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years' mesne profits. The amount of mesne profits has been ascertained by the Munsif. While we do not entirely agree with the reasons in the judgement of the learned Judge of this Court we think the decree passed by him was correct. We accordingly dismiss the appeal with costs.

Appeal dismissed.

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November, 30.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Chavan Bamerji.

JHUNKU LAL (PLAINTIFF) v. PIARI LAL AND OTHERS (DEPENDANTS).^{*}
Act No. III of 1907 (Provincial Insolvency Act), sections 16 and 22—Mortgage of factory—Decree for sale—Appointment of receiver to get in profits for benefit of decree-holder—Insolvency of judgement-debtor—Profits appropriated by creditors of insolvent—Suit by mortgagee decree-holder to recover profits.

One, J. L., being the mortgagee of a cotton ginning factory, obtained a decree for sale on his mortgage, but, instead of the factory being sold in execution of this decree, a receiver was appointed for the period of one year by consent of the decree-holder. The receiver was to work the factory, receive the profits and hand them over to the decree-holder. Notwithstanding that no fresh order was passed by the executing court, the receiver remained in possession of the factory for more than two years. He received the profits, but in accordance with the local practice of the trade made them over to a certain association for the collection and distribution of the profits of cotton ginning factories. Meanwhile the mortgagor became insolvent, and creditors holding simple money decrees against him proceeded to attach the profits of the factory in the hands of the association, and the profits were divided rateably between these creditors. The mortgagee then sued to recover the profits of the factory earned whilst the receiver had been in charge, making defendants (1) the receiver originally appointed by the court (2) the creditors of the insolvent mortgagor and (3) the receiver in insolvency.

Held that the appointment of the original receiver having been made with the consent of the decree-holder and the judgement-debtor was not made without jurisdiction; that the profits of the factory for the year for which the receiver was appointed were assignable entirely to the satisfaction of the mortgagee decree, and that the suit as against the receiver in insolvency was not barred by either section 16 or section 22 of the Provincial Insolvency Act, 1907. *In re Patts; Ex parte Taylor* (1) and *Croshaw v. Lyndhurst Ship Company* (2) distinguished.

^{*} First Appeal No 12 of 1916, from a decree of Sudarshan Dayal, Second Additional Subordinate Judge of Aligarh, dated the 23rd of September, 1915;

(1) (1893) 1 Q. B., 648.

(2) (1897) 2 Ch. D., 154.

THE facts of this case were as follows:—

The plaintiff held a simple mortgage of the shares of Salig Ram, Sagar Mal and Jai Kishore in a certain cotton-ginning factory in Hathras and obtained a decree on the 10th of November, 1910, which was made absolute. In execution of the said decree the said shares were advertised for sale fixed for the 18th of November, 1912. Before that day the judgement-debtors applied for adjournment of the sale and prayed that the factory may be allowed to work as the cotton produce of that year was very good and the profits earned would be paid to the decree-holder. The plaintiff with some reluctance agreed to the appointment of a receiver. The court appointed Babu Ishwar Das receiver, by order, dated the 16th of November, 1912. The operative part of the order is as follows:—

“I accordingly order that the sale of the hypothecated shares in the factories be postponed and Babu Ishwar Das, vakil, be appointed a receiver to take charge of the hypothecated shares and to work the factories in this crop, as such to keep the correct and accurate accounts of the income, expenses and profits from the commencement of the crop to the end of it, to pay and deposit the dues and to render the account of the said dues to the manager of the West Patent Press Company, Limited, Hathras Combination, and to receive the profits regularly from the said manager and to deposit them in court for the decree-holder, Lala Jhunkoo Lal. If the estimate of the profits of one crop turns out to be correct, the decretal amount can be liquidated by means of the profits of three succeeding crops. Babu Ishwar Das be informed of this order and a copy of this order be sent to the manager, West Patent Press Company, Limited, for information and compliance.”

Babu Ishwar Das worked the factory for the cotton seasons 1912-1913 and 1913-1914 and the profits of the shares of the judgement-debtors for these two seasons were in deposit with the manager, West Patent Press Company, Limited, Hathras Combination, and were attached by other decree-holders who held simple money decree against the same judgement-debtors. The attachments were made in some cases before the cotton season of 1913-1914 and in some cases during that season. On the 4th of August,

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1913, the plaintiff decree-holder, Lala Jhunku Lal, put in an application that as he had not till then received any money and that money in the hands of the Hathras Combination had been attached, he did not desire the continuance of the management of the receiver and prayed that the share of the judgement-debtors in the factories may be sold. The shares were actually sold on the 10th of April, 1914, and purchased by Lala Jhunku Lal for Rs. 50,500, which was set-off against his decree, leaving a balance of Rs. 20,000, odd. Certain sums of money out of the profits in the hands of the West Patent Press Company were paid out to other decree-holders, who had attached the money in execution of their decree.

