APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice, and Mr. Justice Madhavan Nair.

1938, November 7.

KHADER MOHIDEEN SAHIB (APPLICANT), APPELLANT,

v.

C. NAGU BAI *alias* SEETHA BAI AND TWO OTHERS (RESPONDENTS 1 AND 3), RESPONDENTS.*

Receiver—Money decree—Person appointed receiver of properties in execution of—Appointment of, subsequently as receiver in a suit on equitable mortgage of the same properties—Right of mortgagee to preferential payment of profits of mortgaged properties from date of later appointment—Neglect of mortgagee in bringing the properties to sale—Effect of, on mortgagee's right—Mortgagee, when entitled to payment of profits of mortgaged property.

When a person was appointed a receiver of certain properties at the instance of the holder of a money decree in execution proceedings and, some time later, he was also appointed to act as a receiver in a suit instituted by an equitable mortgagee of the said properties to enforce his mortgage, the equitable mortgagee is entitled to preferential payment of the profits of the mortgaged properties as against the holder of the money decree from the date of the later order. The fact that the equitable mortgagee had neglected to exercise his right to bring the mortgaged properties to sale could not destroy his right, though he would be entitled to withdraw the profits from the Court only when it was clear that the mortgaged properties were not sufficient to pay the mortgage debt.

APPEAL from the judgment and order of GENTLE J. dated 11th October 1937 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 865 of 1936 in Civil Suit No. 422 of 1929.

* Original Side Appeal No. 74 of 1937.

A. C. Sampath Ayyengar for *T. K. Subramania Pillai* for appellant.

G. Lakshmanna and *K. V. Rangachari* for first respondent.

K. Narasimha Ayyar for second respondent.

S. Murugesa Mudaliar for third respondent.

Cur. adv. vult.

JUDGMENT.

LEACH C.J.—This appeal raises the question whether the holder of a money decree or an equitable mortgagee has preferential rights in the profits of mortgaged properties when a receiver has been appointed at the instance of the holder of the money decree in execution proceedings and also appointed to act in a suit instituted by the mortgagee to enforce his mortgage. In order to understand the position it is necessary to state the facts in some detail. In Civil Suit No. 422 of 1929 on the Original Side of this Court the first respondent obtained a decree on a promissory note against the members of a joint Hindu family consisting of two brothers, Aiya Mudaliar and Muthu Mudaliar, and Sambanda Mudaliar, the son of Aiya Mudaliar. On 16th March 1929 certain immovable properties belonging to the defendants in the suit were mortgaged to the Mercantile Bank of India, Limited, by the deposit of the title deeds. In 1930 the bank sued in Civil Suit No. 537 of 1930 on the Original Side of this Court to enforce its mortgage and on 5th August 1931 it obtained a preliminary mortgage decree for Rs. 1,04,888-2-4. On 24th November 1931 the Court passed a final decree in the mortgage suit and on 3rd February 1933 the bank assigned its decree to the appellant. On 6th November 1930 the first respondent applied for the appointment

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of a receiver of the rents and profits of the mortgaged properties on the ground that it was considered more than doubtful that a sale of the properties would be sufficient to discharge the mortgage debt and on 15th December 1930 the application was granted. On 14th August 1931 the bank applied for the appointment of a receiver in the mortgage suit in order to safeguard its own interests. This application came before STONE J. who on 16th October 1931 passed an order the effect of which was to make the receiver in Civil Suit No. 422 of 1929 also the receiver in the mortgage suit. The learned Judge directed that the rents and profits of the properties should be paid into Court to the joint credit of the decree-holders, that is, to the credit of the first respondent and the bank, and that the money should not be paid out without the further direction of the Court. The learned Judge gave no decision on the question of the rights of the parties with regard to the receiver's collections. He reserved this question for consideration until an application for payment out was made.

On 30th March 1931 Muthu Mudaliar, the second brother, was adjudicated an insolvent, and on 10th November 1931 an order for adjudication was made against Aiya Mudaliar, the elder brother. On 27th November 1933 the first respondent applied for payment out to her of a sum of Rs. 7,376 which the receiver had paid into Court. Notice of this application was given to all parties interested in the matter. On 12th October 1934 LAKSHMANA RAO J. directed that the first respondent should be paid a sum of Rs. 1,737–10–9, representing the monies collected by the receiver before 16th October 1931, the date on which the receiver was also appointed to act as the receiver in the mortgage suit. The learned Judge

held that the Official Assignee was entitled to the amount representing the share of the second brother in the money collected between 30th March 1931, the date when the younger brother was adjudicated, and 10th November 1931, the date on which the elder brother was adjudicated. No appeal was preferred against this order.

