

there was no agreement not to appeal, there cannot possibly be any question of the appellant intentionally permitting the respondents to believe that he had waived that right, and to act according to that belief. I therefore agree in the order proposed by the learned Chief Justice.

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WALLACE, J.

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## APPELLATE CIVIL

*Before Mr. Justice Devadoss.*

FRASER AND ROSS (PETITIONERS), PETITIONERS,

1922  
May, 5.

v.

KRISHNASWAMI AIYER AND OTHERS (PLAINTIFFS  
AND DEFENDANTS,) RESPONDENTS.\*

*Suit for sale—Final decree—Order for sale—Execution of decree by sale ordered—Partition suit in another Court between the mortgagors—Receiver appointed in such suit after final decree in mortgage suit—Application by Receiver after order for sale to the executing Court to be made a party—Leave of the latter Court for execution, necessity for—Duty of decree-holder to apply for leave—Duty of Court to make Receiver a party.*

A mortgagee-decree holder is bound to apply to the Court appointing a Receiver of the mortgaged properties in another suit, for leave to execute his decree, and cannot proceed to sell the mortgaged property in execution of his decree without such leave.

Where, after final decree had been passed and order for sale made by a Court in a suit for sale on a mortgage, a Receiver, appointed by another Court, subsequent to such decree, in a suit between the mortgagors for partition of their family properties including the mortgaged properties, applied to the former Court to be made a party to the execution proceedings, prior to sale ;

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\* Civil Revision Petition No. 323 of 1922.

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*Held*, that the Court should have made the Receiver a party to the execution proceedings.

*Mrs. Levina Ashton v. Madhabmoni Dasi*, (1910) 14 C.W.N., 560, followed.

*Jogendranath Gossain v. Debendranath Gossain*, (1899) I.L.R., 28 Calc., 127, distinguished.

PETITION under sections 115 of Act V of 1908 and 107 of the Government of India Act praying the High Court to revise the Order of V. R. KUPPUSWAMI AIYER, Subordinate Judge of Mayavaram, in Execution Application No. 180 of 1922, in Execution Petition No. 182 of 1921, in Original Suit No. 111 of 1916, on the file of the Court of Subordinate Judge of Kumbakonam.

The first respondent instituted a suit for sale on his mortgage executed by the members of the family of respondents 2 to 12, in the Sub-Court of Kumbakonam in Original Suit No. 111 of 1916; the final decree was passed on 13th September 1920; and an order for sale was made on 7th November 1921. The sale was fixed for 30th January 1922 and was adjourned to 20th March 1922. Meantime, a suit for partition of their family properties including the mortgaged properties was instituted by some of the members of the family of the mortgagors against the others in the High Court in Civil Suit No. 655 of 1921, in which the petitioners were appointed by the Trial Judge on 27th January 1922 as Receivers of all the family properties, the order of the Trial Judge being confirmed by the Court of Appeal on 16th February 1922. On 20th March 1922, the Receivers applied to the Sub-Court of Mayavaram (before which the proceedings in execution were pending) to be made parties to the proceedings in Execution Petition No. 182 of 1921. The Subordinate Judge refused to make them parties and rejected their petition. The sale was proceeded with and concluded on 27th March 1922, the mortgaged property being sold for Rs. 1,10,000 to the thirteenth

respondent herein. Against the order rejecting their petition, the Receivers preferred this Civil Revision Petition.

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*S. Doraiswami Ayyar* for the petitioners.

*T. R. Venkatarama Sastri, A. Krishnaswami Ayyar*  
and *Sivaramakrishna Ayyar* for the respondents.

### JUDGMENT.

This is an application under section 115, Civil Procedure Code, of the Receivers appointed by the High Court in Civil Suit No. 655 of 1921 to revise the order of the Subordinate Judge of Mayavaram refusing to make the petitioners parties to execution proceedings pending before him (Execution Application No. 130 of 1922). This petition came up for admission on 1st May 1922 with an application for stay of proceedings. As the contesting respondent appeared in Court and offered to take notice, I directed the petition to be heard on 3rd May 1922.