The judgement-debtors were adjudicated insolvents on the 11th of March, 1914, and the 1st of May, 1914, and Pandit Kanhaiya Lal was appointed the receiver in insolvency, and the balance of the money was paid over to him by the West Patent Press under the order of the insolvency court. The plaintiff brought the present suit on the allegations that he was entitled to the sum of Rs. 21,000, on account of the profits of the judgement-debtors for the seasons 1912-1913 and 1913-1914, deposited with the West Patent Press and asked for a decree for the sums taken away by other attaching creditors and Pandit Kanhaiya Lal, the receiver in insolvency. The first court held that the receiver Babu Ishwar Das had been appointed for one crop only and that the plaintiff was entitled to the profits of one year, but dismissed the suit on the ground that the plaintiff had not proved what amount represented the profits of one season.

The plaintiff appealed.

Munshi *Panna Lal* (with the Hon'ble Pandit *Moti Lal Nehru* and Munshi *Jang Bahadur Lal*), for the appellant :—

The order appointing Babu Ishwar Das receiver was not limited to one season, but was to continue, and as a matter of fact he worked and managed the factories for two seasons and the plaintiff was entitled to the profits of the two seasons, to the exclusion of other creditors of the judgement-debtors and also to the exclusion of the receiver in insolvency. The order appointing B. Ishwar Das receiver had the effect of depriving the judgement-debtors of their claim to the profits subsequently earned. The

profits had ceased to belong to the judgement-debtors and belonged to the plaintiff. Even if the plaintiff be held entitled to the profits of one year only, the court should have given him an opportunity of proving the exact amount of the profits of that year.

Babu *Piari Lal Banerji* (with Mr. *B. E. O'Connor* and the Hon'ble *Munshi Narain Prasad Asthana*), for the respondents:—

The factory only was hypothecated and not the profits, and therefore the only basis of the plaintiff's right was the order of the court appointing *Ishwar Das* receiver and directing him to receive the profits and deposit them in court for the plaintiff. Assuming that the appointment of a receiver was with jurisdiction, the effect was not to give to plaintiff any charge or lien on profits in the hands of the West Patent Press. The plaintiff had no right until the money was actually realized by him. He had merely an inchoate right and no portion of the profits vested in him. The money in fact was not received by the receiver before it was attached by other creditors. The effect of the appointment of a receiver by way of equitable execution has been considered in several English cases and the result of those cases is that the decree-holder by notice of the appointment of a receiver acquires no charge or lien over the property which is the subject-matter of the appointment of a receiver. He relied on and discussed *In re-Patts*; *Ex parte Taylor* (1), *Croshaw v. Lyndhurst Ship Company* (2), *Tyrrell v. Painton* (3) and *In re Beaumont, Woods v. Beaumont* (4). The above cases also showed that, though the appointment of a receiver operated as an injunction against the judgement-debtors, yet it did not create any right or vest any interest in the decree-holder at whose instance the receiver has been appointed. The plaintiff not being a secured creditor could not assert any title against the receiver in insolvency. Moreover, assuming that the appointment of a receiver was good, it was merely one of the modes of execution and if the receiver received any money, it would be regarded as "assets realized in the course of execution"

(1) (1893) L. Q. B., 613.

(3) (1895) 1 Q. B., 206.

(2) (1897) 2 Ch. D., 154.

