RAJ KISHORE PRASAD NARAIN SINGH

v.

RAM PARTAP PANDEY & ORS.

November 7, 1966

[K. N. WANCHOO, G. K. MITTER AND C. A. VAIDIALINGAM, JJ.]

Bihar Land Reforms Act, 1950 (*Bihar Act* 30 *of* 1950), *s.* 14—*Mortgaged land vesting in State—Claim in respect of mortgaged property including land filed before claims officer—Claim sought to be withdrawn at appellate stage—Mortgagee whether free to pursue remedies under ordinary law in respect of non-vested properties—Application under s.* 14 *whether amounts to a final election of remedies under the Act only.*

The appellant had obtained a usufructuary mortgage from the respondents in 1925 in respect of three sets of properties in Bihar: (a) five items of milkiat properties; (b) a three storey house in the town of Gaya; and (c) certain bakasht lands. By virtue of a notification issued under s. 3 of the Bihar Land Reforms Act, 1950, the milkiat properties vested in the State of Bihar in January 25, 1955., and in respect of the bakasht lands, the respondents became statutory tenants under s. 6. On April 24, 1955, the appellant filed an application under s. 14 of the Act before the Claims Officer alleging that no amounts had been paid by the mortgagors towards their liability. The respondents filed objections disputing the amounts claimed by the appellant. The Claims Officer partly allowed the claim of the appellant. The respondent thereupon filed an appeal before the Board consisting of a single Judge of the High Court constituted under s. 18(1) of the Act. On November 9, 1959 the appellant filed an application for permission to withdraw the claim case preferred by him before the claims officer and further requested that the proceedings in the claim appeal filed by the respondent be dropped. This application was rejected by the Board on the ground that having once elected the procedure under the Act the appellant was not entitled to enforce his right under the ordinary law even in respect of properties not affected by the Act. On the merits, the respondents' appeal was allowed. The appellant came to this Court by special leave.

The question that fell for consideration was whether in a case where a mortgage related to two sets of properties—those which vested in the State and those which had not—the right of the mortgagee to pursue remedies under the ordinary law in respect of non-vested properties had in any way been curtailed by the Act.

HELD: (i) The Act gives jurisdiction to the authorities concerned only in respect of properties which have vested in the State; and the claims that are filed and adjudication made by the authorities concerned, under the Act, can only be with reference to estates that have vested in the State. The prohibition contained in ss. 4(d) and 35 of the Act must also relate only to matters which can form properly the subject of a claim or an adjudication under the Act. [67 E-F]

Therefore while in respect of the estates which have vested in the State under the Act, the mortgagee will be bound to have recourse to the procedure laid down in the Act, in so far as his mortgage takes in other properties his right to enforce his claim under the ordinary law has not been, in any manner, infringed or taken away by the Act. [67 G]

A (ii) The High Court was wrong in holding that the appellant when he filed an application under s. 14 must be considered to have elected his remedy under the Act and therefore he should not be permitted to withdraw the claim. There is no bar to a tribunal permitting the withdrawal of any proceeding if it is satisfied that the said request can be granted otherwise, even though, technically, the provisions of O.XXIII C.P.C. may not apply. There could be no possible prejudice to the respondents by the appellant being allowed to withdraw his claim petition to enable him B to seek his remedy under the ordinary law in respect of the non-vested properties. But, as and when the appellant sought his remedy to enforce his mortgage as against the properties which had not vested in the State the Tribunal or Court may have to apply the principle of Marshalling. [68 A-F; 69 B]

Case law considered. Observations *contra* in *Sukhdeo Das* v. *Kashi Prasad* A.I.R. 1958 Pat. 630 and *Sidheshwar Prasad* v. *Ram Saroop* A.I.R. C 1963 Pat. 412, disapproved.

