made; and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury.

18 Whatever is obtained by way of relief or compensation in any such suit shall, as between the bailor and the bailee, be dealt with according to their respective interests."

These two sections give a clue to the answer to the question whether in the instant case the Bank has got any remedy against the State of Bihar.

In view of the finding that the seizure of the sugar was lawful, it cannot be said that on account of the seizure the State wrongfully deprived the Bank of the use or possession of the sugar. It is true that in the instant case the sugar seized was converted into money on account of the auction sale, and, unless legally forfeited, the sale proceeds would be available to defendants 2 to 5, subject to the claim of the Bank against them; but the Bank ceased to have any lien on the pledged property or the sale proceeds against any third. party, including the State, as soon as the Bank was legally deprived of the possession of the pledged goods. Again, the Bank and its pledgor could have recovered the unforfeited sale proceeds from the State, if the attachment in the certificate proceedings started by the Cane Commissioner did not intervene. The question therefore, is whether the Bank can recover the money from the State representing the Cane Commissioner,

The remedy under Section 180 of the Contract Act would be available to the Bank against the State, if the Commissioner had wrongfully deprived the Bank of the substituted security, namely, the price of the sugar fetched at the auction sale. But there was no wrongful deprivation in the instant case, firstly, because the seizure was lawful, and, secondly, because the Cane Commissioner recovered the money due lawfully as cane cess through certificate proceedings. Section 29 (2) of the

Bihar Sugar Factories Control Act, 1937 empowers the Governor to impose a cess at a certain rate per maund on the entry of sugarcane into a local area; and this is ordinarily called the cane cess. The fact that the amount for which the certificate proceeding was instituted by the Cane Commissioner was lawfully due as cane cess from the South Bihar Mills Ltd., was not disputed; and Rule 46-A (5) of the Rules framed under the Act, 1937 enables the recovery of cane cess by certificate proceedings as a public demand. Hence, there was no wrongful deprivation of the money by the Cane Commissioner through the certificate proceedings; and the remedy under Section 180 of the Contract Act was not available to the Bank against the State representing the Cane Commissioner either.

11. I shall now discuss the authorities cited by Mr. De on behalf of the Bank. He relied first on paragraph 42 of Volume XXV of Halsbury's Laws of England (Second Edition). It is stated there that, on the bankruptcy of the pawner, the pawnee is a secured creditor in the bankruptcy with respect to things pledged before the date of the receiving order and without notice of a prior available act of bankruptcy; but where the pawnee has notice of such an act he cannot, without the sanction of the Court, receive payment of his debt and hand over the security. This passage is, however, not at all relevant to the facts of the instant case. Of course, this passage shows that the pawnee is a secured creditor; but this position is also evident from the provisions of the Indian Contract Act and it was conceded by Mr. Chatterjee that the pawnee is a secured creditor so long as he is in possession of the goods pawned. The decision in *Tejpal Jamna, Das v. E. V. David*, AIR 1928 PC 219 also lays down that the pledgee in possession of the goods is a secured creditor; while the decision in *Mercantile Bank of India Ltd. v. Central Bank of India Ltd.*, AIR 1938 PC 52 deals with symbolical or constructive delivery of possession of the goods to the pledgee.

12. The next authority is a bench decision of the Calcutta High Court in *Co-operative Hindusthan Bank Ltd. v. Surendra Nath Dey*, AIR 1932 Cal

524. This decision also is not of any help to the Bank. In order to enforce his claim under a simple mortgage, Dey instituted a suit on the 20th December, 1926. Defendant No. 4, a Bank, alleged that they had advanced money from time to time

to the mortgagors on cash credit system on the pledge of their goods and under several agreements commencing from 19th November, 1925 to the 2nd July, 1926, the Bank became pledgees in possession of the moveable properties of the mortgagors as belonging to U. Ray and Sons, which were kept in certain premises at Gurpar Road; and, the bank, after giving notice to the mortgagors, sold the pledged properties to the Indian Coal Company.