(4) (1910) 79 L. J. Ch. 744

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within the meaning of section 73 of the Civil Procedure Code. This was so decided in the case of *Fink v. Maharaj Bahadoor Sing* (1). The appointment of the receiver was itself without jurisdiction. The plaintiff as a decree-holder in a suit upon a simple mortgage was bound to sell the property before he could proceed against other property and he could not under the guise of getting a receiver appointed, appropriate towards his decree, other property of the judgment-debtor. He relied on *Latafat Hossein v. Anunt Chowdhry* (2) and *Mirza Muhammad Husain Khan v. Amar Chand Paul* (3). The principle on which equitable execution was allowed was based on the fact that there was some impediment or hindrance to execution in the ordinary way. In the present case there was no obstruction in the way of the plaintiff proceeding to execute his decree by sale of the mortgaged property; *Re Shephard, Atkins v. Shephard* (4). The present suit in so far as it is directed against the receiver in insolvency is not maintainable without the leave of the Insolvency Court. He relied on section 16 of the Provincial Insolvency Act; *Mamraj v. Brij Lal Chakravarti* (5). Again under section 22 of the same Act, the remedy of the plaintiff was by way of application to the Insolvency Act; *Mul Chand v. Murari Lal* (6). Under section 34 of the same Act, the plaintiff had no right to the benefit of his execution against the receiver in insolvency, except in respect of assets realized. Assets cannot be said to be realized until it actually gets into the hands of the decree-holder; *Debi Prasad v. Chiene* (7).

Munshi *Panna Lal* was not heard in reply.

RICHARDS, C. J., and BANERJI, J. :—This appeal arises under the following circumstances. The defendant third party mortgaged a cotton ginning factory to the plaintiff on the 14th of May, 1908. The plaintiff obtained the usual mortgage decree on the 10th of November, 1910. The property was about to be sold when an application was made by the judgment-debtor pointing out that if the factory was sold he would be ruined and asking that instead of selling the factory, the court would be pleased to

(1) (1899) I L. R., 26 Calc., 772.

(4) (1889) 4 ^oCh. D., 181.

(2) (1896) I. L. R., 23 Calc., 517.

(5) (1911) I. L. R., 34 All., 106.

(3) (1913) 16 Oudh Cases, 233.

(6) (1913) I. L. R., 36 All., 8.

(7) (1912) 9 A. L. J. R., 707.

appoint either the plaintiff himself or some other person to be receiver over the factory. The decree-holder, apparently with some reluctance, agreed to a receiver being appointed, and the court appointed Babu Ishwar Das, a pleader, to be the receiver. Under the order the receiver's duty was to enter into possession of the factory, work the same and hold the profits for one year for the benefit of the decree-holder. It obviously was the intention of the Judge that if this plan proved a success, the appointment of the receiver would be extended over the crops for future years until the decree was discharged. The receiver duly entered into possession and worked the factory for two years or more, but no further order was obtained from the court. It may have been unfortunate for the decree-holder; nevertheless, in our opinion, the order only operated to entitle the receiver to possession for one year, and it would have required some further order to entitle him to remain in possession after the expiration of that period. The judgement-debtors were adjudged insolvent on the 11th of March, 1914. The factory was sold in execution of the plaintiff's decree on the 10th of April, 1914, and was purchased by the decree-holder, he being allowed to set off his decree *pro tanto* against the purchase-money. It appears that there is an association in Hathras called the West Patent Press Company, Hathras Combine. The object of this association of cotton ginning factory owners is, apparently, to prevent cutting of rates and to regulate the charges of the several owners so as to keep them at a common level. The practice is to send the whole, or a portion, of the earnings of each factory to the agency, who at stated periods adjust the accounts and distribute the profits amongst the various factories. In this way, after the appointment of the receiver, a considerable sum of money was with the agency to the credit of this particular factory. Had no receiver been appointed, the judgement-debtors would undoubtedly have been entitled to receive the profits standing to their credit with the agency. Just in the same way after the receiver was appointed, he was undoubtedly entitled to receive the money standing to his credit with the agency had there been no other creditors. It appears, however, that after the appointment of the receiver and his taking possession of the factory, certain other creditors (simple

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money decree-holders) attached the money which was with the agency and standing to the credit of this factory. This money was rateably distributed between the simple money judgement-creditors of the insolvent, and the present suit has been instituted by the plaintiff claiming that he is entitled to the money which was earned by the factory after the appointment of the receiver. He is opposed by those judgement-debtors who have obtained the money and also by the receiver in the insolvency matter. The court below was of opinion that the plaintiff was entitled to the profits for one season, but, inasmuch as he had not given evidence which would enable the court to say what those profits were, the court dismissed the suit altogether.