Raja Sailendra Narayan Bhanj Deo v. *Kumar Jagat Kishore Prasad Narayan Singh* [1962] Supp. 2 S.C.R. 119, and *Krishna Prasad* v. *Gauri Kumari Devi* [1962] Supp. 3 S.C.R. 564, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 759 of 1964.

D Appeal by special leave from the judgment and order dated May 13, 1960 of the Patna High Court (before the Board constituted under s. 18(1) of the Bihar Land Reforms Act, 1950 in Claim Appeal No. 22 of 1956.

N. C. Chatterjee and *D. Goburdhun*, for the appellant.

E *B. P. Jha*, for the respondents.

The Judgment of the Court was delivered by

Vaidialingam, J. In this appeal, by special leave, the judgment and order of a single Judge of the Patna High Court, constituted as the Board, under s. 18(1) of the Bihar Land Reforms Act, 1950 (Bihar Act XXX of 1950), (hereinafter referred to as the F Act), are under attack.

The appellant had taken three mortgages from the respondents on July 20, 1915 for Rs. 15,000/- on April 24, 1917 for Rs. 33,000/, and on November 12, 1917 for Rs. 42,500/-. He had filed a suit for recovery of the mortgage amounts and also obtained a decree.

G On November 18, 1925, the appellant had obtained a usufructuary mortgage for a total sum of Rs. 84,000/-, comprising three different sets of properties : (a) five items of milkiat properties ; (b) a three-storey house in the town of Gaya and (c) certain bakasht lands. The deed of mortgage is marked as Exhibit I. By this mortgage, the earlier decree was repaid.

H By virtue of a notification issued under s. 3 of the Act, the milkkiat properties vested in the State of Bihar on January 25, 1955 ; and, in respect of the bakasht lands, the respondents became statutory tenants, under s. 6.

The appellant filed an application, dated April 24, 1955, under s. 14 of the Act before the Claims Officer. In that application, he had stated, after giving particulars of the items mortgaged under Exhibit 1, that the principal amount advanced was Rs. 84,000/- and that no amounts had been paid by the mortgagors towards their liability. The appellant requested the Claims Officer to allow his claim, as per the provisions of the Act. A B

The respondents filed objections to the claim made by the appellant. In short, their plea was that the appellant had not given credit for a sum of Rs. 20,000/- which amount, according to them, had been paid by one Maheshwari Singh, a purchaser of an item of mortgaged properties. They also alleged that the appellant had not given credit, similarly to another sum of Rs. 3,250/- paid by one Baldeo Singh, a purchaser of another item of the mortgaged properties. The last contention raised by them was that the appellant had realised, as income from the properties, a sum of Rs. 9,00,000/- and therefore the entire mortgage liability stood discharged. It may be mentioned at this stage that, according to the appellant, he had realised only a sum of Rs. 23,250/- as income from the properties, which were in his possession. C D

The Claims Officer, by his order dated April 18, 1956, ultimately held that the appellant was entitled to recover a sum of Rs. 40,514/10/- out of the compensation money in respect of his mortgage claim. The Claims Officer was not prepared to accept the plea of the respondents regarding the payment of Rs. 20,000/- by Maheshwari Singh. E

On an admission made by the appellant, the Claims Officer held, that a sum of Rs. 2,309/8/- had been received by the appellant from a purchaser of one item of the mortgaged properties and that the respondents were entitled to be given credit for that amount. The Claims Officer accepted the plea of the respondents that, in respect of the house in Gaya, a ratable reduction of Rs. 2,500/- might be made, out of the principal amount. The Claims Officer was not prepared to accept the plea of the respondents that the appellant had received, by way of income from the mortgaged properties in his possession, a sum of Rs. 9,00,000/-. F G

On the other hand, the abstract of accounts submitted by the appellant showing the net income received, as Rs. 22,340/3/2, has been accepted by the Claims Officer. The Claims Officer had also held that the principal amount advanced by the appellant should be fixed in the sum of Rs. 45,324/-.