The facts found were these. The plaintiff held a mortgage of certain moveables under a deed dated 8th December, 1920, but he had not reduced them to possession. A bank held as securities certain moveables as per a cash credit agreement of 9th March, 1925, and also the aforesaid machine since 20th May, 1925. The bank took possession on 20th April, 1926, of all goods that were under hypothecation with them. The bank also became a pledgee in possession of all moveables mentioned in the list attached to an agreement of 2nd July, 1926.' One Daga held a hypothecation dated 16th August, 1925, in respect of some moveables all of which were included in plaintiff's mortgage which was anterior in date, and some including the machine were under a previous hypothecation in favour of the bank, and some others including the machine were also the subject-matter of the pledge in their favour. As the Indian Statutes are silent regarding mortgage of moveables, their Lordships considered authorities and statutes relating to English Law and observed:

"From the distinction between a mortgage of moveables and a pledge, as it obtains under the English law as indicated above, it would appear that the rights of the mortgagee is not of the same kind or character as those of the pledgee. In the case of a mortgage the whole legal title passes to the mortgagee conditionally and if there is no redemption the title becomes absolute. In the . case of a pledgee with possession a special property passes to him and he is entitled to detain the goods to secure repayment of the debt due to him."

Then, with reference to the following passage from the case of *Narasiah v. Venkataramiah*, ILR 42 Mad 59 : (AIR 1919 Mad 779 (i)):

"When goods are left in the possession of the mortgagor a wide door is opened for fraud and when the equities between the innocent purchaser and the mortgagee

have to be weighed the preponderance must be given to the purchaser, for the mortgagee has by his omission to secure possession of the goods facilitated the commission of the fraud."

Their Lordships observed:

"The principle however is a sound principle of equity and as regards mortgages of immovable property has been enacted in Section 78, T. P. Act The proposition that no seller can give to the buyer of goods a better title to those goods than he himself has is not an inflexible proposition as exceptions to Section 108, Contract Act, will show."

Ultimately, their Lordships held that

"in determining the order of priority in this country, where hypothecation of moveables is a matter not dealt with by the statute, the equitable principle to which reference has already been made ought to be applied and the bank must be given priority over the plaintiff."

It will be seen, therefore, that the Bank was given priority, as it was in possession of the pledged goods. Substantially to the same effect is the decision in *Abdul Habib v. Maung Tun Kyaing*, AIR 1931 Rang 201.

13. None of the case law cited is, therefore, of any help to the solution of the point in controversy in the instant case and, as stated earlier, the clue to the answer to the question whether the bank is entitled to recover anything from the State in the present suit is to be found in Section 180 of the Contract Act. In view of the finding that the bank was not wrongfully deprived of the sugar on account of the lawful seizure or its price on account of certificate proceeding started by the Cane Commissioner, the plaintiff-bank is not entitled to any decree against the State. But the bank is entitled to its alternative remedy against the defendants second party, who were the debtors.

14. Mr. K. B. N. Singh, who appeared for the defendants-second party, raised several objections to this alternative claim of the bank. His first objection was that the present appeal abated against the defendants second party, as one of the

respondents died and his heirs were not substituted. It is admitted that respondent No. 4, Shri N. K. Jain, died leaving nine heirs who were substituted in his place. The appellant came to know of the death of respondent No. 4 from the statement made by the learned Counsel for the respondents on the 13th March, 1961 and, thereafter enquiries were made regarding the heirs by the appellant as well as by the Bank of Bihar. By an order of this Court dated the 23rd April, 1962, the abatement was set aside, and the nine heirs of respondent No. 4 were substituted in his place. They were his widow, his sons, widow and minor son of a pre-deceased son, and his mother. When notices were served on these heirs of Shri N. K. Jain, the process-server reported in August, 1962, that the mother of deceased respondent No. 4, who had been substituted as respondent No. 4 (9), was dead.

Thereafter, no steps were taken for substitution of her heirs, and the appeal abated against the heirs of deceased respondent No. 4 (9) (see order No. 60 dated the 22nd October, 1962). Mr. K. B. N. Singh relied on the Full Bench decision in *Bajinath Ram v. Mt. Tunkowati Kuer*, AIR 1962 Pat 285 (FB), where it was held that, if during the pendency of the appeal one of the appellants or respondents dies and the right to sue does not survive to the remaining appellants or the remaining respondents, the appeal will abate if the legal representatives are not brought on the record with the time limited by law. But this decision does not help him in the instant case. The original respondents were certainly liable for the claim of the bank, because, as the executants of the guarantee, they made themselves liable for the dues of the bank; and the substituted respondents are liable on account of their pimis obligation to pay the debt of the late Nirmal Kumar Jain.