The plaintiff comes here in appeal and contends that he was entitled to all the money earned while the receiver was in possession. He contends that, notwithstanding that the receiver was only appointed for one crop, he nevertheless remained in possession without objection by the judgement-debtors. Lastly, he contends that, even if he is not entitled to all the money, he is at least entitled to the profits of one crop and that the court ought not to have dismissed his suit altogether. The creditors on the other hand, contend that the plaintiff is not entitled to any profits at all, that the effect of the order appointing a receiver was not to create any charge or lien on the profits in favour of the plaintiff, and that they having attached the profits in the hands of the agency were entitled to receive them in discharge of their simple money decrees. The receiver in the bankruptcy matter is also represented and the case on his behalf has been very ably argued by Mr. *Piari Lal Banerji*. He supports the contention of the simple money decree-holders, and contends that in respect of the money earned while the receiver was in possession it belonged to the insolvent and that the balance, not paid over to the simple money decree-holders, vested in the receiver on the adjudication of insolvency because the plaintiff in the present suit was not a "secured" creditor. In support of this contention the cases of *In re Patts* (1) and *Crowshaw v. Lyndhurst Ship Company* (2) are cited. The receiver in the insolvency further contends that the suit was not sustainable against him having regard to the

(1) (1893) 1 Q. B., 648.

(2) (1897) 2 Ch., 154.

provisions of section 16, clause (2), sub-clause (b), of the Provincial Insolvency Act of 1907, and further that the remedy of the plaintiff, if any, as against him is limited to an application made in the insolvency matter to the court having seisin of that matter. Lastly, he contends that the appointment of the receiver by the court executing the plaintiff's decree was null and void having been made without jurisdiction. We will deal with the last point first. If we were concerned to inquire whether the court ought to have appointed a receiver instead of allowing the property to be sold we would have had great difficulty in confirming the order. But we are not concerned with this question because the receiver was appointed with the consent of the decree-holder and the judgement-debtor, that is, with the consent of the only parties who had at the time any interest in the property. Under the circumstances, in our opinion, it cannot be said that the order was made without jurisdiction. The plaintiff at the time the order was made had a mortgage decree on the factory for Rs. 70,000, which, as it turns out, was far more than the value of the factory. The strict legal right of the plaintiff decree-holder was no doubt to have the factory sold. The court, however, at the instance of the judgement-debtor and in his relief appointed the receiver instead of ordering the property to be sold. It seems to us that, as between the decree-holder and his judgement-debtor, from the moment that the receiver entered into possession and began to work the factory he was doing so for the benefit of the holder of the mortgage decree, and the profits, for one crop at least, ought to have been applied in discharge of the decree. In the case of *In re Patts* (1) the judgement-creditors obtained an order appointing a receiver by way of equitable execution over a legacy payable to the debtor under his mother's will, and the question arose whether the order operated to make the creditors "secured" creditors as against the trustee in bankruptcy. It was held that it did not, and that the creditors had acquired no charge or lien on the legacy. The executors were not made parties to the order, a matter to which the Court attached much importance. *Croshaw v. Lyndhurst Ship Company* (2) is to the same effect. The court held in both cases that the order fell short of creating a charge or lien. We

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(1) (1898) 1 Q. B., 648.

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think that the present case is clearly distinguishable and that the principle does not apply. In the present the plaintiff had a mortgage on the factory and had obtained a decree entitling him to have the property sold. Had he been allowed to sell the property the receiver in the insolvency would have got nothing nor would the other creditors. The money was earned after the factory had been taken possession of by the receiver. In the cases cited the creditor had no interest in the property over which the receiver was appointed save the interest acquired by the appointment of the receiver. When carefully considered the appointment of the receiver in the present case has very little analogy to cases in which a receiver is appointed by way of "equitable execution." It was in fact a partial and somewhat irregular "execution" of the mortgage decree on consent of parties. It is pretty clear from a perusal of the judgement of LINDLEY, L. J., in *In re Patts* that the decision in that case would have been different if the order appointing the receiver had been obtained against the executors as well as against the debtor. In the case before us not only had the plaintiff a mortgage decree but in pursuance of the order the judgement-debtor was put out of possession and the receiver put into possession to work the factory. Apart from the express provisions of the Insolvency Act, the receiver in the insolvency matter can be in no better position than the insolvent, and if the effect of the court's order was to entitle the creditor to the season's crop, then the money representing that crop cannot be claimed by the insolvency receiver. For the same reason we think that the holders of simple money decrees have no cause to complain against the order and that they have no claim to the money representing one season's crop. We think also that the fact that the money or part of it may have been in the hands of the agency does not affect the law or merits of the case, because the money was earned after the receiver had taken possession. With regard to the point that the suit was brought against the receiver in insolvency without the consent of the court this objection is based on section 16 of the Provincial Insolvency Act, which provides, amongst other things, that after an adjudication of insolvency no creditor to whom the insolvent is indebted in respect of any debt provable under the Act shall during the