On these findings, the Claims Officer came to the conclusion that no portion of the principal amount had been satisfied out of the unsufruct of the property given on mortgage, except the sum H

A of Rs. 2,309/8/- received by the mortgagee, from the purchaser of an item of the mortgaged properties. A further reduction of Rs. 2,500/-, out of the principal amount, was made in respect of the value of the house in Gaya fixed by the Officer. In the result, the Claims Officer allowed the claim of the appellant in the sum of Rs. 40,514/10/-.

B

The respondents challenged this decision of the Claims Officer, in Claim Appeal No. 22 of 1956, before the Board, constituted under s. 18(1) of the Act. Inasmuch as the claim appeal involved a claim exceeding Rs. 10,000/-, the Board, as per s. 18(1)(a) of the Act, consisted of a Judge of the Patna High Court, namely Misra, J.

C

In the appeal before the Board, the respondents had attacked the various findings, recorded against them, by the Claims Officer.

Before we refer to the findings recorded by the Board, it is necessary to advert to an application filed by the appellant before the Board. The appellant filed an application, dated November

D 9, 1959, before the Board, for permission to withdraw the claim case preferred by him before the Claims Officer and also requesting that further proceedings in the claim appeal, filed by the respondents, be dropped. In that application, the appellant had stated that the claim appeal arose, out of an order, passed by the Claims Officer, on an application filed by the appellant under s. 14 of the Act.

E It was further stated that the respondents were the proprietors and that they had mortgaged certain properties by way of a usufructuary mortgage to the appellant for a total sum of Rs. 84,000/-. The appellant referred to the fact that the Claims Officer had found that the principal amount still remained unsatisfied, and that the decision of the Claims Officer was being challenged by the respond-

F ents. The appellant then stated that he had been advised, and that he also believed it to be in his interest, not to proceed with his claim case and that he would follow such other remedy, as the law permitted.

That application was opposed by the respondents. The learned Judge, by his Order dated December 7, 1959, dismissed the said

G application. In the order dismissing the application, after referring to the circumstances, under which the claim application was made by the appellant, and the findings recorded by the Claims Officer, the learned Judge referred to the fact that the appellant's request was for withdrawal of the claim, without any reservation whatsoever. The learned Judge adverted to certain decisions,

H quoted before him, and was of the view that the principles laid down in those decisions were to the effect that if the result of allowing the prayer for withdrawal would be to prejudice the interest of the opposite party, the application for withdrawal should not be

granted. But the learned Judge did not actually record in this order, what exactly would be the prejudice caused to the respondents by allowing the appellant to withdraw his claim application. Nevertheless, the learned Judge was not inclined to allow the request of the appellant to withdraw his claim application.

When the claim appeal was being heard by the learned Judge, the appellant again appears to have reiterated his request to withdraw the claim application, as originally asked for, in his application dated November 9, 1959. The learned Judge, again, was not inclined to accept that request. In this connection, he referred to a decision of the Patna High Court in *Sukhdeo Das* v. *Kashi Prasad*(1) to the effect that though it was open to a mortgagee either to proceed against the compensation money, as part of the mortgage security, or enforce his right against the mortgagor personally or against the mortgage security that had not vested in the State, nevertheless, it was not open to the mortgagee to proceed simultaneously, to enforce his right under the ordinary law, as also under the Act. The learned Judge also referred to the principle laid down in the said decision that, under those circumstances, the mortgagee would have to elect ; and that, once he had elected his remedy by having recourse to the procedure under the Act, he was bound down to it and he could not resile from that position. The learned Judge was also of the view that in this case the appellant, having filed his claim under s. 14 of the Act, and a decision having been given by the Claims Officer, it was the duty of the Board, sitting in appeal, only to decide the correctness or otherwise of the order passed by the Claims Officer. In consequence, he was of the view that when once the prayer of the appellant for withdrawal had been rejected, he had to proceed to decide the case on merits, as per the provisions of the Act.

