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suit with costs to be paid to the second defendant should be restored, and that the defendants should have their costs in the High Court, and their costs less those disallowed as aforesaid of their appeal to His Majesty in Council.

J. V. W. *Appeal allowed.*

Solicitors for appellants: *Pugh & Co.*
Solicitors for respondents: *T. L. Wilson & Co.*

APPELLATE CIVIL.

Before Mookerjee and Panton JJ.

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Aug. 12.

RAMESHWAR SINGH

v.

CHUNI LAL SHAHA.*

Receiver—Possession of receiver in mortgage-suit, for whose benefit—Receiver, if can be appointed at the instance of mortgagee not entitled to possession.

Possession of a receiver in a mortgage-suit is *primâ facie* for the benefit of the party who has obtained the appointment.

Penney v. *Todd* (1) followed.

A second mortgagee, in whose presence the order for appointment of a receiver in a mortgage-suit by the first mortgagee is made, is not entitled to avoid the consequences of the order of appointment, because he has obtained a decree on his mortgage and has purchased the equity of redemption in execution of that decree.

Whether a mortgagee is or is not entitled to possession, he may invite the Court to appoint a receiver, if the demands of justice require that the mortgagor should be deprived of possession.

* Appeal from Order, No. 84 of 1919, against the order of A. T. Pal, Subordinate Judge of Dacca, dated Feb. 25, 1919.

(1) (1878) 26 W. R. (Eng.) 502.

Inuguirti Venkata Rajagovala Suryarow Bahadur v. *K. Baswi Reddy* (1), *Herbert* v. *Greene* (2), *Weatherall* v. *Eastern Mortgage Agency Co.* (3), and *Eastern Mortgage and Agency Co.* v. *Fakuruddin* (4) referred to.

APPEAL by Maharaja Sir Rameshwar Singh Bahadur, the plaintiff.

The plaintiff brought a mortgage suit (No. 49 of 1915) in the Second Court of the Subordinate Judge of Dacca, making the mortgagors and the second mortgagees defendants, for recovery of money due on a simple mortgage-bond. A receiver was then appointed at the instance of the plaintiff, the second mortgagees being parties in that application. But before the plaintiff obtained his mortgage-decree, the second mortgagees, who held a mortgage on one-half of the property in dispute, had obtained their mortgage-decree in mortgage-suit No. 47 of 1915 in the same Court of the Subordinate Judge of Dacca in which the plaintiff was no party. The mortgagees-defendants executed their decree in suit No. 47 of 1915 and purchased the equity of redemption about a month after the plaintiff got his decree in suit No. 49 of 1915. During the pendency of these proceedings, the second mortgagees obtained Rs. 1,000 from the receiver by an order of the Court in suit No. 47 of 1915. Subsequently, on the 10th September, 1917, the second mortgagees applied to the Subordinate Judge of Dacca, praying that the profit of the property for the period since their purchase in the hands of the receiver might be made over to him. The receiver was also called upon to furnish account. No order being passed on the said application, the second mortgagee again applied on the 23rd August, 1918. The Subordinate Judge, on the 25th February, 1919, held that the petitioners were entitled to get a half part of the profits, as

(1) (1914) Mad. W. N. 771.
(2) (1854) 3 Ir. Ch. Rep. 270, 274.
(3) (1911) 13 C. L. J. 495.
(4) (1912) 17 C. W. N. 16.

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the plaintiff was not a mortgagee in possession, though the order on the receiver had been to pay to the plaintiff and the said order was made in presence of the petitioners. The plaintiff appealed to the High Court.

Mr. N. N. Sarkar (with him *Babu Ambikapada Chaudhuri*), for the appellant. The order for the appointment of the receiver being made in favour of the first mortgagee, the second mortgagee cannot intercept rents and profits in the hands of the receiver: *Penney* v. *Todd* (1). See also *Khubsurat Koer* v. *Saroda Charan Guha* (2), Coote's Mortgage, p. 972 and 'Receivers,' Lawyer's Companion series, p. 415, for American cases.

Babu Gobinda Chandra Dey for the respondents.

[MOOKERJEE J. You were a party to the plaintiff's suit as subsequent incumbrancer. You did not even object to the application for the appointment of a receiver. You never applied that any portion of the money be left for your debt. You then enforce your security and purchase the equity of redemption of your mortgagor. You have obtained his rights. But he was bound by the order appointing the receiver,—as much as you. How can you get round that order ?]

There is another aspect. The Court can always revise its orders on its officers.

I obtained possession through Court, though the receiver continued to manage as before. The plaintiff could not have possession. He was a simple mortgagee. *Khubsurat Koer* v. *Saroda Charan Guha* (2).

[MOOKERJEE J. You are the mortgagee all the same, and the second mortgagee.]

I am entitled to the usufruct.

(1) (1878) 26 W. R. (Eng.) 502. (2) (1911) 14 C. L. J. 526, 558.

[MOOKERJEE J. Do you mean to say *now* that the receiver should not have been appointed ?]

Not quite. I say he should have been appointed only for realization of rents and protection of property. Any further direction in favour of any one was improper.

