APPELLATE CIVIL.

Before Newbould and Graham JJ.

SRIPATI DATTA

v.

BIBHUTI BHUSAN DATTA.*

1925.

July 28.

Appeal—Receiver—Order of removal of receiver, if appealable—Order of removal of receiver without naming successor, if final order and appealable—Appointment of a particular person as a receiver, when can be revised on appeal—Civil Procedure Code (Act V. of 1908), O. XLI, r. 1 (1) (a) and (b) and O. XLIII, r. 1 (s).

An appeal lies, under sub-section (*a*) of rule 1 (*1*) of Order XL, of the Code of Civil Procedure, against an order removing a receiver.

The mere fact that the appointment of the new receiver is postponed does not make the order of removal interlocutory. Such an order is open to revision.

Upendra Nath Nag Chowdhry v. *Bhupendra Nath Nag Chowdhry* (1) explained.

Palaniappa Chetty v. *Palaniappa Chetty* (2) approved.

The selection and appointment of a particular person as a receiver is a matter of judicial discretion to be determined by the Court according to the circumstances of the case and the exercise of this, like other matters of judicial discretion, will rarely be interfered with by an appellate tribunal.

Kali Kumari v. *Bachhan Singh* (3) referred to.

APPEAL from original order by defendants Nos. 1 to 5, Sripati Datta and others.

One Harinath Datta died in 1861 leaving his wife, a son, who was a major at the time, and six minor sons. The descendants of one of these minor sons brought a suit in 1923 in the Court of the Subordinate Judge at

* Appeal from Order No. 262 of 1925, against the order of J. C. Sen, Subordinate Judge of Burdwan, dated June 1, 1925.

(1) (1910) 13 C. L. J. 157. (2) (1916) I. L. R. 40 Mad. 18.
(3) (1913) 17 C. W. N. 974.

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Burdwan against the remaining descendants of the said Harinath Datta praying for a declaration of their share in the joint properties and for other reliefs. The plaintiffs claimed a half share in the disputed properties, while the defendants contended that it was only a third. The case of the plaintiffs was that defendant No. 1, Sripati Datta, managed the properties, while the plaintiffs resided at Calcutta. Thereafter defendant No. 1 was appointed receiver of the disputed properties in January, 1924, at the suggestion of the Court and by consent of the parties. In December 1924, the plaintiffs and two others prayed for removal of the receiver on the allegation of mismanagement, waste, misappropriation of money and for various other acts. The Subordinate Judge, by his order dated the 1st June, 1925, ordered the removal of the receiver and the appointment another from among local pleaders.

Defendants Nos. 1 to 5, who are brothers, thereupon preferred this appeal before the High Court making the plaintiffs and defendants Nos. 6 and 7 respondents.

Sir Provash Chunder Mitter (with him *Babu Suresh Chandra Taluqdar*), for the plaintiffs-respondents, took a preliminary objection as regards the competency of the appeal. The law does not contemplate an appeal against the dismissal of a receiver, who is an officer of the Court. It rests entirely within the discretion of the Court which appoints him. The Court has inherent power to dismiss its own officer. *Upendra Nath Nag Chowdhry* v. *Bhupendra Nath Nag Chowdhry* (1). Further, no appeal lies as the person to be appointed receiver has not been named yet.

(1) (1910) 13 C. L. J. 157.

Dr. Dwarkanath Mitter (with him *Mr. Debendranath Mondal* and *Babu Narayan Chandra Kar*), for the appellants. An appeal lies under O. XL, r. 2, Civil Procedure Code. See also *Srinivas Prosad Singh* v. *Kesho Prosad Singh* (1) and *Palaniappa Chetty* v. *Palaniappa Chetty* (2).

On the merits of the appeal, *Kali Kumari* v. *Bachhan Singh* (3), *Suprasanna Roy* v *Upendra Narain Roy* (4) and *Bhupendra Nath Mukherjee* v. *Monohar Mukherjee* (5) were referred to.

Sir Provash Chunder Mitter, in reply.

Mr. Sarat Chandra Roy Chowdhury (with him *Babu Mahendra Kumar Ghosh*), for respondent No. 5.

Dr. Dwarkanath Mitter, in reply.

GRAHAM J. This appeal is directed against an order of the Subordinate Judge of Burdwan removing a receiver, who had been appointed in a suit (No. 142 of 1923) for declaration of title and partition of certain moveable and immoveable properties.

A preliminary objection has been taken on behalf of the respondents that no appeal lies, and it becomes necessary to deal with this first. So far as this Court is concerned, the question appears to be one of first impression. At all events, no case has been brought to our notice in which this particular point has been decided. It is contended that rule 1 (*s*) of Order XLIII of the Code of Civil Procedure, under which alone an appeal can lie, has no application, inasmuch as rule 1(*l*) (*a*) of Order XL refers only to appointment of a receiver, and is silent as to his removal. It is argued that, as the Code of Civil Procedure

(1) (1911) 14 C. L. J. 489.
(2) (1916) I. L. R. 40 Mad. 18.
(3) (1913) 17 C. W. N. 974.
(4) (1913) 18 C. W. N 533.
(5) (1923) 28 C. W. N. 86.