After having expressed his view in the manner indicated above, on the request of the appellant for withdrawing the claim application, the learned Judge then considered the appeal filed by the respondents, on merits. He was not prepared to accept the finding of the Claims Officer that the sum of Rs. 20,000/- had not been established to have been paid to the appellant by Maheswari Singh, the purchaser of one item of mortgaged properties. In this connection, he referred to the evidence adduced by the parties and, ultimately, held that the sum of Rs. 20,000/- must have been paid by Maheshwari Singh to the mortgagee-appellant and the mortgagors should be given credit for that amount.

There was no controversy regarding the receipt by the appellant of Rs. 2,309/8/- in respect of the purchase of an item of the mortgaged property by Baldeo Singh; and that amount also was given credit to in favour of the respondents. Regarding the claim

(1) A.I.R. 1958 Pat. 630.

A made by the respondents that the appellant, when he was in possession of the mortgaged properties, had realised nearly nine lakhs of rupees, by way of income from the properties, the learned Judge was of the view that there had only been a general finding recorded by the Claims Officer in favour of the appellant. The judgment under attack, shows that he was, at one stage, inclined to remand B the proceeding with a direction to the Claims Officer to record a more definite finding. But he ultimately came to the conclusion that it was not necessary to remand the proceeding, inasmuch as the claim of the respondent could be adjudicated upon on the basis of the evidence adduced by the parties and other circumstances.

In this connection, the learned Judge adverted to the plea C of the appellant that he had realised, by way of rents and profits, only a sum of Rs. 22,000/-. He was, ultimately, of the view that the appellant should have derived at least income, at the rate of 3%, and on that basis he should have received a sum of Rs. 75,600/- by way of interest on the sum of Rs. 84,000/- claimed to have been advanced as principal.

D

The learned Judge, after giving credit to the additional sum of Rs. 23,009/- mentioned above, ultimately held that the total amount received by the appellant would be Rs. 97,909/- ; and, after referring to the provisions of s. 16 of the Act, was of the view that the appellant would be entitled to a total sum of Rs. 85,000/- which is double the amount of principal of Rs. 42,500/-. But, E in view of the finding recorded that the appellant had already received a sum of Rs. 97,909/-, he held that the appellant-creditor had realised more than double the amount of principal, and therefore, further held that the mortgage claim of the appellant should be considered to have been fully discharged and that no further amounts were due to him. In the result, the claim appeal, No. F 22 of 1956, filed by the respondents, was allowed and the claim application filed by the appellant was dismissed.

Mr. N. C. Chatterjee, learned counsel for the appellant, challenges the decision, substantially, on two grounds : (i) that the view of the learned Judge that the appellant, having filed a claim G petition under s. 14 of the Act, must be considered to have elected to adopt the remedy available to him under the Act and, as such, is not entitled to proceed under the general law, as against the properties, which have not vested in the State under the Act, to enforce his mortgage claim, is not correct ; (ii) the findings recorded by the learned Judge, on facts, differing from the conclusions arrived at by the Claims Officer, are not correct.

H

In this appeal, the appellant has also attacked the reasons given by the learned Judge for declining to grant permission to him to withdraw the claim application.

Mr. Chatterjee has urged that, inasmuch as the mortgage comprises properties which have vested in the State under the Act and properties which have not so vested, there is no question of the appellant being bound to seek relief before the Claims Officer, under the Act, in respect of properties which have not vested in the State. According to counsel, the various provisions of the Act will clearly show that the scheme of the Act is only to confer jurisdiction on the Claims Officer to entertain claims, in respect of the mortgages, which take in either the entire properties or part of the properties which have vested in the State. The Act does not, in any manner, take away the right of such a mortgagee to realise his dues, by having recourse to the remedies available to him from the properties, which have not vested in the State.

