

APPELLATE CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

MUHAMMAD ASKARI (DEFENDANT) v NISAR HUSAIN AND OTHERS
(PLAINTIFFS).*

1920
November
18.

Civil Procedure Code (1908), order XL, rule 1—Receiver—Suit for possession and mesne profits—More poverty of defendant not adequate ground for appointing a receiver and removing the defendant from possession.

A Muhammadan lady settled a considerable amount of immovable property on trustees for certain specified purposes and the trustees were put in possession. After the death of the settlor a suit for possession of the trust property was brought by the heirs at law, who also applied for the appointment of a receiver. The principal ground of this application was that the property was considerable, and the managing trustee in possession was not a person of any substance who would be able to meet a decree for mesne profits otherwise than from the trust property itself.

Held, that the reasons alleged for the appointment of a receiver were insufficient. The principles laid down in *Srimati Prosonomoyi Devi v. Beni Madhab Rai* (1) followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. S. A. Haidar, for the appellant.

Maulvi Mukhtar Ahmad, for the respondents.

PIGGOTT and WALSH, JJ. :—The suit out of which this appeal arises relates to property in the Basti district belonging to a lady named Ashraf-un-nissa, who died on the 18th of May, 1917, possessed of immovable property of considerable value, not only in the Basti district but also in the Gonda district of Oudh. Admittedly the said lady had been on bad terms with her brother Ata Husain and there had been previous litigation between them in the Oudh courts. On the 28th of April, 1917, it is alleged that Musammat Ashraf-un-nissa had executed a deed of endowment, settling the whole of her immovable property on certain trustees for certain specific purposes. On her death a dispute broke out between the present respondents and the appellant Muhammad Askari, a former general attorney of the deceased lady who was named the principal trustee in the deed of endowment. The question of possession over the estate of the deceased lady was fought out in the first instance upon applications for

*First Appeal No. 24 of 1920 from an order of Jotindra Mohan Basu, Subordinate Judge of Basti, dated the 4th of February, 1920.

(1) (1888) I. L. R., 5 All., 556.

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mutation of names in the Revenue Courts, both of the Gonda and Basti districts. In the result Muhammad Askari obtained possession as the manager on behalf of the trust. The present suit was brought in the court of the Subordinate Judge of Basti, and the presentation of the plaint was accompanied by an application for the appointment of a receiver. This application was supported by a very-brief affidavit. The statements made in this affidavit are that the income of the property in suit is very considerable; that Muhammad Askari himself is a poor man, possessed of little or no immovable property, and that, in the event of their succeeding in their suit, the plaintiffs, who claim as heirs at law of Musammat Ashraf-un-nissa, would find it difficult to realize from Muhammad Askari any decree for mesne profits which might be passed in their favour. On the basis of this affidavit the trial court passed an order on the 15th of March, 1919, stating that it proposed to appoint a receiver, and called on the parties to suggest the names of suitable persons to take charge of the property in suit in that capacity. Muhammad Askari appealed to this Court against that order, but his appeal failed upon a finding that it was premature, inasmuch as a right of appeal only accrued to him upon the actual appointment of a receiver. The case then went back to the trial court and it is not denied that Muhammad Askari himself suggested to the court that if a receiver were to be appointed the Deputy Commissioner of Gonda, in his official capacity, would be the most suitable person for such appointment. The court accordingly passed an order formally appointing the Deputy Commissioner of Gonda to take charge of the property in suit as a receiver, and the appeal before us is against this order. It is not denied that an appeal lies. A suggestion has been thrown out that Muhammad Askari is precluded from maintaining this appeal by reason of the fact that he had himself suggested the Deputy Commissioner of Gonda as a suitable receiver. Under the circumstances which have already been set forth in this order, we think it clear that Muhammad Askari is entitled to maintain this appeal. He has all along protested that no case was made out for the appointment of a receiver; that it was neither just nor convenient to anyone that the management of the trust property by the

trustees should be interrupted, merely by the institution of a claim against the said property. He only suggested the Deputy Commissioner of Gonda as a suitable person to take charge of the property as a receiver, if the court was bent on appointing one. It would be most unjust, more particularly in view of this Court's order dismissing his previous appeal, to hold that he is precluded from maintaining the present one merely because, when the appointment of a receiver became inevitable, he exerted himself to secure the appointment of a suitable person.

