

as having been tried and disposed of on the regular side and there would be an appeal. But Mr. *Sanyal* argues that, because the Munsif passed the order of the 4th of February in consequence of an order of the District Judge this order cannot be treated as one under section 35. I am unable to accept this contention of the learned Counsel. In my opinion the case of *Sarju Prasad v. Mahadeo Pande* (1) is in point. In that case the Munsif passed an order transferring to the regular side all Small Cause Court suits which he found pending in the court, and tried them out as regular suits. It was held that an appeal lay against the decision of the Munsif. I am, therefore, of opinion that an appeal was entertainable by the court below.

I dismiss this application but pass no order as to costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Kanhaiya Lal and Mr. Justice Ashworth.

SKIPPERS AND COMPANY, LIMITED (PLAINTIFF) v.
E. V. DAVID AND OTHERS (DEFENDANTS).*

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Civil Procedure Code, section 80—Suit against public officer—Notice—Official receiver—Official receiver impleaded merely as being in possession of the property in suit.

Held that section 80 of the Code of Civil Procedure would not apply to a suit against an official receiver, where the suit was really a suit to establish and realize a charge over property and the official receiver was impleaded not on account of any specific action taken by him in respect of the property concerned but merely because he was for the time being in charge of it. *Rajmal Manikchand Marwadi v. Hanmant Anyaba* (2),

* First Appeal No. 496 of 1924 (connected with First Appeal No. 18 of 1925) from a decree of Pandit Vishnu Ram Mehta, Second Subordinate Judge of Cawnpore, dated the 2nd of September, 1924.

(1) (1915) I.L.R., 37 All., 450. (2) (1895) I.L.R., 20 Bom., 697.

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Cecil Gray v. The Cantonment Committee of Poona (1), *Damodar Jaggiwan v. Govindji Jivabhai* (2), *Ratanchand Dharam Chand v. The Secretary of State for India in Council* (3) and *Muari Lal v. E. V. David* (4), referred to.

THE facts of this case were as follows :—

Up to July, 1922, Skippers and Co., Limited, a Calcutta firm, owned a business in Calcutta with a branch at Cawnpore. The Cawnpore branch was managed by Mr. Frank Skippers, defendant No. 2. On the 6th of July, 1922, a sale-deed was drawn up whereby Skippers and Co., Ltd., sold the assets of the firm at Cawnpore to Mr. Frank Skippers. The sale-deed purported to convey the business at Cawnpore of Skippers and Co., Limited, Calcutta, and was to include not only the branch known as the Civil Lines branch but also a branch known as the Cawnpore Motor Company situated on the Mall, Cawnpore. The sale was to cover also not only immovable property and lessee rights but also "the goodwill and interest and book debts and the benefits of all contracts and engagements owing to or entered into by the said company's business at Cawnpore, and the movable plant, furniture, trade, machinery, stocks, cars and all other accessories and all other goods of any kind whatsoever now lying or to be found at the company's business premises at Cawnpore, except any goods sent on consignment sale account from Goodrich Tyre Agency, Calcutta." There was a provision that the vendor company "shall have a lien and charge on all the immovable and movable property sold as aforesaid for securing payment of the balance of the said purchase money or any money that may remain unpaid or become due to the company hereunder or otherwise, which lien and charge shall be subject only to a charge about to be created thereon in favour of the

(1) (1910) I.L.R., 34 Bom., 583.

(2) (1923) 73 Indian Cases, 240.

(3) (1914) 18 C.W.N., 1940.

(4) (1924) I.L.R., 47 All., 291.