It is argued that the request made by the appellant before the learned Judge was to permit him to withdraw his claim petition ; and the appellant had made it clear that his object was to seek remedy, in law, as against the mortgaged properties which have not vested in the State. According to the appellant, the learned Judge has also not found, as to what exactly is the prejudice which will be caused to the respondents by the appellant being allowed to withdraw the claim petition. The only reason given by the learned Judge, according to the appellant, for not permitting the withdrawal of the claim petition, is that the appellant has filed a claim petition under the Act and that he must be considered to have elected to adopt the remedy available under the Act. The question of election, does not arise, inasmuch as the appellant has got a right to seek relief under the general law to enforce his mortgage claim in respect of the properties which have not vested in the State. If the appellant is not, in any way, prohibited from seeking such relief, according to Mr. Chatterjee, the application for withdrawal made by his client should have been allowed.

Mr. Jha, learned counsel for the respondent, has urged that the appellant voluntarily filed a claim petition before the Claims Officer, under s. 14 of the Act, in which he has specifically prayed for adjudicating upon the claim made by him. According to Mr. Jha, the Act, in question, is a self-contained Code and it gives jurisdiction to the Claims Officer to adjudicate upon all matters pertaining to the mortgage claim made by the appellant.

Having filed the claim in question and, after obtaining a decision at the hands of the Claims Officer, the counsel urges, it is no longer open to the appellant to seek withdrawal of the same. According to Mr. Jha, the Act gives jurisdiction to the Claims Officer, even if the mortgage consists of properties which have vested in the State as also properties which have not so vested.

In this connection, Mr. Jha referred us to the provisions contained in ss. 4(d) and 35 of the Act as a bar to any claim being made by the appellant before any other Court.

A Mr. Jha points out that the application for withdrawal, made by the appellant, purported to be under Order XXIII, r. 1, C.P.C., which has no application at all to proceedings under the Act, which does not contain any provision relating to withdrawal of claims. It is also pointed out that the request for withdrawal was made in the appeal filed by his clients challenging the decision of the Claims B Officer to the extent it was against the respondents. Mr. Jha further points out that the respondents, in such an appeal, cannot, as of right, ask for withdrawal of his claim and, in any event, in this case the learned Judge has declined to exercise his discretion in favour of the appellant. Therefore, Mr. Jha points out, no circumstances have been made out by the appellant, justifying an C interference with the discretion so exercised.

The findings recorded on facts, by the learned Judge, are also challenged on behalf of the appellant ; and those findings no doubt are sought to be supported on behalf of the respondents. But, in the view that we take, that the appellant's request for withdrawal of the claim petition should have been allowed, we do not propose D to consider and express any opinion on the second ground of attack that is made in these proceedings.

From what is stated above, it will be seen that the question that arises for consideration is, as to whether, in a case where a mortgage takes in two sets of properties, *viz.*, properties which have vested in the State, under the Act, and properties which have not E so vested, the right of the mortgagee to pursue the remedy available to him under the ordinary law, as against the properties which have not vested in the State for enforcing his mortgage claims, is in any manner taken away by the Act. If we are of opinion that such a right has not been taken away by the Act, it will follow that the view of the learned Judge that it is not open to the appel- F lant to proceed simultaneously to enforce his right under the ordinary law, as also under the Act, is not correct. It will also follow that the further view that a party, situated like the appellant in this case, is bound to elect the remedy which he wants to pursue, cannot also be correct.

The scheme of the Act has been considered by this Court in G two decisions : *Raja Sailendra Narayan Bhanj Deo* v. *Kumar Jagat Kishore Prasad Narayan Singh*(1) and *Krishna Prasad* v. *Gauri Kumari Devi.*(2)

In *Sailendra Narayan's case*(1), the question related to the effect of a decree for redemption obtained by the mortgagor, after the coming into force of the Act, and the entire property, which H was the subject of mortgage and the decree, vesting in the State. After referring to the material provisions contained in the

(1) [1962] Supp. 2 S.C.R. 119. (2) [1962] Supp. 3 S.C.R. 564.