On 20th December 1934 the first respondent applied to the Court for payment to her of a sum of Rs. 3,454–6–0 which was said to represent the share of Sambanda Mudaliar, the son of the elder brother, in the monies lying in Court. The Master granted the application to the extent of Rs. 3,148–2–7 and his order was confirmed by GENTLE J. on appeal. The present appeal is from the order of GENTLE J. The learned Judge considered that the appellant was not justified in standing by for six years and allowing the rents and profits to be accumulated and relied on an observation of REILLY J. in *Ponnu Chettiar* v. *Sambasiva Ayyar*(1) to the effect that in this country a simple mortgagee cannot by getting a receiver appointed in the course of a suit enlarge his security or enlarge his rights to the prejudice of third parties in the equity of redemption.

In order to realize his security an equitable mortgagee must in India bring a suit on his mortgage and obtain a decree for sale. In England it has long been recognized that when an equitable mortgagee takes action to enforce his security he is entitled in certain circumstances to the appointment of a receiver in respect of the rents and profits of the mortgaged property. The Court has a discretion in the matter but ordinarily when there has been default in the

(1) (1932) I.L.R. 56 Mad. 546.

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payment of interest, or the security is likely to be insufficient to discharge the mortgage debt or is in jeopardy a receiver is appointed as a matter of course. Where a receiver has been appointed at the instance of a puisne mortgagee he will only act for the benefit of the puisne mortgagee if the prior mortgagee does not himself apply for the appointment of a receiver. If the prior mortgagee does apply for the appointment of a receiver he will be entitled to an order in supersession of the order obtained by the puisne mortgagee; see *Metropolitan Amalgamated Estates, Limited, In re. Fairweather* v. *The Comany*(1). The holder of a money decree who has obtained an order for the appointment of a receiver does not become a secured creditor merely because a receiver has been appointed, and the order, unless it creates a charge, will not prevail against a trustee in bankruptcy; *In re Dickinson. Ex parte Charrington & Co.*(2), *In re Potts. Ex parte Taylor*(3), *In re Marquis Anglesey. Countess De Galve* v. *Gardner*(4) and *In re Pearce. Ex parte The Official Receiver, The Trustee*(5).

The principles on which the Courts in England have acted have been recognized in this country. In *Maharajah of Pittapuram* v. *Gokuldoss Goverdhandoss*(6) my learned brother, MADHAVAN NAIR J., held that where a receiver has been appointed at the instance of an equitable mortgagee, the mortgagee possesses a preferential right in the rents and profits as against the ordinary creditors of the mortgagor. This decision was quoted with evident approval by a Full Bench of this Court in *Paramasivan Pillai* v. *Ramasami Chettiar*(7) where it was held that the Court

(1) [1912] 2 Ch. 497.
(2) (1888) 22 Q.B.D. 187.
(3) [1893] 1 Q.B 648.
(4) [1903] 2 Ch. 727.
(5) [1919] 1 K.B. 354.
(6) (1931) I.L.R. 54 Mad. 565.
(7) (1933) I.L.R. 56 Mad. 915 (F.B.).

had jurisdiction to order the appointment of a receiver in a suit to enforce a simple mortgage. In *Rameshwar Singh* v. *Chuni Lal Shaha*(1) a Bench of the Calcutta High Court accepted the principle laid down in *Penney* v. *Todd*(2) that the possession of a receiver in a mortgage suit is *prima facie* for the benefit of the party who has obtained the appointment. The Court considered that a receiver who was appointed at the instance of a party must hold the property for his benefit alone and was bound to make over to him the entire income in discharge of his dues. The Rangoon High Court has also recognized the rights of an equitable mortgagee to the rents and profits of the mortgaged property after action has been taken; see *Aga G. Ally Ramzan Yezdi* v. *Balthazar & Son, Ltd.*(3) and *S. C. Venkanna* v. *Mangammal*(4).

As an equitable mortgagee is entitled as against the mortgagor to the rents and profits of the mortgage security if it is insufficient for the discharge of the mortgage debt and as the holder of a money decree who obtains the appointment of a receiver is not in the position of a secured creditor I am of the opinion that the equitable mortgagee has the better title when there is a contest between the two. I am, of course, referring to a case where the order of appointment contains no charge and the creditor merely stands in the shoes of his judgment-debtor. If the law requires a puisne mortgagee to give way to a prior mortgagee when the latter applies for the appointment of a receiver it seems to me that an ordinary judgment-creditor must give way to one who has a charge on the property, and this is the effect of the

(1) (1919) I.L.R. 47 Cal. 418. (2) (1878) 26 W.R. 502.
(3) (1936) I.L.R. 14 Ran. 292. (4) (1936) I.L.R. 14 Ran. 308 (S.B.).

