

## APPELLATE CIVIL.

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*Before Guha and M. C. Ghose JJ.*

MANOMOHAN NIYOGI

v.

SURENDRAKUMAR RAY CHAUDHURI.\*

1932

June 6, 7, 9.

*Receiver—Appeal against order of removal—Code of Civil Procedure (Act V of 1908), O. XL, rr. 1, 4; O. XLIII, r. 1 (s).*

An order removing a receiver appointed under Order XL, rule 1, is appealable under Order XLIII, rule 1 (s) of the Code of Civil Procedure.

*Sripati Datta v. Bibhuti Bhusan Datta* (1) followed.

But this right of appeal can only be exercised by the parties to the litigation. A receiver as such has no right to appeal against the order removing him from his office.

APPEAL by the receiver, who also obtained a Rule in the alternative.

The relevant facts and arguments are fully stated in the judgment.

*Gunadacharan Sen* and *Asitaranjan Ghosh* for the appellant.

*Saratchandra Basak, Bankimchandra Banerji, Rajendrachandra Guha, Bansarilal Sarkar* and *Mahendrakumar Ghosh* for the respondents.

*Cur. adv. vult.*

GUHA J. The plaintiffs, respondents in this appeal, instituted a suit in the first court of the Subordinate Judge at Dacca, Suit No. 263 of 1924, for dissolution of partnership and for accounts, for partition of immovable properties, as also for ancillary and incidental reliefs. There was a prayer for appointment of a receiver in the suit. A preliminary decree was passed in the suit, and two persons were appointed joint receivers, by an order

\*Appeal from Original Order, No. 412 of 1931, with Civil Rule No. 1246M of 1931, against an order of H. K. Chakrabarti, First Subordinate Judge of Dacca, dated Sept. 14, 1931.

dated the 3rd September, 1928. The receivers so appointed took possession of the properties in suit and were in charge of the management of the same. On the 15th May, 1931, the defendants Nos. 5 to 21 made an application for the removal of the joint receivers appointed by the court and for the appointment of a competent and efficient receiver or manager on a modest scale of remuneration or on a fixed salary, so as to reduce the cost of management and effect economy. It appears that the pleaders appearing on behalf of the plaintiffs and defendants, other than defendants Nos. 5 to 21, the applicants for removal of the joint receivers, stated before the court below that their clients had no objection to any curtailment of costs, if that could be effected without impairing efficiency in the management of the properties. The parties to the suit represented by their pleaders were heard by the learned Subordinate Judge in the matter of the removal of receivers, and, on the 14th September, 1931, an order was passed directing that Babu Banbihari Shaha, one of the joint receivers, do provisionally work as the sole receiver from October, 1931, and that the other receiver, Ray Manomohan Niyogi Bahadur, be removed. The receiver so removed by the order of the learned Subordinate Judge has appealed to this Court.

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To this appeal, so preferred by the receiver removed by the order of the court, a preliminary objection was taken, on behalf of the defendants Nos. 5 to 21, respondents in the appeal. It was urged that the appeal was not maintainable; the order of removal of the receiver passed by the Subordinate Judge on the 14th September, 1931, was not an appealable order under the law, regard being had to the provisions contained in section 104 and rule 1, sub-rule (s) of Order XLIII of the Code of Civil Procedure. It was further contended by the learned advocate for the defendants Nos. 5 to 21, respondents, that, inasmuch as none of the parties to the suit had appealed, the order of removal of one of the joint

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receivers could not be challenged by the receiver so removed : the receiver himself had no right of appeal under the law, from the order as it stood. It has been strenuously contended, on behalf of the appellant, that the preliminary objection, directed against the maintainability of the appeal, could not be given effect to; it was urged that none of the grounds upon which the objection was formulated was sustainable in law.