Act, including ss. 4(d) and 35 of the Act, this Court held that the decree for redemption, which had been passed prior to the Act, became infructuous. A

In *Krishna Prasad's case*,(1) this Court had to consider the question as to whether a mortgagee, who had obtained a decree, can execute his personal decree against the mortgagor by attachment and sale of properties which were not the subject of mortgage, without having recourse to the provisions of the Act. In that case, the whole of the property mortgaged had vested in the State under the Act. The mortgagee had filed a suit on the mortgage and obtained a decree providing that the mortgagee-decree holders will be entitled to have a personal decree against the mortgagor-judgment debtor, after exhausting his remedies as against the mortgaged property. Before the decree-holders could realise the decree amount by sale of the mortgaged properties, the Act had come into force ; and, under the provisions of the Act, the entire mortgaged properties had vested in the State of Bihar. Under those circumstances, the decree-holders attempted to recover the decree amount, by attachment and sale of certain other properties, belonging to the judgment-debtor. Objection was taken by the judgment-debtor on the ground that the decree-holders were bound to seek their remedies, from the compensation amount payable to the mortgagors under the Act and that the decree-holders could not proceed against the non-mortgaged properties. This Court, again, after referring to the various provisions of the Act, held that the scheme of the Act postulates that where the provisions of the Act apply, claims of creditors have to be submitted before the Claims Officer and that the claimants have to follow the procedure prescribed under the Act. This Court has also held that the creditors cannot avail of any remedy outside the Act by instituting a suit or any other proceeding in the court of ordinary civil jurisdiction. Ultimately, this Court held that without having recourse to the remedy provided under the Act, a creditor had no right to execute a personal decree as against the non-mortgaged properties. This Court also held that inasmuch as the whole of the mortgaged properties in that case was an estate, it was unnecessary to consider what would be the effect of the provisions of s. 4(d) in cases where part of the mortgaged property is an estate and part is not. In that decision, this Court also observed that it was unnecessary to consider whether s. 4(d) would create a bar, even in cases where the compensation amount payable to the mortgagor is insufficient to satisfy the mortgagee-decree holder's claim even to the extent of the amounts sealed down under s. 16. B C D E F G

From the principles laid down by this Court in the above two decisions, it follows that where the whole of the property mort- H

(1) [1962] Supp. 3 S.C.R. 564.

A gaged 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 and the decision of the Claims Officer or the Board has been made final by the Act.

B What then is the position, when a mortgage comprises, not only properties which have vested in the State under the Act but also takes in other items of properties which are outside the purview of the Act ? Under those circumstances, is the mortgagee still bound to apply to the Claims Officer and follow the procedure indicated by the Act ? This raises the question left undecided in *Krishna Prasad's case.*(1)

C According to Mr. Chatterjee, learned counsel for the appellant, there is absolutely no indication in the Act that any such obligation has been imposed on the mortgagee to invoke the provisions of the Act. The counsel points out that whatever may be the position, so far as the properties which have vested in the State are concerned, the mortgagee is entitled to enforce his claims, under the D ordinary law, as against the properties which have not vested in the State. Learned counsel points out that the prohibition enunciated in ss. 4(d) and 35, have no application at all to any action that may be taken by the appellant in the ordinary civil courts, as against the properties which have not vested in the State. The mere fact that his client, counsel points out, has filed an application E before the Claims Officer under s. 14 of the Act, cannot, in law, take away his ordinary right to enforce his claim as against the non-vested properties. Counsel also points out that in order to enable the appellant to work out his rights as against the non-vested properties, he made a request to the learned Judge for withdrawing his claim petition. According to learned counsel, inasmuch as his client has two independent remedies in respect of the two sets F of properties, *viz.*, of making a claim under the Act in respect of the vested properties and of having recourse to his right, under the ordinary law to enforce the mortgage liability as against the non-vested properties, the appellant cannot be forced to make any election. The application made by the appellant, for withdrawal, was for the purpose of enforcing his rights, as against the non-vested G properties and that request should have been allowed.