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decision in *Maharajah of Pittapuram* v. *Gokuldoss Goverdhandoss*(1). Applying these principles I consider that the Court must hold that the appellant is entitled to the sum which the first respondent wishes to withdraw from the Court if it is clear that the mortgaged properties are not sufficient to pay the mortgage debt. It would appear that they are not sufficient, but this must be ascertained with certainty before any order for payment out is made. If the appellant is entitled to the rents and profits, I do not consider that the fact that he has not brought the properties to sale earlier can destroy his right. I mention this because much has been made of the fact that the appellant has so far neglected to exercise his right to bring the mortgaged properties to sale. The first respondent could herself have brought the properties to sale in execution proceedings had she desired, but the sale would, of course, have been subject to the mortgage.

We will allow the appeal and set aside the order for payment out to the first respondent of the sum of Rs. 3,143-2-7, but subject to the observations which follow. The Court has been given to understand that the appellant is prepared to bring the mortgaged properties to sale under his final decree, and if this is done the position with regard to the sufficiency or otherwise of the security will be manifest. If the appellant does not within a reasonable time from the date of this judgment convince the Court that the mortgaged properties and the rents and profits thereof are insufficient to discharge his debt the Court will be justified in directing payment out to the first respondent of the sum in question, provided, of course, that her decree remains unsatisfied. The appellant

(1) (1931) I.L.R. 54 Mad. 565.

cannot be permitted to leave the question of the sufficiency of his security in doubt indefinitely.

The case will be remitted to the Original Side to be dealt with in the light of this judgment. As the appellant has been dilatory we make no order as to costs.

MADHAVAN NAIR J.

MADHAVAN NAIR J.—I agree and I have nothing special to add to the judgment delivered by my Lord, the Chief Justice ; but I would like to say a few words about my decision in *Maharajah of Pittapuram* v. *Gokuldoss Goverdhandoss*(1) referred to in my Lord's judgment. That decision is ample authority for the position that an equitable mortgagee of properties at whose instance a receiver has been appointed by Court will have, in the event of his security proving insufficient, a preferential right as against the ordinary creditors of the mortgagor to any monies realised by the receiver from the properties. In that case however, the contest was between the equitable mortgagee who had obtained a decree on his equitable mortgage and the Official Assignee who represented the mortgagor who had become an insolvent. I held that the claim of the equitable mortgagee prevailed over that of the Official Assignee representing the general body of creditors. In *Ponnu Chettiar* v. *Sambasiva Ayyar*(2) it was held that the effect of the order appointing a receiver in a suit to enforce a simple mortgage is to deprive the mortgagor of his right to deal with the income of the property over which the receiver is appointed and that the mortgagor cannot defeat the order by assigning the profits to a third party and that a purchaser of the mortgagor's right, title and interest in the property

(1) (1931) I.L.R. 54 Mad. 565. (2) (1932) I.L.R. 56 Mad. 546.

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over which the receiver is appointed, in execution of a money decree obtained by him against the mortgagor, is no more entitled than the mortgagor to the income of the property realised by the receiver. The learned Counsel for the appellant argued in support of the position that the simple mortgagee who got the receiver appointed in that case could not put forward any claim as against the appellant to the income realised by the receiver. In the course of the arguments he relied upon *In re Dickinson. Ex parte Charrington & Co.*(1), *In re Potts. Ex parte Taylor*(2) and *In re Pearce. Ex parte The Official Receiver, The Trustee*(3), and contended that the effect of the order appointing a receiver is not to create a lien in favour of the mortgagees. These cases were held inapplicable by VENKATASUBBA RAO J., one of the learned Judges who decided that case on the ground that they dealt with the special provisions of the Bankruptcy Act. Incidentally, the learned Judge expressed a doubt whether my decision in *Maharajah of Pittapuram* v. *Gokuldoss Goverdhandoss*(4) is correct or not as the claimant in that case whose right was negatived by me was the Official Assignee. What I propose respectfully to say has reference to this doubt; but as the point does not directly arise in the present case, I shall be very brief. In those English cases referred to, the persons who obtained the appointment of receivers were simple money creditors and had no charge over the property, and their general rights if they were mortgagee decree-holders did not arise for consideration. That this aspect of the question is of importance will appear from the observations of two of the learned Judges, Lord ESHER M.R. and FRY L.J.,

(1) (1888) 22 Q.B.D. 187.
(2) [1893] 1 Q.B. 648.
(3) [1919] 1 K.B. 354.
(4) (1931) I.L.R. 54 Mad. 565.

who heard the appeal in *In re Dickinson. Ex parte Charrington & Co.*(1). Lord ESHER M.R. observed:

"I think that the case does not come within sub-section 2 (section 9 of the English Bankruptcy Act) for the appellants have neither a mortgage, charge nor lien upon any part of the property of the debtor."

