

ORIGINAL CIVIL.

Before Mr. Justice Kumaraswami Sastri.

K. G. ETHIRAJULU CHETTI, PLAINTIFF,

v.

1928,
November 20.

A. P. RAJAGOPALACHARIYAR AND OTHERS, DEFENDANTS.*

Civil Procedure Code (V of 1908), O. XL, r. 1—Simple mortgage—Jurisdiction of Court to appoint receiver to take possession of mortgaged property—Impossibility of laying down hard and fast rule.

Though, ordinarily, a Court will not deprive the mortgagor of the possession of his property which is subject to a simple mortgage, yet where on account of circumstances created either by the conduct of the mortgagor or connected with the state of the property, the mortgagee is likely to sustain a loss not foreseen by him at the time he took a simple mortgage, a Court will have jurisdiction to appoint a receiver to take possession of the property for the benefit of the mortgagee.

It is impossible to lay down a hard and fast rule enumerating the circumstances under which alone a Court will appoint a receiver in respect of property subject to a simple mortgage.

APPLICATION by the plaintiff under Order XL, rule 1, Code of Civil Procedure, for the appointment of a receiver to take possession of certain properties for the purpose of receiving the rents and paying them over to the plaintiff.

A. Suryanarayanayya for plaintiff.

K. S. Krishnaswami Ayyangar (T. N. C. Srinivasa-varadachari with him) for defendants.

JUDGMENT.

This is an application for the appointment of a receiver by the plaintiff, who has filed the suit on a

* Civil Suit No. 473 of 1928.

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registered deed of mortgage, dated the 15th of February 1926, for Rs. 23,238-3-5 repayable with interest at 12 per cent per annum, alleged to have been created by the first defendant and his deceased brother, for the recovery of Rs. 31,190-8-3 with costs and further interest.

The affidavit in support of the application states that the properties yield a rent of Rs. 145 a month while the monthly interest accruing due is Rs. 300, that the defendants are not paying the interest which they are bound to pay under the deed of mortgage, but are enjoying the rents of the properties themselves, that the value of the properties has considerably diminished and it is not possible to recover the amount by a sale of the properties, that a very large sum is due for interest alone, and that it is necessary that a receiver should be appointed for the purpose of receiving the rents and paying them over to the plaintiff so that he may not incur further loss.

The fourth and fifth defendants are the minor sons of the deceased executant of the mortgage, and they oppose the application. They deny that the mortgage is binding on them and that the value of the properties has diminished or that there is any fear of the plaintiff not being able to recover the amount due. They state that the plaintiff cannot have in law a receiver appointed, as he is only a simple mortgagee, and that this application is virtually one for getting possession which he is not entitled to under the mortgage.

On the merits, I am of opinion that this is a fit case for the appointment of a receiver. But the question, however, arises, whether the Court has power to appoint a receiver at the instance of a simple mortgagee or other person who is not entitled to possession of the properties.

Order XL, rule 1, of the Civil Procedure Code, enacts that, where it appears to the Court to be just and convenient, the Court may by order

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(a) appoint a receiver of any property, whether before or after decree ;

(b) remove any person from the possession or custody of the property ;

(c) commit the same to the possession, custody or management of the receiver and

(d) confer upon the receiver the powers mentioned therein. "

Sub-rule 2 provides that

" Nothing in this rule shall authorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove."

I may point out that under the previous Code of 1882 the Court had power to appoint a receiver for the realization, preservation or better custody or management of any property, movable or immovable, the subject of a suit, or under attachment. The proviso to the section says that

" Nothing in the section authorizes the Court to remove from the possession or custody of property under attachment any person whom the parties to the suit, or some or one of them, have or has not a present right so to remove."

There can be little doubt that there is a material variation between the old and the new Code.

The argument for the defendants is that a simple mortgagee has only the right to bring the property to sale and that during the continuance of the mortgage he has no right to possession ; and he cannot indirectly by asking for a receiver get possession. It is also argued that the plaintiff who has no present right to possession cannot ask that the defendants who are entitled to possession should be removed.

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The authorities on this question are conflicting.