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nowhere expressly provides a right of appeal against an order removing or dismissing a receiver, an intention to provide for such appeal ought not to be read into the Act.

Now O.XLIII, r. 1 (*s*) gives a right of appeal against an order under rule 1 or rule 4 of Order XL. The learned advocate for the appellants, in meeting the objection, has not relied on rule 4 of that Order, and it is obvious that it has no application in the present case. He has relied, however, on rule 1(*1*) (*b*) of Order XL. This sub-section and the portion which precedes it read as follows :—

"When it appears to the Court to be just and convenient, the Court may by order . . . . . "remove any person from the possession or custody of "the property".

It is argued that the words "any person" include a receiver and that, that being so, the appeal is competent.

It is, I think, open to doubt whether this sub-section has the wide meaning sought to be attached to it, so as to make it include a receiver, and it appears to me that it refers to persons interested in the property and in possession or custody of it prior to the passing of an order appointing a receiver. This view seems also to be supported by sub-section (*c*) which follows.

In my opinion, however, an appeal will lie under sub-section (*a*) of rule 1(*1*) of Order XL. The words used therein are, it is true, "appoint a receiver of any "property", but under section 16 of the General Clauses Act (X of 1897), the power to appoint includes the power to remove or dismiss, the power to terminate being a necessary sequence from and adjunct to the power to create, and it may, therefore, be argued that, if a right of appeal is given against appointment, it is given equally against the removal of a

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receiver, since appointment includes the right to remove. It is true the Code nowhere makes express provision for an appeal against the removal of a receiver, as it does in the case of his appointment, but the reason may well be that it was not considered necessary by virtue of the section in the General Clauses Act referred to above. Indeed one of the objects of a General Clauses Act is to avoid superfluity. Moreover, if an appeal lies against the appointment of a receiver, it would seem to be only logical and consistent that an appeal should equally lie against his removal.

But it has been urged on behalf of the respondents that even if the appeal is held to be competent, it is premature, inasmuch as no receiver has yet been appointed by name to supersede the receiver who has been removed, and that, that being so, it is merely an interlocutory order, and not a final order, and so no appeal will lie. In support of this view reference has been made to the case of *Upendra Nath Nag Chowdhry* v. *Bhupendra Nath Nag Chowdhry* (1). In that case the material part of the order appealed against was in these terms: "I think the whole of "the property in suit will be better managed, and "the interest of all the parties will be better served, "if the property in suit be placed in the hands of a "competent receiver". Subsequently on a date after the appeal to the High Court had been filed, one Nakuleswar Bose was appointed as receiver. It was held on these facts that the order in question was an interlocutory order and not a final order, and that the appeal was therefore premature and incompetent. Similarly in the present case no receiver has yet been appointed by name, the reason apparently being that

(1) (1910) 13 C. L. J. 157.

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the order did not contemplate the appointment of the new receiver until the following month, and in the meanwhile this appeal, involving the sending up of the record to this Court, was filed on the 16th June 1925. It may be argued, therefore, that the order was merely interlocutory, that the appeal was premature and that the appellants should have waited until the new receiver was appointed when there could be no possible doubt as to the competency of the appeal.

In reply to this, however, the learned advocate for the appellants contends that, if an order consists of two parts, half of it being interlocutory, and half final, he is entitled to appeal against that portion of it which is final, and he argues that inasmuch as part of the order directed that the receiver was to be removed, the defendant No. 1 was entitled to appeal, and that he was bound to exercise his right, or run the risk of losing it.

There is certainly some force in this contention The crucial question seems to be whether it was a final order or not. The effect of the order was that the receiver was declared to be removed, and it seems to me that the mere fact that the appointment of the new receiver was postponed (presumably as a matter of convenience) to the beginning of the next month cannot in any way affect the position. So far as the Subordinate Judge was concerned it was presumably a final order, which it would not have been open to him to revise. It was something more than a preliminary order, or expression of opinion. This view of the matter finds support in the case of *Palaniappa Chetty* v. *Palaniappa Chetty* (1) decided by a Full Bench of the Madras High Court.

The present case is distinguishable from the case of *Upendra Nath Nag Chowdhry* (2) referred to above,

(1) (1916) I. L. R. 40 Mad. 18. (2) (1910) 13 C. L. J. 157.

inasmuch as there was in that case no question of removal, it being merely a question of appointment, and it was held that the order was interlocutory and not final, with the result that the appeal was premature.

In my opinion, therefore, the order must be held to be a final order, and as such, consistently with the view which I have taken as to the interpretation to be put on rule 1(*I*) (*a*) of Order XL, liable to be challenged by way of appeal.