Mr. Jha, learned counsel for the respondents, pointed out that the Act gives jurisdiction to the authorities to adjudicate upon all claims arising under a mortgage when a claim petition is filed under s. 14 of the Act and therefore, in this case, inasmuch as the appellant had filed an application under s. 14, it should be H considered that the appellant had elected to adopt the remedies available to him under the Act.

(1) [1962] Supp. 3 S.C.R. 564.

Mr. Jha referred us to the Full Bench decision of the Patna High Court in *Sukhdeo Das' case*,(1) referred to earlier. In that decision, the Patna High Court has held that if there are other properties comprised in the mortgage which have not vested in the State, the Act does not say that those properties will not be available for the recovery of the mortgage money. So far as this observation is concerned, in our view, that seems to be correct, having due regard to the provisions of the Act. But later on, the Full Bench has also held that a mortgagee has to elect between the two remedies and cannot have recourse to both of them simultaneously and that a Court can compel the mortgagee to elect between the remedy under s. 14 and the ordinary remedy available to him under the general law.

These later observations have also been approved by another Full Bench of the same High Court in *Siddheshwar Prasad* v. *Ram Saroop*(2). In this case, the High Court poses one of the questions arising for consideration thus : 'What is the remedy of the mortgagee where the mortgaged property partly vests and partly not?'. In discussing this question, the High Court has held that s. 4(d) will be a bar to a suit or execution proceeding, so far as vested properties are concerned : but the creditor-mortgagee will be entitled to prosecute the suit or execution proceedings as regards the estate or portions of estates which have not vested in the State. But the High Court also observes :

> "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."

Here, again, it will be noted that the opinion expressed by the Patna High Court, that so far as claims relating to properties which have vested in the State are concerned, the procedure indicated in the Act will have to be followed and that s. 4(d) will be a bar to a suit or execution proceedings in respect of the vested estates, is correct. Considerable reliance has been placed by learned counsel for the respondent, on the observations of the Full Bench that a creditor will have to make an election as to the choice of his remedies.

No doubt, the observations extracted above, *prima facie*, support the contentions of the learned counsel for the respondent.

(1) A.I.R. 1958 Pat. 630. (2) A.I.R. 1963 Pat. 412.

A But the question is whether those observations are justified, having due regard to the various provisions contained in the Act. We have referred to the two decisions of this Court in *Sailendra Narayan's case*(1) and *Krishna Prasad's case*(2), dealing with cases of mortgages, comprising wholly of properties which have vested in the State under the Act. We have also referred, in the earlier B part of this judgment, to the principles laid down by those decisions to the effect that where the 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 a creditor is determined by the Claims Officer. No provision in the Act, has been brought to our notice by learned counsel for C the respondent, giving jurisdiction to the authorities, functioning under the Act, to adjudicate upon the claims of a mortgagee with reference to properties which do not vest in the State. Nor has any provision of the statute been brought to our notice prohibiting or placing a bar on the right of a creditor to pursue the remedy available to him under the ordinary law, as against properties which have not vested in the State. Therefore, under those circumstances, D we are not inclined to agree with the observations of the Patna Hight Court in the decisions referred to above that in cases where a mortgaged property consists of both vested and non-vested items, it is open to the creditor to make an election as to the choice of his remedies and that election is to be made by a creditor giving up his right of filing a claim under s. 14 with respect to the vested E estate or prosecuting a suit or execution proceeding in a civil court in respect of items which have not so vested in the State. The Act, so far as we can see, gives jurisdiction to the authorities concerned only in respect of properties, which have vested in the State; and the claims that are filed and adjudications made by the authorities concerned, under the Act, can only be with reference to estates that have vested in the State. In our opinion, the prohibition F contained in ss. 4(d) and 35 of the Act must also relate only to matters which can form properly the subject of a claim or an adjudication under the Act.