In *Chockalingam Pillai v. Pichappa Chettiar*(1), it was held by Sir MURRAY COUTIS TROTTER, C.J., and WALLACE, J., that the Court could not appoint a receiver in a suit for the specific performance of an agreement to sell certain properties and to give a simple mortgage of certain other properties. The learned Judges observe :

“ Mr. T. R. Ramachandra Ayyar for the appellant contends that at any rate so far as the B schedule properties are concerned, it is not open to the lower Court to appoint a receiver, the point being that the lower Court cannot by way of receivership do what it would not be entitled to do even by way of decree. At the highest, the plaintiff is entitled if he succeeds only to a simple mortgage on these properties, and having obtained this simple mortgage he could not immediately sue for possession. He is not entitled on the simple mortgage to possession. The most he could do is to enforce a sale on foot of the mortgage. We think that this argument is sound and that the lower Court was not justified in appointing a receiver so far as the B schedule properties are concerned. ”

In *Gobind Ram v. Jwala Pershad*(2), it was held by Sir RICHARD, C.J., and BANNERJI, J., that in the case of a simple mortgage, the mortgagor was entitled to remain in possession till the property was sold, and the fact that the security was not sufficient and the property was deteriorating was no ground for the appointment of a receiver.

A contrary view has been taken in several cases. In *Arunachellam Chettiar v. Manicka Vachaka Desikar*(3), it was held that a receiver could be appointed after the decree on a mortgage where the decree-holder had been restrained by injunction from selling the mortgaged property and the security was insufficient for the realization of the decree amount by sale. Reference was made to *Ghanshyam Misser v. Gobinda Moni Dasi*(4).

(1) (1925) 22 L.W., 579.

(2) (1917) 43 I.C., 333.

(3) (1909) 6 M.L.T., 238.

(4) (1902) 7 C.W.N., 452.

In *Pañasram v. Purañ Mal Ditta Mal*(1), it was held that there was nothing in Order XL, rule 1, of the Civil Procedure Code which excludes mortgage suits from its operation and a receiver can be appointed in a mortgage suit, that the Code gave the widest power to the Court to appoint a receiver when it appeared to the Court to be just and convenient, and that the right to recover the rents and profits was not necessary to enable the plaintiff to obtain a receiver. It was also held that a receiver could be appointed if the security was insufficient for the realization of the decree amount by the sale of the mortgaged property. In *Musstt. Khubsurat Kuer v. Saroda Charan Guha*(2), MOOKERJEE and CARNDUFF, JJ., in dealing with the contention that the appointment of a receiver in a mortgage suit is premature, because the mortgagee is not under the mortgage decree entitled to appropriate the profits of the properties given as security, observe,

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“In so far as the second contention is concerned, it has been urged that the object of the appointment of a receiver in a mortgage suit is to secure the application of the profits of the mortgaged properties for the benefit of the mortgagee. If the decree is for sale, and if it is established that the security is not sufficient to satisfy the judgment debt, a receiver will be appointed almost as a matter of course, specially if there has been default in the payment of interest.”

The learned Judges refer to *Weatherall v. Eastern Mortgage Agency Company*(3), *Hopkins v. Worcester and Birmingham Canal Proprietors*(4), *Herbert v. Greene*(5), and *Hackett v. Snow*(6).

In *Manindra Chandra Ray v. Suniti Bala Debi*(7), it was held that the Court could appoint a receiver at the instance of a mortgagee where the action was either for

(1) (1923) 85 I.C., 737.

(3) (1911) 13 C.L.J., 495.

(5) (1854) 3 Ir. Ch., 273.

(2) (1911) 16 C.W.N., 126.

(4) (1868) L.R., 6 Eq., 437.

(6) (1847) 10 Ir. Eq., 220.

(7) (1929) 95 I.C., 632.

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foreclosure or sale, if the security was insufficient or if the interest was in arrears.

In *Ram Kumar Lal v. Chartered Bank of India, Australia and China*(1), it was held that in a suit on a mortgage a receiver could be appointed.

In *Gobind Rani v. Brinda Rani*(2), it was held that where a mortgagee applied for the appointment of a receiver, the proper question for consideration was what steps should be taken to protect the mortgagee.