On the merits, the substantial contention on behalf of the appellants is that the removal of the receiver was, having regard to all the facts and circumstances of the case, wholly unjustifiable. I was at one stage of the hearing rather inclined to hold that this contention had been substantiated, but upon further reflection I have formed a decided opinion that we should not be justified in the particular circumstances of this case in interfering with the discretion which has been exercised by the Court below. There can be no doubt that an Appellate Court has the power to interfere, and ought to do so in a fit case for such interference and where it has been shown that there has been an arbitrary exercise of the power of removal. At the same time Courts of Appeal have always been reluctant to interfere in a matter which is regarded as one purely within the discretion the Court concerned. The principles applicable to such cases have been frequently laid down, and it will suffice to refer to one of these cases, *Kali Kumari* v. *Bachhan Singh* (1), where the subject is dealt with. It was there held that the selection and appointment of a particular person as a receiver is a matter of judicial discretion to be determined by the Court according to

(1) (1913) 17 C. W. N. 974.

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the circumstances of the case, and that the exercise of this, like other matters of judicial discretion, will rarely be interfered with by an appellate tribunal. It was further held that in order to induce the Appellate Court to interfere it is necessary to show some overwhelming objection in point of propriety, or some fatal objection in principle to the person named. It was also pointed out that it is a settled rule that one of the parties to a cause should not be appointed receiver without the consent of the other party unless a very special case is made out.

That was a case of appointment of a receiver, but the principles laid down appear to be equally applicable in a case of removal, and the question which then arises is whether in this instance there has been such an arbitrary exercise of discretion by the Court below as would justify our interference. In my opinion no such case has been made out. The main point is that the receiver has failed to submit any explanation, which can be considered satisfactory, of his omission to show in his accounts the sum of Rs. 4,000 realized by him after his appointment as receiver from Messrs. N. C. Sircar and Sons on account of royalties due to the estate. This was a sufficiently serious matter, but the receiver does not appear to have considered it necessary to go into the witness box to meet this and other charges which were preferred against him. All that he condescended to do was to submit an explanation through his pleader, so that in a manner he seems to have allowed the case against him to go by default. On his own showing some portion of this money would go to the plaintiffs and the defendants Nos. 6 and 7 according to the determination of their shares in the pending suit, and it was, therefore, incumbent upon him to show the amount, or at all events some portion of it in his accounts.

On this ground alone the propriety of the order made in the Court below cannot, I think, be challenged with success. But there is another aspect of the matter. It is clear from the learned Subordinate Judge's order that owing to the embittered relations between the parties a great deal of the Court's time had been unnecessarily wasted in hearing all sorts of objections and petitions (there is ample evidence of this on the record), and there seemed every probability that the management of the estate might be seriously hampered. The Subordinate Judge considered that such an undesirable state of affairs should be put an end to, and with that opinion it is not possible to find fault. Indeed matters might almost have reached an *impasse*. Again, apart from the item of Rs. 4,000, there appears to be some justification for the contention that the receiver has betrayed bias in his management. Absolute impartiality as between the parties to the litigation is, however, an indispensable qualification of a receiver, and upon an application for his removal, the Court may properly consider his past relations with the parties as well as his present sympathies. If by reason of interest shown by him, the efficiency of the receiver as an officer of the Court is impaired, the Court will be justified in removing him.

Finally, it is to be observed that in cases where one of the parties to the litigation is appointed as receiver, the order is usually based on consent of the parties, though there may be exceptional cases where this is not so. In the present instance, the appointment was at first made with the consent of the parties. That consent has now been withdrawn, the allegation being that the other parties have lost their faith in the receiver as a result of his misconduct. In these circumstances the foundation upon which the

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appointment rested no longer exists, and with the withdrawal of the consent it may be argued that the justification for retaining him as receiver disappears.

For the reasons stated, while I am of opinion that the appeal is competent, I hold that no case has been made out on the merits which would justify us in interfering. The appeal, therefore, fails and must be dismissed with costs. The hearing fee is assessed at five gold mohurs to the plaintiffs, three gold mohurs to the defendant No. 6 and two gold mohurs to the defendant No. 7.

NEWBOULD J. I agree.

S. M. *Appeal dismissed.*

ORIGINAL CIVIL.

Before Page J.

1925

Aug. 20.

WEST LAIKDIH COAL CO., LTD., *In the matter of**.

Cess—Right of the Crown to recover arrears of cess—Cess Act (IV of 1880), s. 98—Bengal Public Demands Recovery Act (III of 1913), ss. 3 (6), 4, 14—The Companies Act (VII of 1913), ss. 171, 232.

The effect of s. 171 of the Companies Act of 1913 is to leave intact any right to recover debts due to it which the Crown may possess in virtue of its prerogative.

In re Henley & Co. (1) and *In re Oriental Bank Corporation* (2) followed.

The Secretary of State v. *The Bombay Landing and Shipping Co., Ltd.* (3) referred to and discussed.

* Original Civil Jurisdiction.

(1) (1878) 9 Ch. D. 469. (2) (1884) 28 Ch. D. 643.

(3) (1868) 5 Bom. H. C. R. 23.