pendency of the proceedings have any remedy against the property or person of the insolvent in respect of the debt, or commence any suit or legal proceeding except with the leave of the court on such terms as the court may impose. It must be remembered that the plaintiff in the present suit is not seeking any remedy against either the property or person of the insolvent. His contention is that money which the receiver has obtained is his property and never was the property of the judgement-debtor. It is not contended that the money about which the present suit is brought is a "debt" provable under the insolvency Act. On the contrary, the contention of the plaintiff is that he is entitled in justice and equity to the money and that he is not driven to claim it as a creditor secured or unsecured. The contention in reality is that the receiver in the insolvency matter acted wrongfully in taking possession of this money or any part of it. Under these circumstances we do not think that the provisions of section 16 apply.

Some reliance was placed on section 22, which is as follows :—
"If the insolvent or any of the creditors or any other person is aggrieved by any act or decision of the receiver, he may apply to the Court, and the Court may confirm, reverse or modify the act or decision complained of and make such other order as it thinks fit." In our opinion this section clearly is restricted to matters which the receiver has done in the course of the insolvency matter. It would seem almost absurd to argue that if a receiver committed a wholly illegal act, he would not be liable to suit by the person aggrieved, simply because he happened to be a receiver in insolvency. If the plaintiff's contention be correct (and, we think it is) this particular money, which is the subject-matter of the present suit, never formed any portion of the insolvent's estate. We think that the court below ought to have allowed the plaintiff to give evidence which would show what was the amount of profits for the one season. Before finally deciding the appeal we think it desirable to refer issues to the court below. We accordingly refer the following issues :—(1) What was the amount of profits in respect of the shares of the defendants mortgagors (Salig Ram, Sagar Mal and Jai Kishore) for the cotton season 1912-13 in the hands of the West Patent Press Company and of the receiver

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Babu Ishwar Das respectively? (2) How much out of the said profits has been realized by each of the attaching creditors and how much, if any, has been received by the receiver Pandit Kanhiya Lal, and how much, if any, still remains with the West Patent Press Company and the receiver Babu Ishwar Das? The parties will be at liberty to adduce further evidence relevant to these issues. On receipt of the findings ten days will be allowed for filing objections.

Issues remitted.

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December, 1.

REVISIONAL CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

SUKHA AND ANOTHER (DEFENDANTS) v. RAGHUNATH DAS (PLAINTIFF)*

Civil Procedure Code (1908), section 24 (4)—Suit instituted in court of Subordinate Judge invested with Small Cause Court powers—Transfer of suit by order of District Judge to Munsif's court—Jurisdiction of Munsif—Appeal—Act No. IX of 1887 (Provincial Small Cause Courts Act), sections 32 to 35.

The expression "a Court of Small Causes" in section 24 (4) of the Code of Civil Procedure includes courts invested with Small Cause Court jurisdiction as well as courts constituted under Act No. IX of 1887.

Where, therefore, a suit of a Small Cause Court nature, instituted in the court of a Subordinate Judge invested with the powers of a Judge of Small Cause Court, was transferred by the District Judge to the court of a Munsif not possessing the powers of a Small Cause Court, and was tried by him and a decree passed therein, it was held that no appeal lay from the Munsif's decree.

Mangal Sen v. Rup Chand (1) and *Sankararama Aiyar v. Padmanabha Aiyar (2)* followed. *Ram chandra v. Ganesh (3)* and the reasoning of *Dulal Chandra Deb v. Ram Narain Deb (4)* dissented from.

The facts appear from the following order of reference to a Division Bench:—

MUHAMMAD RAFIQ, J.—This application in revision arises out of an order made by the learned Subordinate Judge of Muttra rejecting the appeal of the applicant on the ground that no appeal lay. It appears that the opposite party instituted a suit in the court of the Subordinate Judge of Muttra who was invested with the powers of a Judge of a Small Cause Court. The suit was a

* Civil Revision No. 76 of 1916.

(1) (1891) I. L. R., 13 All. 324.

(3) (1898) I. L. R., 23 Bom., 882.

(2) (1912) 29 M. L. J., 373.

(4) (1904) I. L. R., 31 Cal., 1057.