In *Rameshwar Singh v. Chuni Lal Saha*(3), the learned Judges MOOKERJEE and PANTON, JJ., observe,

“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*(4).”

In *Jaikisondas Gangadas v. Zenabai and Kazi Mahomed Miya Dada Miya*(5), it was held that the Court had power to appoint a receiver in the case of a suit by a mortgagee for foreclosure or sale.

In *Venkata Raja Gopala Surya Row Bahadur v. Basivi Reddi*(6), OLDFIELD, J., was of opinion that the Court had power to appoint a receiver of the mortgaged properties where a decree had been passed for sale on a simple mortgage, even though the personal remedy was barred by limitation. The learned Judge refers to and distinguishes some of the cases *contra*.

SADASIVA AYYAR, J., in dealing with the contention of the appellant that unless the mortgagee was entitled to immediate possession of the corpus of the mortgaged

(1) (1924) 87 I.C., 375.

(3) (1919) I.L.R., 47 Cal., 418.

(5) (1890) I.L.R., 14 Bom., 431.

(2) (1915) 23 C.L.J., 440.

(4) (1854) 3 Ir. Ch. Rep., 273, 274.

(6) (1914) 29 M.L.J., 467.

property or at least to the immediate receipt of the rents and profits, the Court has no power to appoint a receiver, considers that the existence of the right to recover the rents and profits is not an indispensable pre-requisite and points out the distinction between Order XL, rule 1, which follows the Judicature Act of 1873, section 25, and section 503 of the old Code which gave the Court power to appoint a receiver only when it was "necessary for the realization, etc.," of any property, "the subject of a suit or attachment." The learned Judge, however, was of opinion that, when the personal remedy was barred, a receiver ought not to be appointed. He states that if the corpus is likely to deteriorate by acts of waste committed by the judgment-debtor, a receiver could be appointed.

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So far as the law in England as regards receivers is concerned, equitable mortgagees have obtained orders for the appointment of receivers.

In *Crompton and Co., Limited, In re Player v. Crompton & Co., Limited*(1), WARRINGTON, J., observes at page 967

"I think the right to the appointment of a receiver is one of the ordinary rights which accrue to a mortgagee, and specially to an equitable mortgagee, who has no means of taking possession and whose security has become realizable as one of the steps in such realization."

In *Hopkins v. Worcester and Birmingham Canal Proprietors*(2), Sir G. M. GIFFARD, V.-C., was of opinion that a creditor whose principal had become due and who had given notice of demand was entitled to a receiver *ex debito iustitiae*.

I may also refer to the decisions of SRINIVASA AYYANGAR, J., in C.S. Nos. 399 and 881 of 1925, where the learned Judge was of opinion that the Court had power

(1) [1914] 1 Ch., 954.

(2) (1868) L.R. 6 Eq., 487.

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to appoint a receiver in the case of a simple mortgage, although it can only make such an appointment, where special circumstances are shown.

In U.S. No. 227 of 1928, I was of the opinion that a receiver could not be appointed, following the decision in *Chockalingam Pillai v. Pichappa Chettiar*(1). In that suit, the authorities to the contrary, referred to by me above, were not cited, and there was practically no argument.

Having regard to the authorities, I think the proposition stated by me that no receiver can be appointed in a simple mortgage suit at the instance of a simple mortgagee is too wide. I think the result of the authorities is, that while Courts would not ordinarily deprive the mortgagor of his possession in cases where the mortgage is a simple mortgage, there may be circumstances created either by the conduct of the mortgagor or connected with the state of property, which may render it necessary in the interests of justice and for the protection of the mortgagee that a receiver should be appointed. It is impossible to lay down a hard-and-fast rule laying down under what circumstances the Court will appoint a receiver. But ordinarily there should be some loss or detriment not foreseen by the mortgagee at the time when he chose to take a simple mortgage, and allow possession to remain with the mortgagor, which loss could not be compensated except by the appointment of a receiver.

I think having regard to the facts of the present case—the default of the mortgagors in paying the interest and the fall in value of the mortgaged properties—a receiver should be appointed. Costs, costs in the cause.

B.C.S.