FRY L.J. observed as follows:

"It is admitted that they do not hold any 'mortgage' on the property of the debtor."

Then they went on to consider the question whether the orders appointing the receiver created a charge making the judgment-creditor a secured creditor within the meaning of section 9 of the Bankruptcy Act. In the other two cases also the question considered was the same. For the purposes of this case it is not necessary to quote the orders under which the receivers were appointed in those cases. It will be sufficient to observe that the learned Judges interpreted the orders to mean that the property of the judgment-debtors was to be placed in the custody of the receiver to be held by him as the agent for the Court and at its disposal to be used subject to its orders. From this standpoint the question for consideration was: has the order appointing the receiver created a charge or lien in favour of the creditor over the property in his custody? In *In re Potts. Ex parte Taylor*(2) Lord ESHER M.R. pointed out that

"an order appointing a receiver can only amount to a charge, if it charges the person in whose hands the money is not to deal with it except in one way",

and that must mean, said the Master of the Rolls in *In re Pearce. Ex parte The Official Receiver, The Trustee*(3),

"except to pay it or to hold it for the execution creditor".

(1) (1888) 22 Q.B.D. 187. (2) [1893] 1 Q.B. 648.
(3) [1919] 1 K.B. 354, 363.

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The question therefore reduces itself to one of interpretation of the order passed by the Court. In *Maharajah of Pittapuram* v. *Gokuldoss Goverdhandoss*(1), besides referring to the arguments advanced on the general principles arising from the position of the decree-holder as equitable mortgagee, I drew attention also to the order of the learned Judge appointing the receiver—the only point that received and could receive attention at the hands of the learned Judges in the English cases already referred to. In that case the order stated that the receiver "shall pay the net receipts into Court to the credit of this suit", Civil suit No. 229 of 1924, the suit instituted by the equitable mortgagee in which he eventually obtained a decree. It seemed to me that, according to this order, the money in the hands of the receiver was not to be dealt with "except in one way" that is, except to put it to the "credit of this suit", which means to the credit of the mortgagee-decree-holder in the event of his success in the case, and to no one else. According to this interpretation it follows that the mortgagee-decree-holder in *Maharajah of Pittapuram* v. *Gokuldoss Goverdhandoss*(1) was in the position of a secured creditor as against the Official Assignee and that the latter could not therefore claim any preferential right to the money in the hands of the receiver. It will be clear from pages 570 and 571 that my decision in that case was based both on general principles as well as upon the order appointing the receiver, but the former point happened to be more elaborated in view of the arguments advanced. For the reasons which I have briefly indicated above, I would say respectfully

(1) (1931) I.L.R. 54 Mad. 565.

that it does not appear to me that the correctness of my decision in *Maharajah of Pittapuram* v. *Gokuldoss Goverdhandoss*(1) is open to doubt on the strength of the English decisions referred to, unless my interpretation of the order appointing the receiver in *Maharajah of Pittapuram* v. *Gokuldoss Goverdhandoss*(1) is held to be wrong. I may also add that the general question did not fall to be decided in the three English cases referred to.

G.R.

APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice, and Mr. Justice Madhavan Nair.

C. S. NATARAJA PILLAI AND ANOTHER (DEFENDANTS 1 AND 2), APPELLANTS,

1938, November 15.

v.

C. S. SUBBAROYA CHETTIAR (PLAINTIFF), RESPONDENT.*

Foreign judgment—Declaration of status as adopted son of a Hindu widow by—Suit relating to immovable property in British India—Binding nature of judgment in.

A foreign judgment declaring a person to be the adopted son of a Hindu widow is binding on British Indian Courts in a suit relating to immovable property in British India.

APPEAL against the judgment and decree of WADSWORTH J. dated 1st December 1936 and passed

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(1) (1931) I.L.R. 54 Mad. 565.
* Original Side Appeal No. 79 of 1936.