The facts of the case are that the plaintiff in Original Suit No. 111 of 1916 on the file of the Kumbakonam Subordinate Judge's Court obtained a decree on a simple mortgage bond against the members of the well-known Nadar family of Tanjore on 12th April 1917, and on 13th September 1920 a final decree was passed in the suit and on 7th November 1921 an order for sale was made. The sale was fixed for 30th January 1922 and it was adjourned to 20th March 1922. Disputes having arisen between the members of the family, Civil Suit No. 655 of 1921 was filed in the High Court for a partition of the family property. The present petitioners were appointed Receivers on 27th January 1922 and the order appointing them was appealed against and it came up before the Court of Appeal on 16th February 1922, and it is now

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settled that the Receivers should continue to be in possession of the properties. On 20th March 1922 the Receivers applied to the Mayavaram Sub-Court for being made parties to the execution proceedings and the Subordinate Judge declined to make them parties. The sale was proceeded with and was concluded on 27th March 1922 and the mortgaged property was sold for Rs. 1,10,000, to the thirteenth respondent hereto.

It is urged on behalf of the petitioners that the lower Court acted without jurisdiction in refusing to make them parties and as the properties of the Nadar family are all in the hands of the Receivers no sale could take place without their being on record. It is further argued that the Receivers could have paid off this debt or at least could have secured a better price for the properties which they value at Rs. 2,00,000—*vide* paragraph 12 of the affidavit. The property now brought to sale by the Subordinate Judge's Court of Mayavaram is one of the items of properties which are the subject-matter of the suit now pending before the High Court.

Mr. Doraiswami Ayyar who appears for the petitioners relies on *Mrs. Levina Ashton v. Madhabmoni Dasi*(1) and contends that it was the duty of the Court to make the Receivers parties to the execution proceedings. It may be taken as well settled law that there can be no attachment and sale of the property in the possession of a Receiver, in execution of a money decree without the leave of the Court appointing the Receiver. To quote the learned Judges of the Calcutta High Court :

“The general rule is well settled that property in the hands of a Receiver is exempt from judicial process, except of course to the extent permitted by the appointing Court. *Try v. Try*(2), *De Winton v. The Mayor of Brecon*(3) and *Lane v.*

(1) (1910) 14 C.W.N., 560.

(2) (1851) 13 Beav., 422; 51 E.R., 163.

(3) (1860) 28 Beav., 200; 54 E.R., 342.

*Sterne*.(1) It has even been affirmed that though an attachment was levied on property before the appointment of the Receiver, it is within the sound discretion of the appointing Court to refuse to permit a sale of the property thereunder. On this principle it has been held that property in the hands of a Receiver, though subject to a paramount judgment, cannot be sold under execution without leave of Court. A purchaser of such property at an execution sale buys at his peril, and the sale may be cancelled upon an appropriate application to the execution Court."

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It is unnecessary to examine the various authorities relied on by the learned Judges of the Calcutta High Court. The question here is whether a mortgagee-decree-holder is bound to apply to the Court appointing the Receiver for redress or whether he can proceed to sell the mortgaged property in execution of a decree for sale. The only authority that seems to support the contention of the respondent is the judgment of a single Judge of the Calcutta High Court reported in *Jogendra Nath Gossain v. Debendra Nath Gossain*(2). The facts of that case are that pending partition proceedings and after the appointment of the Receiver two of the co-sharers mortgaged their interest in the undivided properties. Some of the mortgaged properties being within the jurisdiction of the Alipore Court, the mortgagee instituted his suit in that Court and sought to bring to sale the particular properties mentioned in the rule, some of which were situated in Calcutta. The judgment-debtors, after obtaining several postponements of the sale for the purpose of paying off the judgment-creditor, applied to restrain the mortgagee from proceeding to a sale on the ground that to sell the mortgaged properties without the leave or sanction of the High Court would amount to contempt of Court. Mr. Justice SALE in discharging the rule observed as follows,

(1) (1862) 3 Giff., 629; 66 E.R., 559.

(2) (1899) I.L.R., 26 Calc., 127.

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"This is not a case where the judgment-creditor is proceeding to execute his decree by attachment. This Court does not permit and will not recognize attachment of the properties in the hands of its Receiver, under process issued without sanction or leave by inferior Courts, the reason being that a proceeding by way of attachment is an interference with the possession of the Receiver. But as the element of interference with the possession of the Receiver is absent from the present case, there is no reason for restraining the sale. The case of *Hem Chunder Chunder v. Frankristo Chunder*(1), is distinguishable inasmuch as the judgment-creditor in that case if he had proceeded to execute his decree in the mufassal Court, could have done so only by way of attachment and sale. Under the Transfer of Property Act no attachment is necessary and the reason for the course adopted in the former case does not now exist."