15. The next objection was that the claim against the defendants second party was barred under Article 73 of the Indian Limitation Act. The suit was instituted on the 9th October, 1950. The cash credit agreement between the company and the bank is dated the 16th December, 1946. On the same date, defendants 3 and 4 (C. K. Jain and N. K. Jain) executed a promissory note in favour of the bank, wherein they promised jointly and severally to pay to the bank the sum of rupees sixty lacs with interest at 3 per cent per annum to be counted half yearly. Both the cash

credit agreement and the promissory note were admitted by the defendants second party. The aforesaid promissory note (Exhibit 7) was forwarded to the bank with a letter dated the 16th December, 1946, (Exhibit 8) under the signatures of the same two defendants.

But a letter of guarantee signed by defendants 3 to 5 (Ext, 9) dated the 30th October, 1948, was sent to the bank, and in this letter defendants 3 to 5 "jointly and severally agreed to pay and satisfy all monies and liabilities already advanced" under the cash credit agreement with Jagdishpur Zamindary Company "or paid, or incurred on such account" or which the bank "may at any time advance, pay or incur to or for the use or accommodation of or on the credit of" the company, provided that the liability of these grantors would not exceed in the whole a sum of rupees forty lacs and interest thereon at the rate of 4 1/2 per cent per annum from the date on which demand" for payment shall have been made by the bank from them. It was a "continuing guarantee"; and it was given "in consideration of" the Bank opening an account with Jagdishpur Zamindari Co., Ltd. This guarantee was not specifically denied by the defendants second party.

If this guarantee was in respect of the cash credit account for which the suit has been instituted, then it was conceded by Mr. K. B. N. Singh that the suit would not be barred by limitation. He submitted, however, that this guarantee (Ext. 9) was not in respect of the above cash credit account. But paragraphs 4 and 5 of the plaint read together speak of the cash credit agreement in question and further security of this cash credit account by personal guarantee of the Directors, who are defendants 3 to 5. This is evident also from the evidence of P. W. 6, the manager of the Arrah Branch of the Bank since 1938. Shri S. K. Jain, defendant No. 5, one of the Directors (who gave the guarantee) and the General Manager of the Jagdishpur Zamindary Company Ltd., has not denied this case of the bank. Of course, it was stated in Paragraph IT of the written statement of defendants 3 to 5 that they did not accept that there was any letter of guarantee covering the claim; but there is no evidence in support of this assertion. Shri S. K. Jain, only witness examined on behalf of defendants 2 to 5, does not speak anything on this point in his examination-in-chief; and the statement in his cross-examination shows that he is not competent to speak of cash credit agreement with the bank, while

defendants 3 and 4 who were competent to speak about the same were not examined. It must, therefore, be held that the guarantee (Ext. 9) was in respect of the cash credit account in question.

16. Then Shri Singh submitted that Exts. 7, 8 and 9 have not been properly proved. But all these documents were admitted in evidence without any objection; and they have not been challenged or denied by the only witness examined for defendants 2 to 5. Shri Singh also referred to Section 129 of the Indian Contract Act, which defines a "continuing guarantee". But I fail to understand how it helps him. Section 129 merely lays down that the guarantee which extends to a series of transactions is called a continuing guarantee; and in the instant case, as stated earlier, defendants 3 to 5 agreed to be liable jointly and severally not only for the money advanced by the Bank before the 30th October, 1948, but also for the moneys that may be advanced at any time in future in connection with the aforesaid cash, credit account. Hence, the guarantee (Ext. 9) was certainly a continuing guarantee; and the suit having been instituted within three years of the date of execution of the guarantee, that is, the 30th October, 1948, is not barred by any provisions of the Indian Limitation Act.