The first question that requires consideration is whether the order of removal of a receiver was appealable as such, irrespective of the position whether the receiver has the right to appeal against any order made under rule 1 of Order XL, which will presently be examined. The order appointing a receiver of any property under rule 1 of Order XL of the Code of Civil Procedure is an appealable order; order of removal has not been made appealable by any express provision contained in the Code. The power of a court to remove or discharge a receiver, whom it has appointed, may, however, be regarded as well established, and that power may be exercised at any stage. The power of removal must of necessity be treated to be an adjunct to the power of appointment : a power incident to and following from the power of appointment. The authority to call a receiver into being necessarily implies the authority to terminate his functions. In this view of the matter, it may be held in favour of the appellant before us that the order of removal passed by the Subordinate Judge is an appealable order. This would be in consonance with the decision of this Court in the case of *Sripati Datta v. Bibhuti Bhusan Datta* (1), in which it was held, by special reference to the provisions of the General Clauses Act, that if the right of appeal was given against appointment, it was given also against the removal of a receiver.

The next question is the one that relates to the receiver's right to appeal against an order of removal passed by the court appointing him. The receiver has, under the law, the right to appeal, when any

(1) (1925) I. L. R. 53 Cal. 319.

order is made by the court, under rule 4 of Order XL of the Code. The express provision so made, conferring the right of appeal so far as a receiver was concerned, limits the general right to appeal in any of the other matters mentioned in rule 1 of Order XL, including an order of removal of a receiver, by implication. It is inconceivable that the legislature intended that a receiver should have the right of appeal from any and every order passed by the court appointing him, seeing that the express provision contained in the Civil Procedure Code limits the right of appeal by a receiver to the only case where there is a direction for the attachment of his property. The parties to the litigation had undoubtedly the right of appeal, if they were aggrieved by any order passed by the court, under rule 1 of Order XL of the Code.

The view expressed above which follows from the plain reading of the provisions of the Code of Civil Procedure, bearing upon the question under consideration, is amply supported by authority of decisions of courts in England. According to the English practice, a summons or notice of motion for the discharge of a receiver should be served on all the parties and the receiver; but a receiver is not generally entitled to appear at the hearing of the application (see Kerr on Receivers, 8th Edition, page 344, and the cases referred to there). So far as decisions by courts in America are concerned, based upon general principles, the views are very well pronounced, and we have no hesitation in accepting the same. A receiver, according to decisions by American courts, should not be heard in motion to vacate his appointment; he is not a party in interest, and has no standing to oppose the motion. He cannot interfere in questions affecting rights of parties and the disposition of the property in his hands: the receiver is not an agent or representative of the parties to the litigation. So far as the right of appeal is concerned, the decisions by American courts indicate that a receiver cannot properly

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appeal from an order of the court discharging him from his trust: the right to discharge him rests with the court at any stage of the controversy: and from the exercise of this right, the receiver cannot appeal. The court, in the exercise of its discretion, may make any order discharging or removing a receiver for the proper care and management of the property in the courts' custody; and the receiver, an officer of the court, should not be allowed, by an appeal, to interfere with such an order (see *High on Receivers*, 4th Edition, pages 313, 975, 982, 987). In the case before us, it is for the purpose of effecting economy, consonant with efficient administration of the property in suit, that the court has directed the removal of one of the joint receivers; and it is pre-eminently a case where the rules of general application, to which reference has been made above, in the matter of right of the receiver, when a question of his removal or discharge by the court arises, are applicable.

We have, therefore, come to the conclusion that, upon the provisions contained in the Code of Civil Procedure and also upon principles of general application, the appeal by the receiver, as preferred to this Court, cannot lie, from the order by the learned Subordinate Judge. The preliminary objection raised on behalf of the defendants Nos. 5 to 21, respondents, relating to the maintainability of this appeal should, in our judgment, be allowed to prevail, and the appeal must be dismissed. We direct accordingly.

Rule No. 1246 M of 1931 is discharged. The parties are to bear their own costs in the appeal and the Rule.

M. C. GHOSE J. I agree.

*Appeal dismissed.*

*Rule discharged.*

A. A.