The reasoning of the learned Judge is that as no attachment was necessary in a mortgage suit the sale could be proceeded with notwithstanding the fact that the property was in the possession of the Receivers. In that case only two of the co-sharers had mortgaged their interest. In the present case all the sharers were parties to the mortgage and all their properties are in the hands of the Receivers. Moreover the Receivers were appointed for the purpose of safeguarding the interests of all the parties to the suit and if an inferior Court is allowed to sell the property merely because there is a mortgage decree the object of appointing a Receiver in a partition suit would become infructuous, and it cannot be the policy of the law to allow the property to be sold by different Courts when that property is in the hands of a Receiver. The mere fact that there is a mortgage on the property would not take the case out of the general rule that no process can be permitted in respect of the properties in the hands of

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(1) (1876) I.L.R., 1 Cal., 403.

the Receiver without the sanction of the Court which appoints him. Moreover after attachment and sale the possession of the property sold cannot be obtained by an auction-purchaser without applying to the Court which appointed the Receiver. That being so, with very great respect to the learned Judge, it is difficult to follow the distinction which he makes between execution in respect of a simple money decree and execution in pursuance of a mortgage decree. The possession of the Receiver being the possession of the Court, no Court can interfere with that possession in any manner without the leave of that Court. The property being in *custodia legis* it would require very strong authority for holding that a mortgagee could set at naught the ordinary principle which prevents process being issued against the property in the hands of the Receiver, without the leave of the Court appointing him, simply because there is a mortgage in his favour. Mr. Venkatarama Sastri who appears for one of the members of the family relies upon various passages in Kerr on Receivers and High on Receivers, and it is unnecessary for me to refer to them. One passage from a well-known book is sufficient for the present purpose :

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“Property in the possession of a Receiver is in the custody of the law and cannot be seized under writ of attachment of execution. It is in the discretion of the Court to refuse to permit a sale of the property in its possession under a judgment though the levy was made before the Receiver was appointed.”

Alderson on Receivers, page 229.

It is argued by Mr. Krishnaswami Ayyar who appears for the auction-purchaser that there is no provision of law for making the receiver a party to execution proceedings, and that Order I, rule 10, has no application to execution proceedings, that section 141 Civil Procedure Code, cannot help the petitioners on the principle of the

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decision of the Privy Council in *Thakur Prasad v. Fakir-ullah*(1) and that section 146 can have no application to the present case. The fallacy of this argument lies in the assumption that the Receiver is a new party. When a Receiver is appointed by a Court he takes possession of the property on behalf of the Court and he is not a party in the sense in which Order I, rule 10, is understood. The Court having taken possession of the properties it appoints an officer to look after the properties on behalf of all the parties and a Receiver is not a legal representative of any party; nor is he a new party to the proceedings. But he represents all the parties for some purpose and his duty is that which is assigned to him by the Court. It is further contended by Mr. Krishnaswami Ayyar that the Receiver has to respect the orders made before his appointment and relies upon *Bryant v. Bull* and *Bull v. Bryant*(2). Vice-Chancellor BACON in delivering judgment says :

“The appointment of a receiver is a matter which does not concern mortgagees or prior incumbrancers, for a Receiver in the exercise of his authority will be obliged to respect former orders of the Court; and the prior incumbrancers will be at liberty to take such proceedings on behalf of their own interests as they may think fit so that that circumstance occasions no kind of difficulty.”

From this passage it cannot be inferred that a mortgagee can proceed with the execution of a decree in his favour without the leave of the Court appointing the Receiver. *The Duke of Buccleuch*(3) is quoted by Mr. Doraiswami Ayyar for the purpose of showing that the execution proceedings are a continuation of the suit and any party can be added at any stage of the proceedings. That case has no application to the present case as in that case assessment of damages was left over and until

(1) (1895) I.L.B., 17 All., 106.

(2) 10 Ch.D., 155.

(3) [1892] P. 201.



the assessment of damages was completed it could not be said that the suit had come to a termination. But in this case the mortgage suit of the Kumbakonam Court had come to a termination when the final decree was passed and there was no more to be done in the suit. But, as I hold that the Receivers are not new parties to the suit, I think Order I, rule 10, does not stand in the way of their being made parties. Considering the fact that the very object of the appointment of the Receivers was to safeguard the interests of all the members of the family and to liquidate the debts in the best manner possible it was the duty of the Subordinate Judge of Mayavaram to have made them parties to the execution proceedings, for the sale itself is liable to be defeated for want of necessary parties and in any case possession of the properties sold by Court could not be obtained without the leave of the High Court which appointed the Receivers. Considering the complications that might arise hereafter, I consider that the Subordinate Judge acted with material irregularity in refusing to make the Receivers parties to the execution proceedings. I therefore set aside the order of the Subordinate Judge and direct him to make the Receivers parties to the execution proceedings and proceed according to law. I allow the petition with costs. The thirteenth respondent will pay the costs of this petition.

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