On the merits there is very little to be said. The case for the appellant simply is that the court below had before it no materials such as to justify the appointment of a receiver. The allegation that the trustee in actual possession of the property in suit as manager is himself a poor man, from whom personally a decree for mesne profits in the event of such a decree being passed might prove difficult of realization, is not an adequate reason for passing the order under appeal. The trial court, if it thought that steps were necessary to safeguard the interests of the parties *pendente lite*, might have taken upon itself to inquire into such matters as the income of the trust property and the expenses necessarily involved in the immediate carrying out of the objects prescribed for the trust. It is quite possible that if this had been done the court might with the consent of the defendants to the suit, who are the entire body of trustees, have made arrangements for the submission of accounts *pendente lite* and the deposit of surplus profits in such a manner as fully to safeguard the plaintiffs in the event of their success. The principles which should govern the action of the courts in the matter of the appointment of a receiver were laid down long ago in the case of *Srimati Prosonomoyi Devi v. Beni Madhab Rai* (1). We are in full agreement with what is there stated as to the need for careful inquiry and the exercise of due caution before a trial court passes an order appointing a receiver, the effect of which is to dispossess the person or persons for the time being in the enjoyment of immovable property. It has not been alleged in this case against Muhammad Askari personally or any

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of the trustees that he or they are wasting the *corpus* of the property, and the court below had before it no allegation that the trustees, or any of them, were misappropriating the income of the property for purposes other than those laid down in the trust deed. On this state of facts it seems to us that the order under appeal cannot be maintained. We are naturally reluctant to interfere with the exercise of discretion in such a matter on the part of a trial court, more especially after a Government official has been appointed trustee and has presumably taken charge of the property, but we do not find it possible to uphold the order of the court below in this case. The result is that this appeal succeeds, and we set aside the order appointing the Deputy Commissioner of Gonda to take charge of the property in suit as trustee. The court below will replace the defendants, the trustees under the deed of the 28th of April, 1917, in such possession as they were previously enjoying. There is nothing, however, to prevent the court from receiving accounts from the Deputy Commissioner of Gonda regarding his period of management and passing suitable orders as to the disposal of any balance which might have accumulated to the credit of the estate during this period of management. We allow the appellant his costs of this proceeding, here and in the court below.

Appeal decreed.

Before Mr. Justice Walsh and Mr. Justice Ryves.

RAMA NAND BHARTI (DEPENDANT) v. SHEO DAS (PLAINTIFF) AND
RAM KHELAWAN AND OTHERS (DEPENDANTS).*

1920.
November, 19.

Act No. IV of 1882 (Transfer of Property Act), section 55, clause (4) (b)—Sale - Pre-emption—Part of purchase money left with vendee to pay to creditor of vendor, but not so utilized—Unpaid vendor's lien.

On a sale of immovable property a suit for pre-emption was brought and succeeded. At the time of the sale part of the purchase money had been left in the hands of the purchasers to pay off an incumbrance on the property, of which fact the pre-emptors had notice. As a matter of fact, however, owing to the suit for pre-emption, the incumbrance was not paid off. *Hold that the vendor had a lien on the property in the hands of the pre-emptors to the extent, at any rate, of the unpaid purchase money. Gur Dayal Singh v. Karam Singh (1) discussed.*

* First Appeal No. 35 of 1920 from an order of Piari Lal Rastogi, Second Additional Subordinate Judge of Basti, dated the 17th of December, 1919.