MOOKERJEE AND PANTON JJ. This appeal is directed against an order made on the receiver in a mortgage-suit, who was appointed at the instance of the first mortgagee, now appellant before us. It appears that on the 4th May, 1915, the first mortgagee who held a mortgage over the entire property instituted a suit to enforce his security against the mortgagor and the second mortgagee. Seven days later he applied for the appointment of a receiver for the preservation of the property, for payment of arrears of rent due to the superior landlord, for the realization of rent and other income from the property and for payment of the income to the plaintiff in reduction of his claim under the mortgage. The Subordinate Judge made a conditional order for the appointment of a receiver on the same day. The order was made absolute on the 15th July, 1915. Since then, the receiver has been in possession and the order for payment of the profits in reduction of the dues on the first mortgage has been duly carried out. On the 12th July, 1916, the mortgagee obtained a decree for Rs. 1,21,540. Meanwhile, the second mortgagee, who held a mortgage on one-half only of the property, had instituted a suit to enforce his security, without joining the first mortgagee as a party. He obtained a decree on the 2nd August, 1915, for the sum of Rs. 6,177. This decree was put into execution, and at the sale which followed, the second mortgagee purchased the equity of redemption in relation to his mortgage for

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a sum of Rs. 425 on the 10th August, 1916. It appears that during the pendency of these proceedings, the second mortgagee had managed to obtain an order in his suit directing the receiver to pay him a portion of the income in his hands derived from the mortgaged property. What followed is not clear, but we find that on the 23rd August, 1918, the second mortgagee made an application to the Court for the purpose of intercepting the whole of the income of the property purchased by him and to receive the amount for the satisfaction of his own dues. This application was opposed by the first mortgagee, but the Subordinate Judge made an order in favour of the second mortgagee on the 25th February, 1919 The legality of this order is called in question in the present appeal.

On behalf of the first mortgagee it has been contended that the order for the appointment of a receiver on the 11th May, 1915, is binding upon the mortgagor as also the second mortgagee in whose presence it was made and that the circumstances which had happened did not justify a modification of that order. Our attention has been invited to the case of *Penney* v. *Todd* (1) where it was ruled that the possession of a receiver in a mortgaged-suit was *primâ facie* for the benefit of the party who had obtained the appointment. On this principle it has been argued that the receiver who was appointed at the instance of the first mortgagee holds the property for his benefit alone and is bound to make over to him the entire income for the satisfaction of his dues. In our opinion, this contention is clearly well-founded.

The order for the appointment of the receiver, made conditionally on the 11th May, 1915, and confirmed on the 15th July, 1915, was passed in the

(1) (1878) 26 W. R. (Eng.) 502.

presence of the mortgagor as also the second mortgagee. They are equally bound by the order in question. Nothing has happened since then which would entitle either of them to avoid the consequences of that order. The second mortgagee has contended that the fact that he has obtained a decree on his mortgage and has purchased the equity of redemption in execution of that decree has altered the position. We are of opinion that there has been no change in his position in relation to the receiver at the instance of the first mortgagee. If neither the second mortgagee nor the mortagagor is entitled to question the propriety of the order for appointment of the receiver, the circumstance that the equity of redemption has been transferred from the mortgagor to the second mortgagee cannot place the latter in a position of advantage. In his character as purchaser in execution of his own decree, he is as much bound by the order for the appointment of the receiver as the mortgagor. If the mortgagor had made an application to the Court to modify the order for the appointment of the receiver and had attempted to intercept the profits, no Court would have listened to him ; the second mortgagee does not now stand in a different position. An argument was addressed to us on the assumption that the first mortgagee was a mortgagee by way of conditional sale and that as such he had obtained a decree for foreclosure. On that assumption it was argued, on the authority of the decision in *Khubsurat Koer* v. *Saroda Charan Guha* (1), that a receiver should not have been appointed at his instance. On an examination of the record, however, it transpires that the decree was for sale of the mortgaged properties. Consequently, no question can arise as to the propriety of the order for the appointment

(1) (1911) 14 C. L. J. 526.

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of a receiver. It was suggested by the second mortgagee that a receiver could not be appointed at the instance of a mortgagee who held a simple mortgage. We are unable to accept this contention as well-founded on principle; there is indeed authority for the contrary view: *Inuguirti Venkata Rajagopala Suryarow Bahadur* v. *K. Baswi Reddy* (1). There is no foundation for the contention that a mortgagee who is not entitled to possession of the mortgaged properties is not entitled to ask for the appointment of a receiver. Whether the mortgagee is or is not entitled to possession, he may invite the Court to appoint a receiver, if the demands of justice require that the mortgagor should be deprived of possession. The principle applicable to cases of this character was lucidly stated in the case of *Herbert* v. *Greene* (2). "In a foreclosure suit or suit to raise a "charge affecting lands by sale of the lands, an order is "not made for the appointment of a receiver, unless "under the following circumstances; first, where "interest is due on the security, the Court usually "requiring an affidavit that interest for one year at "least is due; or, secondly, where the property is "in danger, for example, if the lands are held under "a lease and head rent has been permitted to remain "unpaid and in arrears; thirdly, where there is reason "to apprehend that the sum for which the lands shall "be sold will be insufficient to pay the encumbrances "or charges thereon." [*See* also *Weatherall* v. *Eastern Mortgage Agency Co.* (3), *Eastern Mortgage and Agency Co.* v. *Fakuruddin Mohamed Chowdhury* (4).] If we examine the case from a somewhat different point of view, the unreasonableness of the argument advanced on behalf of the second mortgagee becomes

(1) (1914) Mad. W. N. 771.
(2) (1854) 3 Ir. Ch. Rep. 270, 274.
(3) (1911) 13 C. L. J. 495.
(4) (1912) 17 C. W. N. 16.

still more patent. If the property is not of sufficient value to meet the dues of all the incumbrances, it is clear that when the property is sold, the first mortgagee will be paid first and thereafter the remainder, if any, will be applied in discharge of the claims of the second mortgagee. It is inconceivable that if the relation between the first mortgagee and the second mortgagee is of this description, the latter by purchase of the equity of redemption should become entitled to intercept the profits of the mortgaged property before the dues of the first mortgagee have been satisfied.

The result is that this appeal is allowed, the order of the Court below set aside and the application of the 23rd August, 1918, dismissed with costs in both the Courts.

S. M. *Appeal allowed.*