17. The next argument of Mr. K. B. N. Singh was that inasmuch as no appeal or cross-objection has been filed by the bank in respect of the dismissal of the suit against defendants 2 to 5, no decree can be passed against these defendants-respondents; and he relied on a bench decision of this Court in *Bir Singh v. Budh Ram*, AIR 1950 Pat 346 (at page 348). Their Lordships have observed in that case:

"There is a large volume of case-law on the purpose and scope of Order 41, R. 33, Civil P. C. with particular reference to the illustration given under the rule. Some decisions have held that the illustration is not meant to be exhaustive of the class of cases in which the rule applies; other decisions have held that the illustration indicates the principle underlying the purpose and scope of the rule. I do not think that it is necessary in this case to examine, in detail, the entire case-law on the subject, because the decision in this case need not be rested on the higher plane of absence of jurisdiction. It is, I think, beyond dispute that the general principle is

that a decree is binding on the parties to it unless it is set aside in appropriate proceedings, if a party wishes to have a decree against him modified or reversed, he must comply with certain requirements as to filing of appeals, objections and so forth. Therefore, though Order 41, Rule 33, Civil P. C. is in very wide terms, it must not be interpreted in such a way as to abrogate the other provisions in the Code with regard to the filing of appeals, cross-objections etc. It follows, therefore, that as an ordinary rule an appellate Court must not reverse or vary a decree in favour of a party who has not preferred any appeal or cross-objection against it and this general rule should hold good notwithstanding the enactment of Rule 33 which enables an appellate Court, in exceptional cases, to pass such decree as ought to have been passed, or as the nature of the case may require, although the party in whose favour the decree is being made, may not have filed an appeal or cross-objection. The illustration gives some indication of the class of cases in which Rule 33 will apply; for example, it applies to cases where, as a result of interference in favour of the appellant, further interference with the decree of the lower Court is rendered necessary in order to adjust the rights of the parties according to justice, equity and good conscience."

The last sentence of this passage itself goes against the contention of Mr. K. B. N. Singh. The illustration to Rule 33 reads thus:

"A claims a sum of money as due to him from X or Y, and in a suit against both obtains a decree against X. X appeals and A and Y are respondents. The appellate Court decides in favour of X, it has power to pass a decree against Y."

In the instant case, if the decree against the State of Eihar is set aside, it is absolutely necessary in the ends of justice, to decide whether the bank can recover its moneys from the defendants second party in view of the alternative claim against these defendants contained in relief No. (c) of paragraph 13 of the plaint. In the instant case, there was no question of an appeal or cross-objection being preferred by the Bank, as the trial Court had granted a decree in its favour.

18. Two other decisions, namely, *Suraj Prakash v. Sant Lal Singh*, AIR 1940 Pat 137 and *Mt. Parwati Kuer v. Manna Lal Khetan*, AIR 1956 Pat 414 (FB), were also cited by Mr. Singh on this point; but the facts of those cases are quite different. In

the case of Suraj Prakash Puri, separate and distinct decrees had been passed against two sets of defendants by the lower Court, and only one set of the defendants had preferred the appeal, and, therefore, it was held that the decree could not be set aside against non-appearing set of defendants. In the case of Mosst. Parwati Kuer, the question was whether, in view of Rules 4 and 33 of Order 41, the appellate Court had powers or not to vary or reverse the mortgage decree granted by the lower Court in favour of the defendant, who is not impleaded either as a party appellant or a party respondent and whose name is ordered to be expunged from the memorandum of appeal on account of a technical defect. It was held that the appellate Court had such powers, and there was no question of abatement in such a case, but the appellate Court could not pass a decree against a person who was not a party to the appeal. These two decisions are, therefore, of no help to Mr. Singh; and his last contention also fails.

19. In the result, the appeal is allowed and the appellant (State of Bihar) is not liable for any amount and the Bank of Bihar (respondent No. 1) is entitled to a decree for Rs. 93,910/10/9, besides interest pendente lite at six per cent per annum against the other respondents with corresponding costs of the trial Court; and future interest on the decretal amount at six per cent per annum. The claim of the Bank against the State of Bihar is dismissed with costs of both the Courts. The Bank and other respondents will bear their own costs of the appeal.

Kanhaiya Singh, J.

20. I agree.

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