Imperial Bank of India or some other bank, company or person to secure an advance to the purchaser to the extent of rupees two lakhs and fifty thousand, and the purchaser covenants further with the company to execute and register a legal mortgage of the said property as and when required by the company with full powers of sale and realization and also not to create or allow any security or incumbrance (except as aforesaid) to rank in priority to or *pari passu* with the company's rights hereunder." The price fixed was Rs. 4,39,800, of which Rs. 2,50,000 were paid down, and the balance was to be paid a year hence, on the 6th of July, 1923. The deed was registered at the Sub-Registrar's office, Cawnpore, on the 30th of October, 1922, and receipt of Rs. 2,50,000 acknowledged. There is an endorsement showing that the sale-deed was to be handed at the request of Mr. Frank Skippers, vendee, to an officer of what was then known as the Tata Industrial Bank and is now known as the Central Bank of India, Limited. It is common ground that Mr. Frank Skippers, in order to pay the Rs. 2,50,000 which were paid at the time of registration, borrowed two lakhs of rupees from this bank. He had raised Rs. 50,000 in some other way with which we are not concerned. It is also common ground that on the 30th of July Frank Skippers applied to be made insolvent, and that Mr. E. V. David, defendant No. 1, the official receiver, was made *ad interim* receiver of his property. The balance under the sale-deed became payable on the 6th of July, 1923.

The present suit was brought against the official receiver, Mr. Frank Skippers and one Jairam Das, who is said to have given a surety bond for the payment of the balance of the purchase price, and it asks for a decree for Rs. 1,90,673-9-0 with costs and

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interest by enforcement of the charge on the property. It also asks for a sale of all the property in the possession of the official receiver or Frank Skippers.

The suit was resisted by Mr. E. V. David, official receiver, mainly on the ground that he should have had notice under section 80 of the Code of Civil Procedure and that the charge could not be enforced against the movables in the possession of the firm at the date of the suit, and that the Central Bank which advanced Rs. 2,00,000 to Mr. Frank Skippers had a prior charge under the sale-deed against any property sold. Jairam Das, defendant No. 3, admitted that he was liable, but only for such balance as might be due after proceeding against the movables, etc., under the charge set up by the plaintiff, which charge this defendant admitted as claimed.

The Subordinate Judge of Cawnpore decided as a preliminary point the question of notice. He held that the official receiver was a Government servant but that no notice was required in a case of this kind, as the official receiver was only impleaded as being in possession of the assets, and not for any act done by him in his official capacity. He then decided that the charge only extended to movables which formed a part of the property sold by the plaintiff firm on the 6th of July, 1922, and did not extend to subsequently acquired movables. He rejected the claim of the Central Bank of India, Limited, to any prior charge on the assets of Mr. Frank Skippers. Accordingly he gave a decree against the immovable property in the hands of defendant No. 1, defendant No. 2, and against such movables in their hands as were in existence on the business premises at the date of the sale by the plaintiff firm. He directed that a commission would issue to determine what these movables were, and directed that the list

of such movables as found by the Commissioner will be deemed to be a part of the decree.

A Commissioner was appointed, but he was never able to ascertain what were the movables on the premises when the sale took place, and what were the movables on the premises at the date of his holding his inquiry that had been subsequently added. The successor of the Subordinate Judge not being in a position to carry out his predecessor's direction for the addition to the decree of a list of movable property against which the decree was to take effect, inserted in the decree a direction that no movable property would be proceeded against unless and until the plaintiff in the course of the execution proceedings showed that the movable property against which he asked for execution had been in existence at the date of the sale.

Against this decree the plaintiff appealed on the ground that the charge covered all movable property and stock-in-trade that might be found on the premises at any date up to the satisfaction of the decree. The official receiver filed a cross-appeal which raised certain points. One was that the lower court was wrong in refusing, on the ground that the Central Bank, Limited, was no party to the suit, to declare the existence of a prior charge in favour of the Bank. Another was that, as the plaintiff failed to show the movables to which the charge extended, the decree should have excluded any relief against the movables. A third was that the suit was premature owing to want of notice to him as official receiver under section 80 of the Code of Civil Procedure. There were other points raised in the petition of appeal but they were not pressed.

On this appeal—

Dr. *Kailas Nath Katju*, for the appellant.

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Babu Piari Lal Banerji and Pandit Uma Shankar Bajpai, for the respondents.

The judgement of the Court (KANHAIYA LAL and ASHWORTH, JJ.), after setting forth the facts as above, found on a construction of the sale-deed that the plaintiff's charge affected such property only as was in existence at the date of the sale. It found also that there was no prior charge in favour of the Central Bank of India.