We are further of opinion that, while in respect of the estates, which have vested in the State under the Act, the mortgagee will G be bound to have recourse to the procedure laid down in the Act, so far as his mortgage takes in other properties, his right to enforce his claim under the ordinary law, has not been, in any manner, infringed or taken away by the Act. If that is so, it follows that in this case the appellant, notwithstanding the fact that he had filed a claim under s. 14 of the Act, with reference to properties which have vested in the State, is entitled to avail himself, of any H other remedy open to him in law, to enforce his claim as against the non-vested properties comprised in the mortgage. The main

(1) [1962] Supp. 2 S.C.R. 119. (2) [1962] Supp. 3 S.C.R. 564.

reason given by the learned Judge, for rejecting the application filed by the appellant for withdrawing his claim, is that the appellant, when he filed an application under s. 14, must be considered to have elected his remedy under the Act, and therefore he should not be permitted to withdraw the claim. A

Here, again, when once we have held that there is no scope for the application of the doctrine of election, the reason given by the lower Court for declining to grant permission to withdraw the claim, also falls to the ground. Then the question is whether the appellant should be given leave to withdraw the claim filed by him before the Claims Officer under s. 14 of the Act. B

No doubt, technically, the provisions of Order XXIII, C.P.C. may not apply ; but we do not see any bar to a tribunal permitting the withdrawal of any proceeding, if it is satisfied that the said request can be granted otherwise. No doubt, before permission is granted to withdraw a proceeding, the tribunal can consider as to whether the withdrawal, if granted, will prejudice the opposite party. In this case, as we have already pointed out, the learned Judge has not found any positive prejudice, that will result to the respondents, by the appellant being permitted to withdraw his claim application. If the doctrine of election applies, as held by the Patna High Court, which decision has been followed by the learned Judge in this case, quite naturally, permitting the appellant to withdraw his claim, may result in prejudice to the respondent, in whose favour certain findings have also been recorded by the Claims Officer. But we have already pointed out that there is no question of the appellant being put to election in circumstances like this ; and if, that is so, there cannot also be any question of prejudice being caused to the respondent by the appellant's request for withdrawing the claim being granted, more especially, in view of the limited request made by him, to which we will advert presently. C D E

As we have already indicated, the appellant's request was for permitting him to withdraw his claim application on the ground that he proposed to seek the remedy that might be available to him in law, as against the mortgaged properties, which have not vested in the State. If the appellant's request for withdrawing his claim petition had been made with liberty to enable him again to seek his remedies, as against the properties which have vested in the State, the position may be different, because, in those circumstances, the respondents can forcibly urge that they have obtained a decision on certain aspects in their favour at the hands of the Claims Officer and that, if permission to withdraw is granted to the appellant, it would be prejudicial to them. When the appellant was making a very simple request for withdrawing his claim petition, only to enable him to seek any remedy available to him in law, as against the non-vested properties, we do not see any reason as to why that request should not be granted. F G H

A We accordingly grant the request of the appellant to withdraw Claim Case No. 14 of 1956 filed by him before the Claims Officer, Gaya, in terms of the appellant's application dated November 9, 1959, and made to the Board. But, as and when the appellant seeks any remedy, to enforce his mortgage, as against the properties which have not vested under the Act, that Tribunal
B or Court may have to apply the principle of Marshalling.

In the result, the appeal is allowed and the claim petition is permitted to be withdrawn, as indicated above. We make it very clear that we have not expressed any opinion on the various findings recorded, either by the Claims Officer, or by the learned Judge.

C Inasmuch as the appellant himself initiated the proceedings under s. 14 of the Act, which brought about this situation, we direct that the parties will bear their own costs in this appeal.

G.C. *Appeal allowed.*