The judgement then continued:—

As regards the objection based on the language of section 80 of the Code of Civil Procedure, we are of the opinion that it is not a valid objection. There has been much difference of opinion shown by the High Courts of India as to the object of section 80. The Bombay High Court seems generally to have taken the view that section 80 applies only to suits based on tort. Reference may be made to *Rajmal Manikchand Marwadi v. Hanmant Anyaba* (1), *Cecil Gray v. The Cantonment Committee of Poona* (2) and *Damodar Jagjiwan v. Govindji Jivabhai* (3). On the other hand the Calcutta High Court has extended the section to actions arising out of a breach of contract; see *Ratanchand Dharamchand v. The Secretary of State for India in Council and another* (4). Taking the language of the section as it stands along with the definition of "act" in the General Clauses Act where an act will include illegal omission, that is to say, an omission which gives rise to a civil action, it is difficult to place any restriction on the section, which would appear to require notice in all suits against any person for anything done or omitted by him in his official capacity. There is a decision of this Court

(1) (1895) I.L.R., 20 Bom., 697.

(2) (1910) I.L.R., 34 Bom., 583.

(3) (1923) 73 Indian Cases, 240.

(4) (1914) 18 C.W.N., 1340.

to which one of us was a party which has points of similarity with the present case—*Murari Lal v. E. V. David* (1). It was held that no suit can be instituted against an official receiver in respect of any act done by him in his capacity as such a public officer without a previous notice prescribed by the Code of Civil Procedure. The relief asked in that suit was one for a declaration of title by the plaintiff in some property which the official receiver had advertised for sale in the interests of the unsecured creditors. The peculiarity of the present case is that the cause of action stated in the plaint is said to be the failure of the defendants, that is to say the official receiver, the insolvent and the surety in respect of the debt due to the plaintiff firm, to pay the plaintiff firm the balance of the purchase money of the business in question. Now the suit is really one for establishing and realizing a charge over property movable and immovable. The official receiver did not deny the right of the plaintiff to maintain a charge. He was directed by the District Judge to resist the suit for the purpose of settling certain matters. It does not appear that any act or omission can be predicated on the part of the official receiver as one in respect of which the suit is being brought. Section 28(6) of the Provincial Insolvency Act (V of 1920) says: "the making of an order of adjudication shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed." From this it would appear that the plaintiff was not bound to make the official receiver a party and that he is not alleging any act or omission on the part of the official receiver as one in respect of which he is suing. It would appear that the

(1) (1924) I.L.R., 47 All., 291.

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plaintiff must have recourse to the court to get the property sold, and that nothing that the official receiver has done up to the date of suit has stood in his way of doing this. The official receiver is joined as a party in whom the property vests for the time being and not as the party who made a contract or was guilty of any breach of it. For the above reasons we think it would be unsafe in this case to hold that notice under section 80 was required.

Accordingly we dismiss appeal No. 18 of 1925 with costs. We allow appeal No. 496 of 1924 and direct that the charge shall be enforceable against the movable property entered in the inventory prepared by the official receiver or the sale proceeds thereof in his hands on the date of the decree of the court below in addition to the immovable property specified in the decree. The appellant in appeal No. 496 of 1924 will get his costs in this Court from the contesting defendant respondent.

Appeal No. 18 dismissed.

Appeal No. 496 allowed.

Before Mr. Justice Walsh and Mr. Justice Pullan.

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 June, 25.
 MAHADEO PANDE AND OTHERS (DEFENDANTS) v. SOM-NATH PANDE AND ANOTHER (PLAINTIFFS) AND SALIG PANDE AND OTHERS (DEFENDANTS).*

Minor—Guardian ad litem—Mortgage—Application for final decree for foreclosure—Name of minor's guardian wrongly entered—Suit to set aside decree.

In a suit for foreclosure of a mortgage in which a minor defendant was interested the plaintiffs named the minor's father as his guardian *ad litem*. The minor's father, however, declined to act and the Nazir of the court was appointed

* Second Appeal No. 1854 of 1923, from a decree of Lal Gopal Makerji, District Judge of Azamgarh, dated the 18th of October, 1923, modifying a decree of Ram Ugrah Lal, Subordinate Judge of Azamgarh, dated the 8th of August, 1922.